7

EU Accession to the ECHR

Completing the Complete System of EU Remedies?

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7.1 INTRODUCTION

Accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, the Convention) is back on the table and becoming a realistic prospect. Negotiations kickstarted in mid-2020 and have unfolded relatively smoothly, partly facilitated by Russia's recent exclusion from the Council of Europe.[1] The 46 + 1 Group reached a deal on 17 March 2023, prior to the Summit of Heads of State and Government of the Council of Europe in Reykjavik in May 2023.[2] Accession to the ECHR will obviously have consequences for fundamental rights accountability of the EU. While most of the chapters in this volume focus on internal EU procedures and remedies that provide for (or obstruct) access to justice, this chapter takes stock of this external fundamental rights system conducive to effective judicial protection.

Eventual accession will close more than forty years of discussion. This discussion was first launched at the end of the 1970s in the good old days of

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[1] 'EU accession to the ECHR' (Council of Europe Portal) <www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights#{%2230166137%22:[0]}>.

[2] Note that this deal is incomplete, because it does not include an agreement on CFSP (see Section 7.4). The CJEU, Parliamentary Assembly, and ECtHR also need to give their opinions. 'Geannoteerde agenda van de bijeenkomst van de Raad Justitie en Binnenlandse Zaken, 8 en 9 december' (*Openoverheid*, December 2022) <https://open.overheid.nl/documenten/ronl-8ef5c0285d2b43b46ecb7e93e42ad3985c4a911b/pdf>, 12.

the European Communities.[3] Accession and its advantages and consequences have been among the 'favourite topics of discussion' of academics.[4] It is well known that accession has been thwarted twice by the Court of Justice of the European Union (CJEU) with its *Opinion 2/94* and *Opinion 2/13*. The latter opinion from December 2014 has been especially criticised.[5] *Opinion 2/13* has been described as a 'problematic attitude of "European exceptionalism"' and reflective of 'an overconfident belief that the EU under the Court's own stewardship, has risen above the political and institutional defects that typically generate fundamental rights infringements'.[6] Following *Opinion 2/13*, it was long thought that accession would be difficult or of limited added value.[7] Since June 2020, thirteen negotiation meetings haven taken place with a total of forty-four days of discussions. It seems that most of the objections that were raised by the CJEU have been addressed in one way or another.

With accession, 'one of the last gaps in European fundamental rights protection will be overcome'.[8] After accession, individuals can turn to the European Court of Human Rights (ECtHR) and complain about fundamental rights violations of the EU. Strasbourg can thus critically examine from an ECHR perspective the gaps in legal protection identified in other parts of this volume. This includes the strict *locus standi* requirements, the high threshold for damage, and the limited judicial review of the Common Foreign and Security Policy (CFSP). In addition to ex post accountability, accession could potentially have a preventive function and influence the position of the CJEU and other EU institutions and agencies. Accession could, however, also contribute to a more formalistic complacency on the part of the CJEU in

[3] Commission, 'Memorandum on the accession of the European Communities to the Convention for Protection of Human Rights and Fundamental Freedoms', Bulletin Supplement 2/79, COM (79) 210 final; Paul Gragl, 'A giant leap for European human rights? The final agreement on the European Union's accession to the European Convention on Human Rights' (2014) 51 Common Market Law Review 13, 14.

[4] Jean Paul Jacqué, 'The accession of the European Union to the European Convention of Human Rights and Fundamental Freedoms' (2011) 48 Common Market Law Review 995.

[5] Christoph Krenn, 'Autonomy and effectiveness as common concerns: A path to ECHR accession after Opinion 2/13' (2015) 16 German Law Journal 147; Steve Peers, 'The CJEU and the EU's accession to the ECHR: A clear and present danger to human rights protection' (*EU Law Analysis*, 18 December 2014) <http://eulawanalysis.blogspot.com/2014/12/the-cjeu-and-eus-accession-to-echr.html.>.

[6] Turkiler Isiksel, 'European exceptionalism and the EU's accession to the ECHR' (2016) 27 The European Journal of International Law 565, 565–566.

[7] See Jasper Krommendijk, 'Opinion 2/13 as a Game Changer in the Dialogue between the European Courts?' in Emmanuelle Bribosia and Isabelle Rorive (eds), *Human Rights Tectonics. Global Perspectives on Integration and Fragmentation* (Intersentia 2018).

[8] Gragl (n 3).

line with its often-repeated mantra that there is a 'complete system of remedies', without any substantive changes in its approach to remedies.[9]

This chapter answers the question as to what the potential impact of EU accession to the ECHR is from the perspective of fundamental rights accountability and effective judicial protection vis-à-vis the EU. In order to answer this question, this chapter examines the most recent version of the negotiated Accession Agreement (AA).[10] The Section 7.2 delves into the added value of accession. It shows how accession fills two protection gaps (Section 7.2.1) while also contributing to coherence and legal certainty (Section 7.2.2). This section ends with a reflection on expected substantive effects (Section 7.2.3). Section 7.3 focuses on the procedural practicalities governing review by the ECtHR following accession, discussing admissibility (Section 7.3.1), the co-respondent mechanism in relation to shared responsibility of the EU and EU Member States (Section 7.3.2), and the prior involvement procedure (Section 7.3.3). Section 7.4 analyses the particular context of the CFSP, not least because most gains in terms of remedying existing gaps in judicial protection could surface in the context of the CFSP.

7.2 THE BENEFITS OF ACCESSION

Many commentators and experts have over the years written about the (legal) advantages of accession of the EU to the ECHR. Various overviews can be made. For the purpose of this edited volume focused on the access of individuals to fundamental rights accountability mechanisms, three main perspectives are relevant.[11] The first is the importance of external scrutiny and remedies outside the EU legal system (Section 7.2.1). A second advantage concerns the strengthening of coherence between the ECHR and the EU legal order with positive effects for legal certainty (Section 7.2.2). The last subsection discusses other substantive effects positive from the perspective of judicial protection, such as a possible relaxation of standing requirements or a development of positive obligations in relation to the EU (Section 7.2.3).

[9] Case C-583/11 P *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* [2013] ECLI:EU:C:2013:625, para 92.

[10] 'Final consolidated version of the draft accession instruments' (CDDH ad hoc negotiation group ('46+1'), 17 March 2023) <https://rm.coe.int/final-consolidated-version-of-the-draft-accession-instruments/1680aaaecd>. (hereafter: Accession Agreement or AA).

[11] In addition, because the EU becomes a contracting party, the EU can also be directly involved in negotiations in relation to the ECHR. The duty of sincere cooperation in Consolidated Version of the Treaty on European Union (TEU) [2008] OJ C115/13 art 4(3) also obliges Member States to conduct these negotiations as a block; Gragl (n 3) 15.

Accession of the EU not only has concrete *legal* effects. It is also of political and symbolic value.[12] This relates very much to the credibility of the EU and its foreign policy.[13] Accession sends a strong signal to third countries that the EU itself is also willing to accept external scrutiny.[14] Hence, the EU is subject to external fundamental rights monitoring in the same way as it demands from others.[15] Accession, thus, does away with 'charges of double standards'.[16]

7.2.1 *External Remedies Filling Two Protection Gaps*

Accession obviously has the immediate effect of providing natural or legal persons with the possibility to complain before the ECtHR. Currently they experience a gap in the protection of their ECHR rights in two different ways: the inability to complain about acts or omissions of the EU as well as the (near) impossibility to address the implementation of EU law by EU Member States when the latter have no margin of discretion. Accession will remedy these deficiencies and enables individual complaints in both scenarios. Accession even allows applications in relation to EU primary law.[17] This is noteworthy because the CJEU itself cannot annul or declare primary EU law invalid.[18] With respect to the first scenario, it is currently impossible to complain about fundamental rights violations (allegedly) committed by the

[12] Noreen O'Meara, '"A more secure Europe of rights?" The European Court of Human Rights, the Court of Justice of the European Union and EU accession to the ECHR' (2011) 12 German Law Journal 1813, 1825.

[13] Leonard Besselink, 'The Protection of Fundamental Rights post-Lisbon. The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions' (FIDE General Report 2013) 35.

[14] Martin Kuijer, 'The accession of the European Union to the ECHR: A gift for the ECHR's 60th anniversary or an unwelcome intruder at the party?' (2011) 3 Amsterdam Law Forum 17, 22.

[15] Paul Craig, 'EU accession to the ECHR: Competence, procedure and substance' (2013) 36 Fordham International Law Journal 1114.

[16] Sionaidh Douglas-Scott, 'The European Union and human rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 658.

[17] Article 3(3) AA refers to 'a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments'. In this scenario, Member States may become co-respondents, as discussed in Section 7.3.2. 'Appendix 5: Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms' (17 March 2023) <https://rm.coe.int/final-consolidated-version-of-the-draft-accession-instruments/1680aaaecd> (hereafter: Draft explanatory report to the AA) paras 41 and 56–57.

[18] From the perspective of the ECHR, such an exclusion stands at odds with the current practice that does not give national constitutions a similar status. Gragl (n 3) 28–29.

EU and its institutions.[19] Without EU accession to the Convention, the EU cannot be held liable under the ECHR. One well-known example is *Connolly*. This was a case brought by a European Commission official challenging a disciplinary procedure resulting in suspension following the publication of a book. He criticised the reasons for his dismissal as infringing his freedom of expression. The ECtHR declared the case inadmissible *ratione personae*, which means that the alleged violation of the ECHR was not committed by (or to be attributed to) a contracting State Party.[20] Another example of the broadening of the possibility for accountability of the EU concerns civilian and military missions launched in the context of the CFSP (Section 7.4 will discuss this more extensively). Accession will make it possible to complain before the ECtHR about alleged fundamental rights violations in the context of such missions.

The inability to make a complaint against the EU before the ECtHR prior to accession does not preclude the possibility that the EU Member States themselves are held responsible for violations of the Convention arising from their EU law obligations. Connolly, for example, not only complained against the EU but also the fifteen EU Member States at that time. The ECtHR, however, noted that at no time did any of the EU Member States in question intervene, directly or indirectly, in this dispute. Hence, there was no action or omission by these States that would be such as to engage their responsibility under the Convention. Where no Member States are involved in an infringement, the ECtHR also has no jurisdiction.[21]

Connolly illustrates that the accountability deficit can in principle be overcome by targeting EU Member States when they are (in)directly involved. Aside from pure EU acts or omissions, in many situations there is such involvement, because EU law frequently depends on the implementation by national authorities. Nonetheless, it is currently impossible to complain against EU Member States when they implement EU law without any discretion.[22] This relates to the *Bosphorus* doctrine developed in a case

[19] *Confédération française démocratique du travail v the European Communities, alternatively: their Member States a) jointly and b) severally* (dec.), App no 8030/77 (ECtHR, 10 July 1978); *M. & Co v Germany* (dec.), App no 13258/8 (ECtHR, 9 February 1990).

[20] The Commission official earlier started cases before the CJEU. See Joined Cases T-34/96 and 163/96 *Bernard Connolly v Commission of the European Communities* [1999] ECLI:EU:T:1999:102; Case C-274/99 P *Bernard Connolly v Commission of the European Communities* [2001] ECLI:EU:C:2001:127; *Connolly v 15 Member States of the European Union* (dec.), App no 73274/01 (ECtHR, 9 December 2008).

[21] See *Connolly v 15 Member States* (n 20); Douglas-Scott (n 16) 659.

[22] Kuijer (n 14) 21.

dealing with an alleged violation of the right to property following the seizure of an aircraft by Ireland on the basis of a strict obligation contained in an EU regulation with no discretion.[23] On the basis of this doctrine, the ECtHR presumes that the ECHR is not violated when the Member State had no discretion on the basis of EU law and when the full potential of the EU's supervisory mechanism and system of legal protection had been employed. This presumption can be rebutted if the protection of ECHR rights was manifestly deficient.[24] The *Bosphorus* presumption reflects the difficult position of Member States in situations in which there is no room for manoeuvre for Member States and, hence, no possibility to reconcile or pragmatically weigh conflicting obligations.[25] The presumption is also seen as an illustration of the willingness of the ECtHR to show comity and respect for the CJEU.[26] The ECtHR has only once rebutted the presumption since its *Bosphorus* judgment of 2006. In *Bivolaru and Moldovan*, the ECtHR determined for the first time that the presumption did not apply even though it did not find a breach of Article 3 ECHR because the French judge had applied the EU legal framework correctly.[27]

There is a burgeoning discussion in the literature whether accession means an end to the *Bosphorus* presumption. Most commentators think this is the case.[28] They argue that there is no reason to extend a preferential treatment to the EU that diverges from other regular ECHR contracting parties.[29] The ECtHR is expected to apply a more rigorous review of EU action instead of

[23] This presumption is also based on the rationale that the ECHR does not prevent states from transferring powers to an international organisation such as the EU, provided that fundamental rights are respected. *Matthews v United Kingdom*, App no 24833/94 (ECtHR, 18 February 1999).

[24] *Bosphorus* v *Ireland*, App no 45036/98 (ECtHR, 30 June 2005) para 156.

[25] Christiaan Timmermans, 'Will the Accession of the EU to the European Convention on Human Rights fundamentally change the relationship between the Luxemburg and the Strasbourg courts?' [2014] EUI Distinguished Lectures (Speech delivered at the 'Judicial Cooperation in Private Law' of 15 and 16 April 2013).

[26] Tobias Lock, 'EU Accession to the ECHR: Implications for Judicial Review in Strasbourg' (2010) 35 European Law Review 777, 798.

[27] Note that the ECtHR concluded in the other case (*Moldovan*) that the *Bosphorus* presumption of equivalent protection was fulfilled but that there was a manifest deficiency and, thus, a violation of Article 3 ECHR; *Bivolaru and Moldovan v France*, App no 40324/16 and 12623/17 (ECtHR, 25 March 2021).

[28] Kuijer (n 14) 21; Francis Jacobs, 'The Lisbon Treaty and the Court of Justice' in Andrea Biondi, Piet Eeckhout, and Stefanie Ripley (eds), *EU law after Lisbon* (Oxford University Press 2012) 205; Lock (n 26) 798; O'Meara (n 12) 1828; Pedro Cruz Villalón, 'Rights in Europe: The crowded house' (2012) King's College London Working Paper 01/2012, 6; Gragl (n 3) 19; Besselink (n 13) 37.

[29] Timmermans (n 25).

the more deferential *Bosphorus* presumption.[30] Timmermans, however, notes that it is ironical that the presumption existing before accession is abandoned after accession. He also argues that the CJEU is not comparable to supreme courts of Member States.[31]

In sum, accession provides external remedies that close two protection gaps. One might wonder how big the gaps are and, thus, in how many cases fundamental rights accountability remains a dead letter. Answering these questions is obviously highly speculative. The few declarations of inadmissibility by the ECtHR tell very little, because complaints against the EU are by definition unsuccessful and thus probably only the tip of the iceberg. Based on the case law of the CJEU, one could argue that there are only a limited number of violations committed by EU institutions.[32] One competition law example is *Baustahlgewebe* in which the CJEU held that the proceedings before the Court of First Instance were excessively long. It, hence, lowered the fine for the respective company.[33] A similar tendency can be reported for declarations of invalidity of EU law. In the last decade, there have been less than a handful of cases such as *Digital Rights Ireland* and *Schrems* in the context of data protection and privacy.[34] Once again, these numbers tell very little. They are more a reflection of the high thresholds for the fulfillment of the conditions for non-contractual liability of the EU or the strict *locus standi* requirements for legal and natural persons in relation to the action for annulment.

7.2.2 *Greater Coherency between the EU and ECHR*

At a more abstract level, accession has the consequence that the ECtHR becomes the 'ultimate arbiter'. The CJEU will be – in hierarchical terms – subject to the jurisdiction of the ECtHR.[35] The judgments of the ECtHR are binding on all EU institutions including the CJEU, following Article 46

[30] Douglas-Scott (n 16) 668.

[31] Timmermans (n 25).

[32] Isiksel (n 6) 583.

[33] Case C-185/95 *Baustahlgewebe v Commission* [1998] ECLI:EU:C:1998:608. In a later case, the CJEU determined that applicants must bring a separate action before the Court of First Instance to obtain damages for losses stemming from long judicial proceedings. Case C-50/12 P *Kendrion v Commission* [2013] ECLI:EU:C:2013:771..

[34] Case C-293/12 *Digital Rights Ireland* [2014] ECLI:EU:C:2014:238; Case C-362/14 *Schrems v Data Protection Commissioner* [2015] ECLI:EU:C:2015:650.

[35] This also brings to an end the 'pluralist framework' whereby there does not exist a final arbiter of the protection of fundamental rights in Europe. Iris Canor, 'Primus inter pares. Who is the ultimate guardian of fundamental rights in Europe?'(2000) 25 European Law Review 3.

ECHR.[36] The ECtHR can thus 'correct' the CJEU when the latter provides more limited protection.[37] The ECtHR has the last word and could solve a conflict between case law of both courts.[38] A consequence is that the ECHR acts as a clear 'minimum benchmark'.[39] The EU will no longer be 'the ultimate repository of meaning' with respect to fundamental rights in relation to EU law, at least to the extent that these rights are covered by the ECHR.[40] Also, from a substantive perspective, the meaning of these rights and their balance with other interests will eventually be made by Strasbourg.[41] Accession might lead the CJEU to offer less relative weight to market objectives.[42]

The hierarchical relationship minimises the risks of conflicting case law.[43] Even though real conflicts have almost never occurred,[44] the threat has been 'ever present'.[45] Currently, there is a lot of debate within the literature as to the possibility of diverging standards of judicial independence.[46] It also remains to be seen whether the ECtHR will follow the two-step test that the CJEU

[36] Consolidated Version of The Treaty on the Functioning of the European Union OJ C326/47 (TFEU) art 216(2); Case *Opinion 2/13 – Accession of the EU to the ECHR* [2014] ECLI:EU:C:2014:2454, paras 180-182; Draft explanatory report to the AA (n 17) para 30.

[37] Besselink (n 13) 35.

[38] Timmermans (n 25).

[39] Johan Callewaert, 'No more common understanding of fundamental rights' (2022) 22 La revue des jurists de Sciences Po 25, 25.

[40] Craig (n 15) 1145.

[41] Ibid 1146.

[42] Isiksel (n 6) 583.

[43] Douglas-Scott (n 16) 658–659; Kuijer (n 14) 21; Adam Łazowski and Ramses Wessel, 'When caveats turn into locks: *Opinion 2/13* on accession of the European Union to the ECHR' (2015) 16 German Law Journal 179. Former CJEU Judge Arestis held that the CJEU is 'very concerned with the consistency of its judgments' with the case-law of the ECtHR. George Arestis, 'Fundamental rights in the EU: three years after Lisbon, the Luxembourg perspective' College of Europe research papers 02/2013, 13. The Joint Communication from Presidents Costa and Skouris pointed to the need to ensure 'the greatest coherence' between the ECHR and the Charter. 'Joint communication from Presidents Costa and Skouris' (24 January 2011) <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf.>.

[44] The CJEU did not follow the ECtHR in *Emesa Sugar*, where the CJEU denied parties a right to comment on the AG's Opinion. Case C-17/98 *Emesa Sugar* [2000] ECLI:EU:C:2000:70; Bruno de Witte, 'The use of the ECHR and Convention case law by the European Court of Justice' in Patricia Popelier, Catherine van de Heyning, and Piet van Nuffel (eds), *Human rights protection in the European legal order: the interaction between the European and the national courts* (Intersentia 2011) 25; Douglas-Scott (n 16) 648; Sara Iglesias Sánchez, 'The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights' (2012) 49 Common Market Law Review 1565, 1602.

[45] Jacqué (n 4) 1001.

[46] Ben Smulders, 'Increasing convergence between the European court of Human Rights and the Court of Justice of the European Union in their recent case law on judicial independence: The case of irregular judicial appointments' (2022) 59 Common Market Law Review 105.

developed in the context of criminal cooperation marked by mutual trust. In *Aranyosi*, the CJEU held that the execution of a European arrest warrant has to be postponed if a national court finds that there are, firstly, systemic or generalised deficiencies as to the detention conditions in the issuing Member State and, secondly, a real risk for the individual of inhuman or degrading treatment.[47] The CJEU has extended this two-step test to situations involving the fundamental right to a fair trial.[48] The CJEU has declined the possibility of postponement where an individual risk cannot be proven.[49] It also ruled out the possibility to examine such an individual risk without any systemic or generalised deficiencies.[50] It is unclear whether this approach is in line with the ECHR and the case law of the ECtHR.[51] Nothing precludes the ECtHR from finding an individual case when there are no structural problems. Such divergences are less likely to occur after accession.

Given the binding nature of ECtHR judgments, accession could also 'cement more firmly' the role of ECtHR judgments in the EU legal order.[52] Accession could lead to a more deliberative and substantive engagement and dialogue with the ECtHR replacing the current discretionary, selective, and instrumental engagement with Strasbourg.[53] The CJEU treats ECtHR judgments currently as 'mere' useful sources of inspiration that are regularly taken into consideration. After accession, the CJEU can apply the ECHR directly,

[47] Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* [2016] ECLI:EU:C:2016:198, paras 86–91.

[48] Case C-216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* [2018] ECLI:EU:C:2018:586.

[49] A Dutch district court challenged the restrictiveness of the test. Thomas Vandamme, '"The two-step can't be the quick step": The CJEU reaffirms its case law on the European Arrest Warrant and the rule of law backsliding' (*European Law Blog*, 10 February 2021) <https://europeanlawblog.eu/2021/02/10/the-two-step-cant-be-the-quick-step-the-cjeu-reaffirms-its-case-law-on-the-european-arrest-warrant-and-the-rule-of-law-backsliding/>.

[50] Case C-158/21 *Puig Gordi and Others* [2023] ECLI:EU:C:2023:57.

[51] Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* [2016] ECLI:EU:C:2016:198, paras 89–92; compare Johan Callewaert, 'Do we still need Article 6(2) TEU? Considerations on the absence of EU accession to the ECHR and its consequences' (2018) 55 Common Market Law Review 1685; Jasper Krommendijk and Guus de Vries, 'Do Luxembourg and Strasbourg trust each other? The interaction between the Court of Justice and the European Court of Human Rights in cases concerning mutual trust' (2021) 4/5 European journal of human rights 319.

[52] Gragl (n 3) 15.

[53] Isiksel noted in 2016 that the fundamental rights case law of the CJEU has been 'curt, stipulative and tacit' and reticent. Isiksel (n 6) 582; De Witte (n 44); Krommendijk 'Opinion 2/13 as a Game Changer in the Dialogue between the European Courts?' (n 8); see, however, recently Case C-203/21 *Delta Stroy 2003* [2022] ECLI:EU:C:2022:865; Case C-69/21 *Staatssecretaris van Justitie en Veiligheid (Éloignement – Cannabis thérapeutique)* [2022] ECLI:EU:C:2022:913.

without a 'detour' via general principles of EU law in the sense of Article 6(3) of the Treaty on European Union (TEU).[54] Nonetheless, the question remains whether the CJEU will indeed treat the ECHR and ECtHR case law in the way outlined above. An option could be that it treats the ECHR in the same way as all international agreements and hence places the ECHR below the EU Treaties, as some ECHR Member States do in relation to their own constitution.[55]

In conclusion, accession is beneficial from the perspective of legal certainty and coherence.[56] It reduces the current complexity in the operation of these two legal orders.[57] Gragl aptly observed that 'the adverse effects of two parallel and juxtaposed legal regimes will be overcome' after accession.[58] Accession thus has an 'anti-patchwork effect'.[59] This is also desirable for national courts who are sometimes struggling with differing standards.

7.2.3 *The Substantive Effects of Accession in Practice*

The foregoing leads to the question of what substantive effects accession will have on the level of fundamental rights protection. Several commentators doubt whether accession will have a substantive impact, in part because the level of protection in relation to several ECHR rights is more limited.[60]

[54] Consolidated Version of the Treaty on European Union [2016] OJ C202/13; Besselink (n 13) 35.

[55] Christina Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 The Modern Law Review 254, 277.

[56] Jörg Polakiewicz, 'EU law and the ECHR: Will EU accession to the European Convention on Human Rights square the circle? The draft accession agreement of 5 April 2013' [2013] SSRN Electronic Journal, conclusion.

[57] Johan Callewaert, *The accession of the European Union to the European Convention on Human Rights* (Council of Europe 2014) 90.

[58] Gragl (n 3) 56.

[59] Callewaert 'No more common understanding of fundamental rights' (n 39) 25.

[60] Timmermans (n 25). See, however, Polakiewicz (n 56) conclusion. Leskinen notes that accession will have an impact on EU competition law. Charlotte Leskinen, 'An evaluation of rights of defense during antitrust inspections in the light of the case law of the ECtHR: would accession of the European Union to the ECHR bring about a significant change' [2010] Instituto de Empresa Business School Working Paper 10/04.

Another unresolved question concerns protocols not ratified by all EU Member States. According to Article 1(1) AA, the EU 'only' accedes to the Convention, to the Protocol to the Convention and to Protocol No. 6 to the Convention. AG Cruz Villalón proposed an autonomous interpretation of Charter rights corresponding to ECHR rights in protocols not ratified by all EU Member States. Opinion of AG Cruz Villalón in Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2012:340, paras 82–87.

Much depends on the way in which the ECtHR will proceed after accession with respect to its intensity of review. Four aspects can be discerned. First, to what extent will the ECtHR grant the EU a different or broader margin of appreciation than the margin for 'regular' ECHR Member States? Even though the *Bosphorus* presumption will probably disappear, this margin enables the ECHR to take the special sui generis nature of the EU into consideration, including, for example, the fact that EU legislation is the result of choices of twenty-seven Member States.[61] It could be that the ECtHR is more reluctant to thwart a particular balance between conflicting rights and public interests that are the result of a careful legislative process involving various EU institutions and twenty-seven Member States. If the EU enjoys the same margin as regular state parties, it remains to be seen whether the balance struck by the EU legislature and CJEU falls within the margin. The balance struck between trade union rights and the freedom of services by the CJEU in *Viking/ Laval* has, for example, been questioned.[62] It is also far from certain whether the CJEU has stayed within the margin with its decision in *Achbita* balancing freedom of religion in the workplace and the freedom to conduct a business.[63]

A second uncertainty related to the ECtHR's intensity of review concerns the doctrine of positive obligations. It is unclear to what extent and how the ECtHR will extend its case law on positive obligations under the ECHR to the EU and apply it to a failure on the part of the EU to take (legislative or executive) action.[64] If the ECtHR does not differentiate between the EU and 'regular' Member States, the substantive impact of accession is arguably bigger. Extending the doctrine of positive obligations to the EU is not entirely risk-free from an EU perspective, in part because the CJEU has not yet

[61] Craig (n 15) 1141.

[62] Hans Petter Graver, 'The *Holship* ruling of the ECtHR and the protection of fundamental rights in Europe' (2022) 23 ERA Forum 19; Case C-341/05 *Laval un Partneri* [2007] ECLI:EU:C:2007:809; Case C-438/05 *International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECLI:EU:C:2007:772; *Case of Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (Ntf) v Norway*, App no. 45487/17 (ECtHR, 10 June 2021).

[63] Case C-157/15 *Samira Achbita v G4S Secure Solutions* [2017] ECLI:EU:C:2017:203, paras 38–39; *Eweida and Others v United Kingdom*, App nos 48420/10, 36516/10, 51671/10 et al. (ECtHR, 15 January 2013); José Rafael Marín Aís, 'Freedom of Religion in the Workplace v. Freedom to Conduct a Business, the Islamic Veil Before the Court of Justice: Ms. Samira Achbita Case' (2018) 3 European Papers 409.

[64] For a discussion of the difficulties, see Catherine Stubberfield, 'Lifting the Organisational Veil: Positive Obligations of the European Union Following Accession to the European Convention on Human Rights' (2012) 19 Australian International Law Journal 117.

accepted in full the doctrine.[65] The only exception is the CJEU's judgment in *La Quadrature du Net* of 2020 that positive obligations under the Charter may justify national legislation that requires providers of electronic communications services to retain particular data about communications.[66] An all too expansive adoption of positive obligations could be in tension with the principle laid down in Article 51(2) of the Charter of Fundamental Rights of the European Union (CFR)[67] and Article 6(1) TEU. According to this principle, the Charter does not extend the field of application of Union law beyond the powers of the Union, does not establish any new power or task for the Union, and does not modify the powers and tasks as defined in the Treaties. The question is to what extent the ECtHR will extend its doctrine in situations in which the EU has no or very limited competences.[68]

A third aspect relating to the intensity of review by the ECtHR deals with the rather procedural *Dhahbi* case law.[69] There is an abundant body of ECtHR case law on the duty to state reasons for decisions of national courts not to refer a case for a preliminary ruling to the CJEU. On several occasions, the ECtHR has found a violation of Article 6 ECHR in cases where the highest national court –despite a sufficiently clear and substantiated request by one of the parties in the proceedings – failed to make a preliminary reference.[70] In these cases, the violation consists of a failure to comply with the duty to state reasons under Article 6(1) ECHR. This failure concerns in

[65] See about the scope for the development of positive obligations under the Charter: Malu Beijer, *The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations* (Intersentia 2017).

[66] The CJEU held that positive obligations of the public authorities may result from Article 7 CFR, requiring them to adopt legal measures to protect an individual's private and family life, home, and communications. It also held that such obligations may arise from Articles 3 and 4 CFR, as regards the protection of an individual's physical and mental integrity and the prohibition of torture and inhuman and degrading treatment. In this connection, the CJEU also referred to the ECtHR's case law about the positive obligations flowing from Articles 3 and 8 ECHR. Case C-511/18 *La Quadrature du Net and Others* [2020] ECLI:EU:C:2020:791, paras 126–128 and 145.

[67] Charter of Fundamental Rights of the European Union [2016] OJ C202/389.

[68] Vassilis Pergantis and Stian Øby Johansen, 'The EU accession to the ECHR and the responsibility question. Between a rock and a hard place' in Nicolas Levrat and Others (eds), *The EU and Its Member States' Joint Participation in International Agreements* (Hart 2022) 242.

[69] *Dhahbi v Italy*, App no 17120/09 (ECtHR, 8 April 2014).

[70] See most recently *Sanofi Pasteur v France*, App no 25137/16 (ECtHR, 13 February 2020); for an analysis of this case: Jasper Krommendijk, 'Tell me more, tell me more: the obligation for national courts to reason their refusals to refer to the CJEU in *Sanofi Pasteur*' (*Strasbourg Observers*, 20 February 2020)<https://strasbourgobservers.com/2020/02/20/tell-me-more-tell-me-more-the-obligation-for-national-courts-to-reason-their-refusals-to-refer-to-the-cjeu-in-sanofi-pasteur/.>.

essence a more formal or procedural violation of the right to effective judicial protection. The ECtHR underscored in these judgments:

> [I]t is not for the Court to examine any errors that might have been committed by the domestic courts in interpreting or applying the relevant law …. On that latter point, it has also pointed out that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, if necessary, in conformity with Community law, the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention.[71]

Nonetheless, even prior to accession, the ECtHR adopted a more substantive analysis in *Dangeville* and – more recently – *Spasov*. In the latter Romanian case, the ECtHR for the first time held that there was a 'denial of justice' and thus a violation of Article 6(1) ECHR due to a manifest error of law by a national court regarding the interpretation and application of EU law.[72] One would expect that after accession the ECtHR will adopt this more substantive approach and also scrutinse the application of EU law by national courts in more depth, obviously subject to the earlier mentioned margin of appreciation.

A fourth question concerns whether the ECtHR will 'accept' the strict *locus standi* requirements in relation to the action for annulment (Article 263 TFEU) and action for failure to act (Article 265 TFEU).[73] It is well known that direct access to the CJEU is difficult. When an act is not addressed to them, natural or legal persons have to show that they are directly and individually concerned (see Chapter 1).[74] Ever since the 1963 *Plaumann* judgment, the CJEU requires persons to show that the 'decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed'.[75] AG Jacobs, the Court of First Instance (currently the General Court), and several commentators have argued for a relaxation of the

[71] *Sanofi Pasteur v France* (n 70) para 68.

[72] The engagement with EU substantive law by the ECtHR in *Spasov* is thus not wholly unprecedented, as it bears some resemblance to the use of EU law in the *Dangeville* case. *Dangeville v France*, App no 36677/97 (ECtHR, 16 April 2002).

[73] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU).

[74] The Lisbon Treaty relaxed the standing rules for non-privileged applicants in relation to regulatory acts that do not entail implementing measures. Following Article 263(4) TFEU, applicants do not have to prove individual concern.

[75] Case C-25/62 *Plaumann v Commission* [1963] ECLI:EU:C:1963:17.

CJEU's interpretation of individual concern because they were of the opinion that a strict reading violates Article 6 and/or Article 13 ECHR.[76] The CJEU has, however, consistently resisted the temptation to reconsider its case law on individual concern, especially with a reference to the entire system of EU remedies and the possibilities for individuals to indirectly access the CJEU via the preliminary reference procedure (Article 267 TFEU). It famously held: 'To that end, the FEU Treaty has established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the Courts of the European Union.'[77] The CJEU has also explicitly ruled out that the possession of an individual right leads to the establishment of standing as such.[78] It is not unthinkable that individuals will turn to the ECtHR after an inadmissibility decision and claim a violation of Articles 6 and 13 ECHR. In *Posti and Rahko v Finland*, the ECtHR held:

> where a decree, decision or other measure, albeit not formally addressed to any individual natural or legal person, in substance does affect the 'civil rights' or 'obligations' of such a person or of a group of persons in a similar situation, whether by reason of certain attributes peculiar to them or by reason of a factual situation which differentiates them from all other persons, Article 6 § 1 may require that the substance of the decision or measure in question is capable of being challenged by that person or group before a "tribunal" meeting the requirements of that provision.[79]

In the earlier mentioned *Bosphorus* case, the ECtHR nonetheless concluded, after recognising that access of individuals to the CJEU is 'limited', that the protection of fundamental rights is equivalent to the ECHR.[80] Judge Ress, however, stressed in his concurring opinion that this determination does not mean that the limited access via Article 263 TFEU is necessarily in accordance with the ECHR.[81] The Aarhus Compliance Committee determined,

[76] The CFI came to 'the inevitable conclusion' that the action for annulment 'can no longer be regarded, in the light of Articles 6 and 13 of the ECHR and of Article 47 of the CFR, as guaranteeing persons the right to an effective remedy enabling them to contest the legality of Community measures of general application which directly affect their legal situation'. Case T-177/01, *Jégo-Quéré v Commission* [2002] EU:T:2002:112; Opinion of AG Jacobs in Case C-50/00 P *Unión de Pequeños Agricultores (UPA)* [2002] EU:C:2002:197; Craig (n 15) 1130–1131.

[77] *Inuit* (n 9) para 92.

[78] Ibid para 106; Case C-565/19 P *Carvalho and Others v Parliament and Council* [2021] ECLI:EU:C:2021:252, paras 48–49.

[79] *Posti and Rahko v Finland*, App no 27824/95 (ECtHR, 24 September 2002) para 53.

[80] *Bosphorus* v *Ireland* (n 24) paras 162 and 165.

[81] Concurring opinion Judge Ress, para 1.

albeit only with respect to environmental matters, that the standing requirements are too severe to comply with the Aarhus Convention.[82]

In sum, this subsection shows that the impact of accession from an effective judicial protection perspective depends on the approach taken by the ECtHR. The eventual substantive effects also depend on possible (internal) procedural rules to be decided by the EU as to the implementation of ECtHR judgments. ECtHR judgments are 'only' declaratory in nature and do not as such invalidate secondary EU law.[83] The question from the perspective of EU law is whether a separate CJEU judgment annulling the respective provision(s) of the EU law instrument is subsequently necessary or whether the EU legislature can amend legislation so that it is in conformity with the ECHR without such an intermediate step. There are no guidelines for the CJEU (yet) on how to deal with ECtHR judgments.[84]

7.3 PROCEDURAL PRACTICALITIES AFTER ACCESSION

Now that accession seems to be becoming a reality it is important to take stock of the most important procedural aspects, primarily from the perspective of potential individual applicants being the victims of fundamental rights violations committed by the EU and, to a lesser extent, EU Member States in the implementation of their EU law obligations. This section takes the most recent negotiation document of 17 March 2023 as the basis of analysis.[85] This leads to one important caveat, namely that some aspects might change in the future. It goes beyond the scope of this chapter to fully analyse all details of relevant procedural issues. The procedures are quite complicated as several commentators have already noted.[86]

7.3.1 *ECtHR Admissibility Requirements*

The most obvious starting point for a procedural overview of the consequences of accession is admissibility. Applicants must overcome two procedural

[82] Findings and Recommendations of the Compliance Committee With Regard to Communication ACCC/C/2008/32 (Part II) Concerning Compliance by the European Union (17 Mar. 2017) ECE/MP.PP/C.1/2017/7, para 64.

[83] Gragl (n 3) 20.

[84] Eckes (n 55) 281.

[85] 'Final consolidated version of the draft accession instruments' (CDDH ad hoc negotiation group ('46+1'), 17 March 2023) < https://rm.coe.int/final-consolidated-version-of-the-draft-accession-instruments/1680aaaecd>.

[86] Besselink (n 13) 35; Gragl (n 3) 57; Lock (n 26) 1054.

admissibility hurdles before the ECtHR delves into the merits of their case. First, following Article 34, only persons, non-governmental organisations, or groups of individuals may bring a complaint against the EU before the ECtHR.[87] Second is the requirement to exhaust all 'domestic' remedies under EU law, following Article 35 ECHR.[88] This reflects the subsidiary nature of the ECHR system, giving national courts the opportunity to first reflect on the compatibility of their national laws with the ECHR.[89] The ECtHR described the exhaustion rule as 'one that is golden rather than cast in stone'.[90] The rule is not applied, amongst others, when the applicants can show that a remedy was not available in practice or that the remedy was inappropriate, ineffective, or unreasonable.[91]

Applying this logic to the EU 'complete system of legal remedies', accession enables natural and legal persons to access the ECtHR after having started and exhausted an action for annulment (Article 263(4) TFEU), action for failure to act (Article 265(3) TFEU), or action for damages (Articles 268 jo. 340 TFEU). The same holds true for civil service disputes between the EU and its staff (Article 270 TFEU) and disputes in relation to arbitration clauses in contracts concluded by or on behalf of the Union (Article 272 TFEU). Since the General Court has jurisdiction to hear and determine these actions at first instance, persons should in theory have made it all the way up to the Court of Justice. This is obviously subject to the aforementioned caveat that an appropriate and effective remedy was available. One unresolved question in this context is whether the ECtHR will require an individual to start an action for annulment even though it is evident that he does not satisfy the earlier discussed strict *locus standi* requirements.[92] Third party interveners are also expected to benefit from accession. This could include persons who (unsuccessfully) appealed the substantive decision of the General Court before the Court of Justice but

[87] This means that a Member State cannot complain before the ECtHR following a liability action against the EU. The General Court ruled on the first damages action against the EU by a Member State. Case T-151/20 *Czech Republic v European Commission* [2022] ECLI:EU:T:2022:281.

[88] Callewaert, 'Do we still need Article 6(2) TEU?' (n 51) 85.

[89] A, *B and C v Ireland*, App no 25579/05 (ECtHR, 16 December 2010) para 142; Registry of the ECtHR, 'Practical Guide on Admissibility Criteria' (*Registry of the ECtHR*, 31 August 2022) <www.echr.coe.int/documents/admissibility_guide_eng.p> paras 86–88.

[90] Practical Guide on Admissibility Criteria (n 89) para 89.

[91] For example with references to particular precedents, Practical Guide on Admissibility Criteria (n 89) paras 95–112; *De Wilde, Ooms and Versyp v Belgium*, App nos 2832/66, 2835/66 and 2899/66 (ECtHR, 18 June 1971).

[92] Lock (n 26) 788.

also those who were refused leave to intervene by the General Court and Court of Justice.[93]

This overview indicates that persons cannot directly turn to the ECtHR in relation to CJEU judgments rendered in the context of the preliminary reference procedure (Article 267 TFEU), as the explanatory report to the AA makes clear as well.[94] Individuals can, however, complain before the ECtHR vis-à-vis the national court's judgment implementing the CJEU's preliminary ruling, obviously subject to the domestic exhaustion rule.[95] This means that where a reference was made by a lower court, the persons should appeal to the higher or highest court(s) before they can complain before the ECtHR. Note that the person concerned can in this way indirectly 'challenge' the underlying CJEU ruling including the CJEU's interpretation of EU law and its pronouncements on the validity of EU law before the ECtHR. The ECtHR is subsequently in a position to review whether EU law, as interpreted by the CJEU, is in conformity with the ECHR. The EU can become a co-respondent in such a situation, as will be discussed in Section 7.3.2. One question is whether the ECtHR will require the applicant, in a case in which a reference was made, to have put forward the fundamental rights violations in their submissions before the referring court and the CJEU in the same way as the ECtHR has required applicants in 'regular' cases against an ECHR contracting party. Is it enough that the applicant merely alluded to the EU Charter of Fundamental Rights, or should the claims also have been couched in ECHR terms? There are indications in the case law that the ECtHR might be(come) strict(er), albeit only in a few UK cases.[96] The applicant is not required to have requested a reference for a preliminary ruling before the national court. A reference is generally not seen as a domestic legal remedy that must be exhausted before an individual can turn to the ECtHR, because the individual does not enjoy a right to a reference.[97] This was also acknowledged by the Presidents of the CJEU and ECtHR in their Joint Communication.[98]

[93] Third party interveners can only do so 'where the decision of the General Court directly affects them'. Consolidated Version of the Statute of the Court of Justice of the European Union (Statute) OJ C83/210 art 56, para 2; Statute art 57, para 1.

[94] Draft explanatory report to the AA (n 17) para 74.

[95] Callewaert, 'Do we still need Article 6(2) TEU?' (n 51) 86.

[96] *Lee v the UK*, App no 18860/19 (ECtHR, 7 December 2021) paras 56 and 70; *Hickey v the UK*, App no 39492/07 (ECtHR, 4 May 2010). Lize Glas, 'The age of subsidiarity? The ECtHR's approach to the admissibility requirement that applicants raise their Convention complaint before domestic courts' (2023) 41(2) Netherlands Quarterly of Human Rights 75.

[97] Draft explanatory report to the AA (n 17) para 74; Gragl (n 3); Craig (n 15) 1125.

[98] 'Joint communication from Presidents Costa and Skouris' (24 January 2011) <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf.>.

7.3.2 *Shared or Concurrent Responsibility and the Co-respondent Mechanism*

In many instances, the EU is not solely responsible for an alleged breach of fundamental rights.[99] Since implementation of EU law happens primarily at the national level, EU Member States are almost always involved in one way or another.[100] Under EU law, such acts of Member States implementing EU law are attributed to the Member State(s) concerned.[101] Attribution to Member States does not preclude the EU from being concurrently responsible. The alleged unlawful conduct on the part of the EU could, for example, consist of an omission to act or a failure to provide proper oversight, thereby contributing to or facilitating a breach on the part of the Member State. The failure to exercise sufficient supervisory powers on the part of EU institutions may give rise to liability on the part of the EU.[102] The CJEU has also held the Commission liable for its wrongful authorisation of import licences by EU Member States.[103]

For situations of concurrent or shared responsibility, the Accession Agreement foresees a so-called co-respondent mechanism. Article 3(1) AA entails that a new fourth paragraph will be added to Article 36 ECHR:

> 4. The European Union or a member State of the European Union may become a correspondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.

[99] See more generally about shared responsibility the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the Articles on the Responsibility of International Organizations (ARIO); André Nollkaemper and Others, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31 European Journal of International Law 15.

[100] Draft explanatory report to the AA (n 17) para 46.

[101] Draft explanatory report to the AA (n 17) para 27. This also reflects the ECtHR's determination that 'a Convention Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligation'. *Bosphorus* v *Ireland* (n 24) para 153.

[102] See, e.g., Case C-4/69 *Lütticke v Commission* [1971] ECLI:EU:C:1971:40, para 17 (the Commission was not held liable for lack of a serious breach). Melanie Fink, 'EU liability for contributions to Member States' breaches of EU law' (2019) 56 Common Market Law Review 1227.

[103] See, e.g., Joined Cases C-5/66, 7/66, 13/66–24/66 *Kampffmeyer and Others v Commission* [1967] EU:C:1967:31; Case C-30/66 *Becher v Commission* [1967] ECLI:EU:C:1967:44.

The mechanism benefits the applicant as well as the potential co-respondent. From the perspective of effective judicial protection of the applicant, the co-respondent mechanism ensures that individual applications against the *wrong* entity are not declared inadmissible.[104] Individuals often do not know the ins and outs of EU law and implementation rules so it can be difficult for them to determine whether the respondent is a Member State or the EU.[105] It could happen that natural or legal persons start an action against EU Member States –when implementing EU law – in such cases of shared or concurrent responsibility while the EU also played its part. Article 3(2) AA enables the EU to become a party to the proceedings before the ECtHR alongside the respondent State(s). EU Member States have a more limited possibility under Article 3(3) AA when an application is brought against the EU. They can only become a co-respondent in cases where the conformity of EU primary law with the ECHR is contested.[106] The anticipated mechanism benefits the co-respondent in the sense that they become a party to the case and, hence, can take part in the proceedings.

The current Accession Agreement has made it easier for the EU and EU Member States to act as co-respondents before the ECtHR. The reason is the CJEU's objections to the way the mechanism was set up in the AA 2013 in *Opinion 2/13*. The CJEU was critical about the required review by the ECtHR in relation to requests to intervene as co-respondents in a case before the ECtHR. On the basis of the AA 2013, the ECtHR could examine whether it is plausible that the conditions were met. According to the CJEU, this would require the ECtHR to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions. The revised AA no longer uses the term 'request' but merely stipulates that the EU and/or EU Member States may become a co-respondent 'upon their initiative'. Article 3(5) AA further adds that 'The Court shall admit a co-respondent by decision if a reasoned assessment by the European Union sets out that the conditions in paragraph 2 or 3 of this article are met'. This presupposes an almost mechanical automaticity. That is confirmed by the explanatory report to the AA that provides that the 'assessment by the EU will be considered as determinative and authoritative'.[107]

[104] Gragl (n 3) 32.
[105] Gragl (n 3) 32; Craig (n 15) 1122.
[106] The rationale is that EU Member States are the *Herren der Verträge* and should, thus, be able to pronounce themselves on primary EU law that is being contested before the ECtHR, while they are not in such a position in relation to other EU (secondary) acts and omissions.
[107] Draft explanatory report to the AA (n 17) para 61.

A second substantive change in the current Accession Agreement is the amendment of Article 3(8) AA.[108] The amended provision reads: 'If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the Court in its judgment shall hold the respondent and the corespondent *jointly responsible* for that violation' (emphasis added). The original provision in the AA 2013 enabled the ECtHR to divert from this default rule and determine that only one of them is responsible on the basis of the reasons given by the respondent and the co-respondent. The reason for this amendment is *Opinion 2/13* in which the Full Court held:

> The question of the apportionment of responsibility must be resolved solely in accordance with the relevant rules of EU law and be subject to review, if necessary, by the Court of Justice, which has exclusive jurisdiction to ensure that any agreement between co-respondent and respondent respects those rules. To permit the ECtHR to confirm any agreement that may exist between the EU and its Member States on the sharing of responsibility would be tantamount to allowing it to take the place of the Court of Justice in order to settle a question that falls within the latter's exclusive jurisdiction.[109]

The amendment also addresses the earlier concerns in the literature as to the interference of the ECtHR with the EU competence division.[110] It seems that the current AA requires subsequent steps at the EU level to execute the ECtHR judgment. The CJEU probably needs to apportion responsibility by the EU and the Member State(s) concerned. Internal attribution rules might be a logical step. The question thus remains how the EU will proceed following a determination of a violation of the ECHR by the ECtHR in situations of concurrent responsibility.

The previous paragraphs create perhaps the impression that the EU and its Member States enjoy a special and more lucrative position in comparison with other ECHR contracting parties. It appears that the current AA is even more deferential to the EU than the original AA 2013.[111] This picture is not entirely true, as the explanatory report to the AA also emphasises: the

[108] Other smaller changes relate to the obligation on the part of the ECtHR to make available to the EU information concerning all such applications that are communicated to its Member States (and applications against the EU should be communicated to the Member States). The EctHR also communicates its decisions to the parties.

[109] *Opinion 2/13* (n 36) para 234.

[110] Pergantis and Johansen (n 68) 261 and 267; Jacqué (n 4) 1016.

[111] It has been pointed out that the original AA already gives too much power to the EU, thereby limiting the possibilities for control on the part of the EctHR (e.g., only a plausibility review).

mechanism is not 'a procedural privilege' for the EU or its Member States. The report mentioned that it is a way 'to avoid gaps in participation, accountability and enforceability' in the Convention system, while also serving 'the proper administration of justice'.[112] It is important in this context to underscore the advantages of the co-respondent mechanism from the perspective of effective judicial protection of potential applicants. First, individuals only have to exhaust the local remedies of one entity: the Member State or the EU.[113] In addition, a possible wrong decision by the applicant(s) as to the respondent does not affect the admissibility decision as can be derived from the last sentence of the earlier quoted future Article 36(4) ECHR.[114] Second, the co-respondent becomes a party to the case and is, hence, also bound by the ECtHR judgment.[115] Third, if Member States enjoy no discretion, that is, when they are in a situation – in the words of Article 3(2) AA – where a 'violation could have been avoided only by disregarding an obligation under European Union law', the EU can be held responsible as well alongside the EU Member State(s) in question.[116]

7.3.3 *The Prior Involvement Procedure*

Article 3(7) of the Accession Agreement also establishes a procedure to ensure that the CJEU can make an assessment of the compatibility of EU law with the ECHR before the ECtHR does so, when it has not had a chance to interpret or decide on the validity of EU law. This prevents the ECtHR from delivering its own original interpretation of EU law or from deciding a case on the basis of a wrong interpretation of EU law.[117] Such a scenario would breach the CJEU's exclusive jurisdiction over the definitive interpretation of EU law, as the CJEU underscored in *Opinion 2/13*.[118] This procedure is reflective of the subsidiary role of the ECtHR.[119] The revised AA does not fundamentally change the procedure, except for the clarification that the procedure is not limited to questions of validity of

The EU and/or EU Member States may become a co-respondent if it 'appears' that such allegation calls into question the compatibility with the rights. Jacqué (n 4) 1015.

[112] Draft explanatory report to the AA (n 17) para 47; Gragl (n 3) 32.
[113] Draft explanatory report to the AA (n 17) para 48.
[114] Besselink (n 13) 38.
[115] Draft explanatory report to the AA (n 17) para 47.
[116] Gragl discussed this in depth, (n 3) 33–45.
[117] Gragl (n 3) 20 and 46.
[118] *Opinion* 2/13 (n 36) para 246.
[119] Draft explanatory report to the AA (n 17) para 77; Jacqué (n 4) 1018.

secondary EU law but also questions of interpretation.[120] The procedure is primarily relevant in relation to situations in which a request for a preliminary ruling was not made, as the explanatory report to the AA also suggests.[121] It seems at first sight not relevant for direct actions before the CJEU, such as the action for annulment, because the CJEU had an opportunity to pronounce itself. Nonetheless, as noted earlier, such actions frequently result in inadmissibility decisions for lack of *locus standi* without any discussion of the merits. The Accession Agreement does not preclude the CJEU's prior involvement in these cases.

The prior involvement procedure seems to give the CJEU a prominent role. Its (future) role should, however, not be overstated for three reasons. First, the CJEU is only given a chance after the application is declared admissible by the ECtHR.[122] It could be argued that this is too late, because the admissibility decision might already involve some reflection on EU law, as the discussion of the strict *locus standi* requirements in Section 7.2.3 shows.[123] Second, the assessment of the CJEU will not bind the ECtHR. Article 3(7) AA provides: 'The provisions of this paragraph shall not affect the powers of the Court.' In addition, the explanatory report to the AA also mentions explicitly that the CJEU's assessment will not bind the Court.[124] Third, it is often difficult to make a distinction between interpretation and application of EU law. Formally, national laws (including EU law) are treated by the ECtHR as being part of the facts of the case. The ECtHR will not substitute itself for national authorities and will thus not interpret EU law as such.[125] But, in practice, the task to give an interpretation of the ECHR can 'shade, sometimes unavoidably, into the interpretation of national norms'.[126] Authors have thus questioned the CJEU's conclusion that the EU and its institutions cannot be bound 'in the exercise of their internal powers, to a particular interpretation of the rules of EU law'.[127] According to them, such 'second-guessing' is precisely the rationale of accession.[128]

[120] Ibid para 77.
[121] The report expects this situation to arise 'rarely'. Draft explanatory report to the AA (n 17) para 75.
[122] The proposed Article 36(4) provides: 'The admissibility of an application shall be assessed without regard to the participation of a corespondent in the proceedings.'
[123] Jacqué (n 4) 1021.
[124] Draft explanatory report to the AA (n 17) para 78.
[125] Jacqué (n 4) 1017.
[126] Isiksel (n 6) 575.
[127] *Opinion* 2/13 (n 36) para 184.
[128] 'Internal' mechanisms are 'prone to error and manipulation' and biases. Isiksel (n 6) 575–576 and 581.

7.4 THE COMMON FOREIGN AND SECURITY POLICY

This section starts with an explanation of the current gap in effective judicial protection within EU law in relation to the Common Foreign and Security Policy (CFSP) (Section 7.4.1). It will subsequently examine how the 2013 and current AA have dealt with the CFSP and the challenges involved (Section 7.4.2).

7.4.1 *CFSP: The Current Gap in Effective Protection*

One major protection gap prior to accession concerns fundamental rights violations by the EU in the context of the CFSP. This problem has become more pertinent in recent years, because of the increasing shift of powers from Member States to the EU, as illustrated by the growing number of civilian and military operations and restrictive measures or sanctions.[129]

The gap in effective judicial protection in the CFSP relates to the limited jurisdiction of the CJEU in this area and its evolvement in recent years. The jurisdiction of the CJEU is clearly circumscribed in the Treaties, even though the CJEU itself has interpreted its jurisdiction broadly. Because of the special and intergovernmental nature of the CFSP area, also reflected in the inability to adopt legislative acts, Article 24 TEU stipulates that the CJEU shall not have jurisdiction in relation to the CFSP with two exceptions. First, the CJEU can monitor compliance with Article 40(1) TEU and make sure that the implementation of the CFSP does not affect the application of the procedures and the extent of the powers of the institutions in relation to other EU competences. In practice, this boils down to ensuring that the correct legal basis is used in the adoption of EU secondary law and that the correct corresponding decision-making procedures are used. Second, and most relevant for the purpose of this chapter, is the ability of the CJEU to review the legality of decisions providing for restrictive measures against natural or legal persons following Article 275 TFEU.

The CJEU has stretched these exceptions in its case law and has tried to minimise the effective judicial protection gap.[130] The rationale is that the limitations to the CJEU's jurisdiction derogate from the rule of general

[129] Gragl (n 3) 15.

[130] For a recent discussion with reference to older literature, see Maria José Rangel de Mesquita, 'Judicial review of Common Foreign and Security Policy by the ECtHR and the (re) negotiation on the accession of the EU to the ECHR' (2021) 28 Maastricht Journal 356. The CJEU has been quite lenient with respect to access to CFSP documents as well. Case T-14/98 *Hautala v Council* [1999] ECLI:EU:T:1999:157.

jurisdiction in Article 19 TEU and must, therefore, be interpreted narrowly and in the light of the right and principle of effective judicial protection.[131] The CJEU has, for example, provided a strict interpretation of the acts excluded from review in Article 275 TFEU. According to the CJEU, this does not include measures adopted by *Eulex Kosovo* such as the awarding of a public contract giving rise to expenditures for the EU budget.[132] In *H*, the CJEU also accepted jurisdiction to assess the action for annulment in relation to a decision of the Chief of Personnel of the EU Policy Mission in Bosnia and Herzegovina to redeploy an Italian national seconded to another office.[133] The CJEU has also accepted the possibility of preliminary references in relation to the validity of CFSP acts in *Rosneft*.[134] There is currently a case pending before the CJEU dealing with the question of whether the CJEU can also handle questions on the *interpretation* of a CFSP decision concerning restrictive measures.[135] In addition, the CJEU accepted non-contractual liability in relation to individual CFSP restrictive measures adopted on the basis of Chapter 2 of Title V TEU in *Bank Refah Kargaran*.[136] The question is whether the CJEU has jurisdiction in relation to damages caused by other CFSP acts, measures, or omissions, such as CFSP missions. There is currently another damages case (*KS and KD*) pending before the CJEU against the Council, Commission, and EEAS for the mishandling of recommendations of the EU Human Rights Review Panel established to investigate and prosecute war crimes committed during the war in Kosovo in 1999. The General Court dismissed the action for lack of jurisdiction 'to review the legality of such acts or omissions, which relate to strategic choices and decisions concerning the mandate of a crisis management mission set up under the CSDP,

[131] Case C-455/14 P *H v Council and Commission* [2016] ECLI:EU:C:2016:569; Case C-658/11 *Parliament v Council* [2014] ECLI:EU:C:2014:2025, para 70; Case C-439/13 P *Elitaliana* v *Eulex Kosovo* [2015] EU:C:2015:753, para 42.

[132] *Elitaliana* v *Eulex Kosovo* (n 131).

[133] *H v Council and Commission* (n 131), paras 59–60; see also a subsequent staff management case in relation to the EU Satellite Centre: Case C-14/19 P *CSUE v KF* [2020] ECLI:EU:C:2020:492, para 66.

[134] See also Graham Butler, 'A question of jurisdiction: Art. 267 TFEU preliminary references of a CFSP nature' (2017) 2 European Papers 201.

[135] Reference from the Regional Court of Bucharest in relation to Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. Case C-351/22 *Neves 77 Solutions* [case in progress].

[136] Case C-134/19 P *Bank Refah Kargaran* [2020] ECLI:EU:C:2020:793, para 44; The possibility of damages in relation to restrictive measures adopted on the basis of Article 215 TFEU has been recognised earlier. For example, Case T-384/11 *Safa Nicu Sepahan v Counccil* [2014] EU:T:2014:986; Stella Thanou, 'Individual restrictive measures and actions for damages before the General Court of the European Union' (2020) 20 ERA Forum 599.

which is an integral part of the CFSP, nor can it award damages to applicants who claim to have suffered harm as a result of those acts or omissions'.[137] It held that the action does not concern restrictive measures in the sense of Article 275 TFEU or compliance with Article 40 TEU.[138] The Court also distinguished the case from the CJEU's public procurement (*Elitaliana*) and staff management (*H*) cases.[139]

In sum, the advancing CJEU case law in relation to the CFSP already minimises the gaps in the CJEU's jurisdiction at the time of *Opinion 2/13*. Nonetheless, several acts, actions, or omissions performed in the context of the CFSP are still excluded from review.[140]

7.4.2 *CFSP: Accession of the EU and Its Benefits*

The AA 2013 did not provide for any specific arrangements in relation to the CFSP. The AA simply empowered the ECtHR to review the compatibility with the ECHR of acts, actions, or omissions performed in the context of the CFSP. This was problematic for the CJEU since it would give the ECtHR jurisdiction in a policy area in which the CJEU itself does not have jurisdiction.[141] Entrusting exclusive review to a non-EU body 'outside the institutional and judicial framework of the EU' fails to have regard to the 'specific characteristics of EU law', as the CJEU concluded critically in *Opinion 2/13*.[142] The CJEU's position in relation to CFSP has received a lot of criticism in the literature. Łazowski and Wessel held: 'It is one thing to prevent judicial activism in that area; it is quite another thing to deliberately leave gaps in the protection of fundamental rights.'[143] The CJEU's concerns in relation to the CFSP are arguably the most controversial aspect of *Opinion 2/13*. It is therefore no surprise that the CFSP has been reserved to the end of the negotiations on the EU's accession to the ECHR as so-called basket 4.

It still remains to be seen how the new AA will solve the problem of the limited jurisdiction of the CJEU in the CFSP. The March 2023 deal of the 46 + 1 Group left this question to the EU to solve as an internal matter.

[137] Case T-771/20 *KS and KD v Council and Others* [2021] EU:T:2021:798, para 27.
[138] Ibid para 33.
[139] Ibid paras 35–36.
[140] Christian Breitler, 'Jurisdiction in CFSP Matters – Conquering the Gallic Village One Case at a Time?' (*European Law Blogpost*, 13 October 2022) <https://ELB-Blogpost-Christian-Breitler-October-202239-final.pdf> (europeanlawblog.eu).
[141] *Opinion 2/13* (n 36) para 254.
[142] Ibid paras 255–258.
[143] Łazowski and Wessel (n 44) 212.

The EU will keep the Council of Europe's Steering Committee for Human Rights informed.[144] One possible solution is a reattribution mechanism as proposed by the EU in February 2023. The proposed Article 4a AA re-attributes CFSP acts to EU Member States: an 'act, measure or omission shall be attributed to one or more member States of the European Union . . . if the European Union has designated that member State or those member States of the European Union as responsible for that act, measure or omission by means of a reasoned declaration'.[145] An earlier version of the explanatory report to the AA mentions in relation to this proposal that the decision whether an act, action, or omission falls within the scope of the CFSP is a matter of internal EU law, 'which can only be decided definitively' by the CJEU. The ECtHR shall accept this 'final determination'.[146] This also means that the Member State(s) designated will become respondent(s) in the case of re-attribution of responsibility and the action shall be deemed to be directed against the designated Member State(s) instead of the EU. This also has implications for the applicant(s) if they have not exhausted remedies 'in at least one member State jurisdiction'. The proceedings before the ECtHR are to be stayed in order to allow the applicant to pursue domestic remedies in the designated Member State(s), if those remedies are still available. Article 4a AA and the explanatory report to the AA explicitly provide for the activation of the co-respondent mechanism and prior involvement procedure discussed earlier.[147]

Note that it remains unclear whether the EU will stick to its earlier proposed re-attribution mechanism. It is also unclear whether it is acceptable for non-EU contracting parties to the ECHR. These parties have been critical about the proposal.[148] This could explain why the EU is reflecting on a

[144] 'Meeting report of the 18th meeting of the CDDH ad hoc negotiation group ("46+1") on the accession of the European Union to the European Convention on Human Rights' (Meeting Report, 17 March 2023) <https://rm.coe.int/meeting-report-18th-meeting/1680aa9807>, paras 7–8.

[145] 'Consolidated version of the draft Accession Instrument (as of 2 February 2023)' (CDDH ad hoc negotiation group ('46+1'), 16 February 2023) <https://rm.coe.int/consolidated-version-of-the-draft-accession-instruments-as-of-2-februa/1680aa3443>.

[146] Draft explanatory report of 'Consolidated version of the draft Accession Instrument (as of 2 February 2023)' (CDDH ad hoc negotiation group ['46+1'], 16 February 2023) <https://rm.coe.int/consolidated-version-of-the-draft-accession-instruments-as-of-2-februa/1680aa3443>, paras 26b–c.

[147] Draft explanatory report of the draft Accession Instrument (n 146) para 26a.

[148] See 'Meeting report of the 13th meeting of the CDDH ad hoc negotiation group ("46+1") on the accession of the European Union to the European Convention on Human Rights' (Meeting Report, 13 May 2022) <https://rm.coe.int/cddh-46-1-2022-r13-fin-en/1680a6801c>, paras. 37–39.

possible alternative solution in the form of an interpretative declaration in relation to the CFSP.[149] From a legal perspective, one also wonders how this re-attribution mechanism applies to civilian missions that have an accepted distinct legal capacity under EU law as 'subsidiary organs' of the EU. From the perspective of the ECtHR and especially its *Behrami and Saramati* case law, conduct of subsidiary organs of international organisations is attributable to the organisation.[150] Re-attribution to the EU Member States seems only logical when they instead of the EU maintain 'effective control'.[151] According to Hillion and Wessel, there is a (rebuttable) presumption in favour of attributing wrongful conduct of such missions to the EU, rather than to the contributing EU Member States.[152] In the earlier mentioned *KS and KD* case, the English High Court also followed this logic and determined in an *obiter dictum* that the case would most likely fall within the CJEU's exclusive jurisdiction, agreeing with the submissions of the intervening European Commission that the 'nature of the claim is not itself concerned with a sovereign policy choice made by the Member States'.[153] It seems that in this scenario it becomes difficult, or at least far-fetched, to use the legal fiction of re-attribution to Member States. One could thus have doubts about the

[149] 'Geannoteerde agenda van de bijeenkomst van de Raad Justitie en Binnenlandse Zaken, 8 en 9 december' (*Openoverheid*, December 2022) <https://open.overheid.nl/documenten/ronl-8ef5c0285d2b43b46ecb7e93e42ad3985c4a911b/pdf>, 12.

[150] In *Behrami and Behrami v France*, the applicants challenged the failure of the Interim administration for Kosovo (UNMIK) to demine as a result of which a child was killed. The ECtHR determined that UNMIK is a subsidiary organ of the UN, institutionally directly and fully answerable to the UN Security Council. The impugned (in)action was thus attributable to the UN and not its Member States. *Behrami and Behrami v France and Saramati v France, Germany and Norway* (dec.), App no 71412/01 (ECtHR, 2 May 2007) para 142.

[151] In *Saramati v France, Germany and Norway*, the applicant challenged the unlawful detention by the NATO led international security force (KFOR) that was mandated by the UN Security Council. The ECtHR held that it has no jurisdiction *ratione personae*, because the UN Security Council retained 'ultimate authority and control', while KFOR was only exercising lawfully delegated powers of the UN Security Council. The impugned action was hence attributable to the UN and not to the troop-contributing countries. Ibid paras 133–135. In the case of *Al-Jedda*, the ECtHR attributed the unlawful detention of an Iraqi by the US/UK led Coalition Provisional Authority to the UK, because the Security Council had 'neither effective control nor ultimate authority and control'. *Al-Jedda v United Kingdom*, App no 27021/08 (ECtHR, 7 July 2011) para 26.

[152] Christophe Hillion and Ramses A. Wessel, '"The Good, the Bad and the Ugly": three levels of judicial control over the CFSP' in Steven Blockmans and Panos Koutrakos (eds), *Research Handbook on EU Common Foreign and Security Policy* (Edward Elgar 2018).

[153] England and Wales High Court [UK] *Tomanović et.al. v the European Union et.al.* [2019] EWHC 263 (QB), paras 58 and 81. For an analysis, see Stian Øby Johansen, 'Suing the European Union in the UK: *Tomanović et. al. v. The EU et. al.*' (2019) 4 European Papers 345.

mechanism from the perspective of effective judicial protection if it leads to a legal vacuum in which liability claims are not dealt with by a court.

7.5 CONCLUSION

This chapter took stock of the consequences of the accession of the EU to the ECHR from the perspective of fundamental rights accountability and effective judicial protection vis-à-vis the EU. It showed that accession fills a current protection gap in two ways: it enables complaints against the EU (currently declared inadmissible by the ECtHR) as well as against EU Member States when they implement EU law and have no margin of discretion (currently shielded from scrutiny on the basis of the rebuttable *Bosphorus* presumption). Accession is also beneficial for the coherence of the two legal systems of the EU and the ECHR, reducing the likelihood of conflicts between the two orders. This chapter argued that it is difficult to predict the actual impact of accession on the level of protection of fundamental rights. Much depends on the actual scrutiny or intensity of review of the ECtHR. While the ECtHR will most likely do away with its *Bosphorus* presumption, it could factor in the special sui generis nature of the EU by granting a wider margin of appreciation than to 'regular' states. Uncertainties also exist in relation to the extent to which the ECtHR will extend its doctrine of positive obligations to the EU.

In many instances, the EU is not solely responsible for an alleged breach of fundamental rights. The Accession Agreement provides for a co-respondent mechanism for this reason. This mechanism facilitates effective judicial protection before the ECtHR in three ways. First, individuals only have to exhaust the local remedies of one entity: the Member State or the EU. Second, the co-respondent becomes a party to the case and is, hence, also bound by the ECtHR judgment. Third, if Member States are under a strict obligation of EU law and enjoy no discretion, the EU may be held responsible alongside the EU Member State(s) in question. Noteworthy about the latest version of the Accession Agreement is that the ECtHR will not divide responsibility between the EU and EU Member States. That is left to the EU, but it is (still) unclear how that will function in practice.

While the Accession Agreement provides some answers, several questions as to the consequences of accession can only be answered by the ECtHR. This not only concerns the earlier mentioned width of margin of appreciation or the doctrine of positive obligations but also the question as to whether the strict *locus standi* requirements meet the ECHR test.

While accession will definitely improve the possibilities for holding the EU accountable, it remains to be seen how this will work in reality. Several

commentators have been sceptical. Pergantis and Johansen held: 'Depriving the ECtHR of the opportunity to interpret Union law, allocate responsibility, and determine remedies for the execution of its judgments undermines the external control that it is meant to exercise.'[154] This chapter, nonetheless, showed that the co-respondent mechanism and the prior involvement procedure do not *only* grant the EU and its Member States a more lucrative position in comparison with 'regular' ECHR state parties. Both procedures also have several advantages from the perspective of effective judicial protection of prospective applicants and fundamental rights accountability.

[154] Pergantis and Johansen (n 68) 247.