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## EU Accession to the ECHR: Competence, Procedure and Substance

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# EU ACCESSION TO THE ECHR: COMPETENCE, PROCEDURE AND SUBSTANCE

*Paul Craig\**

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### INTRODUCTION

The issues raised by EU Accession to the ECHR have already generated a valuable and growing literature.<sup>1</sup> This article seeks to contribute to this literature. The discussion begins with an overview of the European Union's competence to accede to the European Convention on Human Rights ("ECHR"), and the process by which the Accession Agreement was negotiated. The focus then shifts to analysis of whether the EU needs its own Charter of Rights<sup>2</sup> in addition to membership of the ECHR.

This is followed by examination of a range of procedural issues raised by EU accession to the ECHR. This includes the choices open to claimants when pursuing rights-based claims and the constraints placed on those choices resulting from EU accession to the ECHR. It will be seen that accession raises some difficult issues concerning who should be the respondent and co-respondent in any particular case, and the manner in which a case concerning Convention rights is routed to the European Court of Human Rights ("ECtHR") based in Strasbourg. The new schema will moreover generate problems of delay.

The final section of the article addresses some of the prominent substantive issue raised by EU accession to the ECHR. This includes a re-assessment of the case law defining the relationship between the EU and the ECHR prior to accession and evaluation of the extent to which it is relevant post accession; discussion of the impact of accession on the autonomy of EU law; and consideration of the way in which the ECHR rights and Charter rights will interact in the future.

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1. See generally Christina Eckes, *EU Accession to the ECHR: Between Autonomy and Adaptation*, 76 MODERN L. REV. 254 (2013); Jean-Paul Jacqué, *The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms*, 48 COMMON MKT L. REV. 995 (2011); Tobias Lock, *EU Accession to the ECHR: Implications for Judicial Review in Strasbourg*, 35 EUR. L. REV. 777 (2010); Tobias Lock, *Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order*, 48 COMMON MKT L. REV. 1025 (2011); Tobias Lock, *End of an Epic? The Draft Agreement on the EU's Accession to the ECHR*, 31 YEARBOOK OF EUROPEAN L. 162 (2012); Norcen 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*, 12 GERMAN L.J. 1813 (2011).

2. Charter of Fundamental Rights of the European Union, 2010 O.J. C 83/389 [hereinafter Charter of Rights].

It is a great pleasure to contribute to this symposium for Sir Konrad Schiemann, to honor his work both in the UK Court of Appeal and as the UK judge on the European Court of Justice.

## I. *COMPETENCE*

### A. *Competence and Process*

Debate about the relationship between the EU and the ECHR is, as Jacqu e rightly notes,<sup>3</sup> as old as the Community itself. The nature of this debate has been told ably elsewhere, including by Jacqu e himself. Suffice it to say for the present that prior to the Lisbon Treaty the ECtHR jurisprudence was the most formative influence on the European Court of Justice's (ECJ) own fundamental rights' case law,<sup>4</sup> but the EU was not formally bound by the ECHR, and there were doubts over its competence to accede.<sup>5</sup>

The Lisbon Treaty formally resolved the status of the EU's Charter of Rights by rendering it legally binding with the same legal status as the constituent treaties.<sup>6</sup> The Lisbon Treaty also stipulated that the EU should accede to the ECHR,<sup>7</sup> albeit with the caveat that such accession should not affect the Union's competences as defined in the Treaty on European Union ("TEU") and Treaty on the Functioning of the European Union ("TFEU"). There is a Protocol attached to the Lisbon Treaty, which states that the agreement relating to accession to the ECHR must make provision for preserving the specific characteristics of the Union and Union law.<sup>8</sup> This is in particular

3. See Jacqu e, *supra* note 1, at 995.

4. See Guy Harpaz, *The European Court of Justice and its Relations with the European Court of Human Rights: the Quest for Enhanced Reliance, Coherence and Legitimacy*, 46 *COMMON MKT L. REV.* 105, 108 (2009).

5. See Opinion 2/94, *On Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] E.C.R. I-1759.

6. See Consolidated Version of the Treaty on European Union art. 6(1), 2012 O.J. C 326/13 [hereinafter TEU post-Lisbon]; See Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. C 326/47 [hereinafter TFEU].

7. See TEU post-Lisbon, *supra* note 6, art. 6(2).

8. *Id.* art. 6(2); Protocol (No. 8) relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, 2012 O.J. C 326/273 [hereinafter Protocol No. 8].

with regard to the arrangements for the Union's participation in the control bodies of the ECHR, and the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.<sup>9</sup>

Although the Lisbon Treaty contained no timeline for accession to the ECHR, it did impose a duty to accede. Negotiations began in July 2010 and were carried forward by a committee composed of representatives from the ECHR and the EU.<sup>10</sup> The committee reached an agreement in July 2011, which had to be approved by the appropriate decision-making organ within the EU and ECHR respectively.<sup>11</sup> Some Member States of the EU were unhappy with certain aspects of the July Agreement and proposed changes, but these changes were not accepted by all Member States of the EU. An ad hoc working group named the 47+1 group was established by the Committee of Ministers of the Council of Europe to broker agreement on the issues where disagreement persists.<sup>12</sup> The working group reached agreement<sup>13</sup> on the draft text in April 2013.<sup>14</sup>

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9. The Protocol also seeks to preserve derogations made by Member States pursuant to Article 15 of the ECHR and reservations made by Member States in relation to their membership of the ECHR. See Protocol No. 8, *supra* note 8, art 2.

10. See *EU Accession to the Convention of Human Rights*, COUNCIL OF EUROPE, <http://hub.coe.int/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention>. The working documents on the accession of the European Union to the Convention can be found at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working\\_documents\\_en.asp](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents_en.asp).

11. See Draft Legal Instruments on the Accession of the European Union to the European Convention on Human Rights, CDDH-UE (2011) 16 (draft) [hereinafter Draft Legal Instruments], available at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working\\_documents/CDDH-UE\\_2011\\_16\\_final\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents/CDDH-UE_2011_16_final_en.pdf).

12. See Council of Europe, Relevant Excerpts from the Report of the 75th Meeting of the CDDH, ¶ 9, (2012), available at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Working\\_documents/47\\_1%282012%2902\\_Extracts\\_CDDH\\_Report\\_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Working_documents/47_1%282012%2902_Extracts_CDDH_Report_EN.pdf).

13. Steering Committee for Human Rights, Fifth Negotiation Meeting Between the CDDH Ad Hoc Negotiation Group and the European Commission on Accession of the European Union to the European Convention on Human Rights (2013) [hereinafter Fifth Negotiation Meeting], available at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working\\_documents\\_en.asp](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents_en.asp).

14. See *Milestone reached in EU Accession to ECHR*, COUNCIL OF EUROPE, available at <http://hub.coe.int/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention> (last visited July 4, 2013).

Article 6(2) TEU imposed an obligation on the EU to accede to the ECHR, but was silent concerning accession to ECHR Protocols.<sup>15</sup> The Council decided to negotiate accession only in relation to Protocols that all Member States of the EU had already accepted. This could, as Jacqu e rightly notes,<sup>16</sup> be problematic because Article 52(3) of the Charter imposes an obligation to read Charter rights that correspond to Convention rights in the same way as those Convention rights.<sup>17</sup> A claimant might therefore rely on Article 52(3) in circumstances where Charter rights correspond to those in the Convention, but where the relevant Charter rights are contained in a Protocol to the Convention that was not included in the Accession Agreement.

The final version of the accession agreement must in any event be accepted unanimously by the Council and requires the consent of the European Parliament. It must then be approved by the Member States in accord with their respective constitutional requirements.<sup>18</sup> The ECJ's approval of the agreement will also be sought. The accession agreement must also be accepted in accord with the requirements of the ECHR. There is nonetheless a great deal in the July Agreement that is agreed by both sides and therefore the important contours of the ECHR/EU deal are clear. The ECHR will be used principally by claimants in order to challenge EU legal acts that are said to violate Convention rights, but these rights might also be used to challenge primary provisions of the constituent EU Treaties.<sup>19</sup>

### B. *Competence and Need*

The discourse concerning EU Accession to the ECHR has been coloured implicitly if not explicitly by the assumption that things would be simpler for the states that are party to both the

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15. See TEU post-Lisbon, *supra* note 6, art. 6(2), 2012 O.J. C 326/13.

16. See Jacqu e, *supra* note 1, at 1004–05.

17. See *id.* at 1004–05. This is subject to the caveat that the EU can provide more extensive protection.

18. See TFEU, *supra* note 6, art. 218, ¶ 8, 2012 O.J. C 326/146.

19. This is the assumption underlying the Draft Legal Instruments on the Accession of the European Union to the European Convention of Human Rights. See *Draft Legal Instruments*, *supra* note 11, art. 3, ¶ 3.

EU and the ECHR if the EU did not have a separate rights-based instrument in the form of the EU Charter of Rights.

There are however real difficulties with this argument. The EU is a polity that comprises twenty-eight Member States,<sup>20</sup> with in excess of 500 million people.<sup>21</sup> The German Federal Constitutional Court was correct a generation ago to pressure the EEC to develop a fundamental rights case law,<sup>22</sup> and it would almost certainly have done so even if it had not been pressed into action by the FCC.<sup>23</sup> The ECJ recognized that the Treaty and measures made pursuant thereto could impact on fundamental rights, and that protection for those rights at EEC level would enhance the legitimacy of the Community, as well as head off threat of revolt by the Member States. It was then natural for the EU to take this case law and develop it into a more visible human rights document that became the EU Charter of Rights. The imperatives that have driven Member States to articulate written Bills of Rights were equally applicable to the EU. These imperatives were evident in the deliberations of the Cologne European Council in 1999,<sup>24</sup> which decided that there should be a Charter of Fundamental Rights to consolidate the fundamental rights applicable at Union Level and to make their overriding importance more visible to EU citizens.<sup>25</sup>

This might be accepted, but some nonetheless argue that matters would have been much simpler/better if the EU, desirous of a Bill of Rights, had simply joined the ECHR, as it is now doing post the Lisbon Treaty. It can be accepted that there

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20. See *Countries*, European Union, <http://europa.eu/about-eu/countries> (last visited July 4, 2013).

21. See *Living in the EU*, EUROPEAN UNION, <http://europa.eu/about-eu/facts-figures/living> (last visited July 4, 2013).

22. See generally *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case C-11/70, [1970] E.C.R. I-1125 (German Constitutional Court pressuring the EEC to develop a fundamental rights case law)

23. See Gráinne de Búrca, *The Evolution of EU Human Rights Law*, in *THE EVOLUTION OF EU LAW* 465, 477–79 (Paul Craig & Gráinne de Búrca eds., 2d ed. 2011).

24. See Cologne European Council, *Conclusions of the Presidency*, Annexes (1999).

25. See generally Paolo Carozza, *The Member States*, in *THE EU CHARTER OF FUNDAMENTAL RIGHTS: POLITICS, LAW & POLICY* 40 (Steve Peers & Angela Ward eds., 2004); Gráinne de Búrca, *The Drafting of the European Charter of Fundamental Rights*, 26 *EUROPEAN L. REV.* 126, 130 (2001); Justus Schönlaue, *DRAFTING THE EU CHARTER: RIGHTS, LEGITIMACY AND PROCESS* 80–81 (2006).

are good normative reasons as to why the EU should be monitored in terms of human rights, in the same way that it demands of others. This is, however, a different point. The justification for the EU having a separate Charter is quite simply that the EU, like any other polity, is perfectly entitled to judge for itself which rights should be included within any Bill or Charter of Rights. It made this determination in Tampere and Cologne in 1999 in opting for a document that would contain a broader set of rights than those in the ECHR.<sup>26</sup> There will inevitably be some who agree with this choice, others who do not, but the decision as to the breadth of the Charter was for the constituent powers of the EU to make, and they made it after due deliberation. It necessarily follows that even after EU accession the Strasbourg Court will only have the final say in relation to those Charter rights that are also contained in the Convention. The ECJ will retain final authority in relation to other Charter rights.

## II. PROCEDURE

### *A. Choice and Consequence for Claimants*

Litigants who wish to advance a rights-based argument have a number of options at their disposal. EU accession to the ECHR has added a further variable to the factors that the applicant should take into account. This can be exemplified by reference to the UK. Different situations should be disaggregated for the sake of clarity.

First, if there is no connection to EU law then the applicant will perforce have to use the Human Rights Act 1998 and access the ECHR through this route.<sup>27</sup> The precepts concerning fundamental rights' from EU law can only be used against Member State action where it falls within the scope of EU law. The application of this precept can be contentious given the breadth of EU law, but this does not undermine the force of the

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26. See Cologne European Council, Conclusions of the Presidency, Annexes (1999); Tampere European Council, Conclusions of the Presidency (1999), available at [http://www.europarl.europa.eu/summits/tam\\_cn.htm#d](http://www.europarl.europa.eu/summits/tam_cn.htm#d).

27. Human Rights Act, 1998, c. 42 (U.K.).



precept itself.<sup>28</sup> This has been confirmed by the EU Charter of Rights, Article 51(1) of which provides that Member States are only bound when implementing EU law<sup>29</sup>, the better interpretation of this provision being that they are bound when acting within the scope of EU law.<sup>30</sup> The limit of EU competence is reinforced by Article 51(2) of the Charter, which states that the Charter does not extend the field of application of EU law beyond the powers of the Union, or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.<sup>31</sup>

Secondly, if there is a connection to EU law there may be cases where the individual seeks to rely on a right contained in the EU Charter that is not included in the ECHR or the HRA. In such instances, it will be for the claimant to invoke the Charter right via a direct action under Article 263 TFEU if the case is against an EU institution.<sup>32</sup> The claimant might alternatively invoke the Charter right in an indirect action under Article 267 TFEU for a preliminary ruling begun in the national court in order to challenge state action that falls within the scope of EU law, or to attack indirectly an EU measure that cannot be challenged directly under Article 263 TFEU because of the restrictive rules on standing.<sup>33</sup>

Thirdly, if there is a legal connection with EU law and the right invoked falls within the ambit of the ECHR then the claimant has an incentive to access the ECHR through EU law. This was so even prior to EU accession to the ECHR. The ECJ took account of the ECHR in fashioning its own fundamental rights doctrine, and this then bound Member States when they acted in the scope of EU law.<sup>34</sup> Convention rights mediated

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28. *See generally* Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio, Case C-309/96, [1997] E.C.R. I-7493 (providing example of contentiousness of given precept); Kremzow v. Austria, Case C-299/95, [1997] E.C.R. I-2629 (same); Maurin, Case C-144/95, [1996] E.C.R. I-2909 (same).

29. *See* Charter of Rights art. 51(1), 2010 O.J. C 83/389.

30. Paul Craig, *THE LISBON TREATY, LAW, POLITICS & TREATY CHANGE* 210–13 (2010).

31. *See* Charter of Rights art. 51(2), 2010 O.J. C 83/389.

32. *See* TFEU, *supra* note 6, art. 263.

33. *See* TFEU, *supra* note 6, art. 267.

34. *See, e.g.*, *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas*, Case C-260/89 [1991] E.C.R. I-2925; *Johnston v. Chief Constable of*

through EU law could provide a more potent weapon than the HRA where the incompatibility with Convention rights flowed from primary legislation. In such instances the courts are limited to making a declaration of incompatibility under section 4 HRA. However, the supremacy of EU law applies in relation primary legislation. The national courts can then declare the primary legislation to be inapplicable to the instant case, rather than simply making a declaration of incompatibility under section 4 HRA.<sup>35</sup>

*B. Constraints on Claimant Choice: Determination of the Respondent*

Litigants commonly choose the party or parties against which to bring the claim. This choice is however circumscribed in relation to EU accession to the ECHR. There may be situations where it is uncertain whether the appropriate respondent should be the Member State, or whether the EU should also be joined as a party. This issue may arise where, for example, the immediate target of the litigation is action taken by a state, but where on closer examination the challenge implicates EU law. The Draft Accession Agreement between the EU and the ECHR is designed to meet this problem. Article 36 ECHR is amended to accommodate the schema in Article 3 of the Accession Agreement.

Article 3(2) provides that where an application is directed against one or more Member States of the EU, the EU can become a co-respondent to the proceedings where the claimant's allegation appears to call into question the compatibility with Convention rights of a provision of EU law, notably where the violation could have been avoided only by disregarding an obligation under EU law.<sup>36</sup> Article 3(3) of the Accession Agreement provides that where the application is made initially against the EU, Member States may become co-respondent if it appears that the allegation calls into question the compatibility with Convention rights of a provision of the

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the Royal Ulster Constabulary, Case 222/84 [1986] E.C.R. 1651; Wachauf v. Germany, Case 5/88, [1989] E.C.R. 2609.

35. See *Regina v. Secretary of State for Transport, ex parte Factortame Ltd. (No 2)* [1991] 1 A.C. 603; *Regina v. Secretary of State for Employment* [1994] 1 W.L.R. 409.

36. See Fifth Negotiation Meeting, *supra* note 13, art. 3, ¶ 2.

TEU, TFEU, or any other provision having the same legal value, such as the EU Charter, especially where the violation could have been avoided only by disregarding an obligation under those instruments.<sup>37</sup>

Article 3(4) complements the previous provisions by providing that where an application is directed against and notified to both the EU and one or more of Member States, the status of any respondent may be changed to that of a co-respondent if the conditions in Article 3(2)–(3) are met.<sup>38</sup>

There are, however, preconditions to the use of the co-respondent mechanisms adumbrated above. These are laid down in Article 3(5), which states that a High Contracting Party shall become co-respondent either by accepting an invitation from the Court or by decision of the Court upon the request of that High Contracting Party. When inviting a High Contracting Party to become co-respondent, and when deciding upon a request to that effect, the Court must seek the views of all parties to the proceedings. When deciding upon such a request, the Court must assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in Article 3(2) or Article 3(3) are met.<sup>39</sup>

Article 3(7) deals with responsibility for the violation. The Draft Agreement of July 2011 had merely stated that the respondent and co-respondent should appear jointly before the Strasbourg Court. This was amended to provide that the respondent and co-respondent shall be jointly responsible for a proven violation, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.<sup>40</sup>

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37. *See id.* art. 3, ¶ 3.

38. *See id.* art. 3, ¶ 4.

39. *See id.* art. 3, ¶ 5.

40. *See* Fifth Negotiation Meeting, *supra* note 13.

*C. Constraints on Claimant Choice: The Routing of a Case to the Strasbourg Court*

EU accession to the ECHR also has implications for the way in which cases advance from a national court to Strasbourg. We are accustomed to a litigant raising points under the Human Rights Act 1998, exhausting national judicial remedies before national courts in accord with well-established case law and then taking the case to Strasbourg thereafter if dissatisfied with the decision at national level. Matters are more complex in relation to cases where the claimant seeks to invoke the ECHR against the EU.

The rationale for this complexity became evident from two papers produced by the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR).<sup>41</sup> These were in effect a form of negotiation between the two legal orders that went on in parallel to the deliberations between the negotiating teams from the EU and ECHR. It is clear from these papers that the ECJ's principal concern was that it should have the opportunity to pass judgment on an alleged violation of the ECHR before the case was deliberated by the Strasbourg Court.

Thus the Discussion document from 2010 was predicated on the assumption that adherence to subsidiarity as a principle governing the relations between the ECHR and its contracting parties meant that external review by the Strasbourg Court was preceded by effective internal review by the ECJ and/or national courts. This was, said the Discussion document, especially important given that in the EU judicial system the ECJ and General Court (GC) have the sole jurisdiction to declare an EU act invalid. A national court could find an EU act challenged before it to be valid, but could not find the act to be invalid

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41. Discussion of the Court of Justice of the European Union on Certain Aspects of the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2010 [hereinafter Discussion Document of the Court of Justice], available at [http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention\\_en.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en.pdf); President of the European Court of Human Rights Jean-Paul Costa and the President of the European Court of Justice Vasilios Skouris Communication to Member States, 2011 O.J. 075 [hereinafter Joint Communication].

prior to the ECJ or GC having ruled to that effect.<sup>42</sup> It was therefore necessary to preserve this characteristic of the EU's legal system of judicial protection, and this meant avoiding the possibility that the Strasbourg Court would be called on to decide on the conformity of an EU act with the Convention without the ECJ having had an opportunity to give a definitive ruling on the point.

The root cause of the problem in this respect is that EU acts may be challenged either directly via Article 263 TFEU, or indirectly via Article 267 TFEU by way of an application for a preliminary ruling that the challenged measure was invalid. Many claimants in the past have been forced to proceed indirectly via national courts because of the very limited rules for *locus standi* for a direct action.<sup>43</sup> It is however difficult to regard the application for a preliminary reference under Article 267 TFEU as a remedy since the claimant is not in control as to whether the case proceeds, this being a determination made by the national court. The Discussion paper concluded that it "would be difficult to regard this procedure as a remedy which must be made use of as a necessary preliminary to bringing a case before the European Court of Human Rights in accordance with the rule of exhaustion of domestic remedies."<sup>44</sup>

These concerns were echoed in the subsequent Joint Communication. In the case of a direct action review by the Strasbourg Court would be preceded by scrutiny before an EU court, since the action would initially proceed via Article 263 TFEU, the GC would have considered the claim and hence the claimant would thereby have exhausted domestic remedies before proceeding to the Strasbourg Court. Where however the action was indirect via Article 267 TFEU the national court might not refer the case to the ECJ, the claimant might then proceed to the Strasbourg Court before an EU court had considered the matter and it would be difficult to deny such recourse on the ground that the claimant had not exhausted national remedies since the Article 267 TFEU action could not

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42. Foto-Frost v. Hauptzollamt Lübeck-Ost, Case 314/85, [1987] E.C.R. 4199, ¶ 17.

43. See TFEU, *supra* note 6, art. 263.

44. Discussion document of the Court of Justice, *supra* note 41, ¶ 10.

be regarded as a remedy for these purposes, given that the claimant had no power to require that such a reference should be made.<sup>45</sup>

The concern about ensuring that the ECJ should be seized of the issue prior to the determination being made by the Strasbourg Court was addressed in Article 3(6) of the Draft Agreement:

In proceedings to which the European Union is co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the Convention rights at issue of the provision of European Union law as under paragraph 2 of this Article, sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court.<sup>46</sup>

It should be noted that Article 3(6) is mandatory in a triple sense: the CJEU *shall* be afforded the opportunity to adjudicate on the matter if it has not yet done so; the CJEU *shall* ensure that any such assessment is made quickly, the assumption being that the CJEU will use the accelerated procedure for such cases; and the powers of Strasbourg Court *shall* not be affected.<sup>47</sup>

While Article 3(6) is clearly mandatory in the preceding senses, it nonetheless remains ambiguous as to when the “pause button” is pushed in Strasbourg. It must clearly be before the ECtHR gives final judgment. It may however make a very real difference as to whether the CJEU is afforded its opportunity prior to the ECtHR making any determination on the merits, or whether the ECtHR will make a *prima facie* determination, but pause before making this final in the light of the CJEU’s

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45. See Joint Communication, *supra* note 41, at 2; see also Fifth Negotiation Meeting, *supra* note 13, ¶ 65 (stating with reference to art. 267 proceedings: “Since the parties to the proceedings before the national courts may only suggest such a reference, this procedure cannot be considered as a legal remedy that an applicant must exhaust before making an application to the Court.”)

46. Fifth Negotiation Meeting, *supra* note 13, art. 3, ¶ 6.

47. See Fifth Negotiation Meeting, *supra* note 13, art. 3, ¶ 6.

decision and observations thereon from the parties. The explanatory report attached to the Draft Agreement states that assessing the compatibility with the Convention means to rule on the validity of a legal provision contained in acts of the EU institutions, bodies, offices or agencies, or on the interpretation of a provision of the TEU, the TFEU or of any other provision having the same legal value pursuant to those instruments, and that such assessment should take place before the Court decides on the merits of the application.<sup>48</sup> However the same explanatory report also provides that the examination of the merits of the application by the Court should not *resume* before the parties and any third party interveners have had the opportunity to assess properly the consequences of the ruling of the CJEU.<sup>49</sup> It is also assumed that the parties involved will have the opportunity to make observations before the CJEU.<sup>50</sup>

It can be questioned whether Article 3(6) is warranted. It will lead to further delay in proceedings. It places the EU legal order in a privileged position, since there is no analogous mechanism for the highest courts of other contracting parties to the Convention. This is noteworthy given that the situation where the CJEU has not made a pronouncement as to compatibility with fundamental rights is not unique, given that some national legal systems do not have any, or only very limited, judicial review of the constitutionality of their legislation,<sup>51</sup> with the result that Strasbourg is sometimes the first court to rule on the compatibility of the legislation with human rights.

It is in any event important to appreciate in more detail the circumstances in which Article 3(6) might be invoked. It was included, as we have seen, to cope with difficulties arising from indirect actions under Article 267 TFEU.

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48. See Fifth Negotiation Meeting, *supra* note 13, Appendix V ¶ 66.

49. See *id.* ¶ 69 (emphasis added).

50. *Id.* ¶ 66.

51. See, e.g., *Constitution and Charter*, GOVT. OF THE NETHERLANDS, <http://www.government.nl/issues/constitution-and-democracy/constitution-and-charter> (last visited July 4, 2013) (“The courts cannot review primary legislation to see whether it is compatible with the Constitution and then declare it unlawful if it is not.”).

There will be no difficulty where the national court believes that the claimant's argument is *prima facie* correct and that the EU measure is indeed contrary to Convention rights. The national court cannot invalidate the EU norm. It will therefore refer the case to the CJEU and the latter will then have the opportunity to pronounce on the compatibility of the EU norm with Convention rights prior to the case being heard by Strasbourg.

There will equally be no difficulty where the claimant argues that the national measure implementing the EU norm is incompatible with Convention rights. The claimant contends that the EU norm itself is compatible with ECHR rights, but that the way in which it was implemented at national level was contrary to Convention rights. The claimant seeks the CJEU's view on this issue. This poses no problem viewed from the perspective of the CJEU's concern that it has the opportunity of considering rights-based claims prior to any adjudication by the ECtHR. This is because the national court might refer the matter to the CJEU, in which case the CJEU has by definition the opportunity to pass judgment. The alternative is for the national court to find that the claim is a good one and strike down the implementing measure without touching the EU norm, in which case once again this is not problematic from the CJEU's perspective because it leaves the EU norm itself untouched.

The problematic scenario is where the claimant challenges the EU norm in Article 267 TFEU proceedings as being contrary to Convention rights. The national court finds the claimant's argument unconvincing, and upholds the validity of the EU norm as it is entitled to do pursuant to *Foto-Frost*.<sup>52</sup> Thus no case ever goes to the CJEU to test the claimant's argument. The claimant then seeks to contest the national court's judgment before the ECtHR. This is the scenario that concerns the CJEU, since it is in these circumstances that it would have no opportunity to consider the case prior to the matter being addressed by the ECtHR. The only way to avoid this would be to modify *Foto-Frost*, such that any national court would be obliged

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52. See *Foto-Frost*, [1987] E.C.R. 4199, ¶ 14.



to refer any case to the CJEU in which a claimant contested an EU norm on Convention grounds, even where the national court found the argument unconvincing. However it is not clear that this modification would fit with the TFEU, since it would impose an obligation to refer on any national court, and this is inconsistent with the wording of Article 267 TFEU. It would also risk overburdening the CJEU, since the national court would be obliged to refer a case to the CJEU whenever a Convention right was pleaded, even if the national court felt that the rights-based argument was spurious.

There is a further scenario that is problematic from the CJEU's perspective. The claimant once again wishes to challenge indirectly the EU norm for violation of Convention rights. The difference here is that the claimant seeks to take the case directly to the Strasbourg Court without recourse to the national court, since this will save time, costs etc. The obvious procedural objection is that the claimant's application would be dismissed for failure to exhaust domestic remedies. The counter-argument is, as we have seen, that Article 267 does not constitute for these purposes a domestic remedy and hence there is no obligation to exhaust this avenue for relief. The reason why the Article 267 procedure does not constitute a remedy for the purposes of the rule about exhaustion of domestic remedies is itself interesting and reveals a duality in the very meaning of remedy: it seems to be in part because the claimant is not in control of such proceedings, it being for the national court to decide whether to refer, and it is in part because the national court is prevented pursuant to *Foto-Frost* from invalidating the EU norm.

The preceding discussion has been concerned with the circumstances in which Article 3(6) would be invoked in relation to indirect actions. The two papers from the CJEU/ECtHR are expressly predicated on the assumption that there would be no such problem in relation to direct actions, and this view is echoed in some of the secondary literature.<sup>53</sup> The rationale for this view is that by definition such cases would be lodged with the GC in accord with Article 263 TFEU, and hence there would be adjudication by an EU court on

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53. See, e.g., Jacqué, *supra* note 1, at 1017–18.

compatibility with Convention rights prior to any adjudication by the ECtHR.<sup>54</sup>

This is indeed true, subject to the following important caveat, which is the problem with standing. If the GC or CJEU reject a direct action, as they have often done in the past, because there is no *locus standi*, then there will have been no determination by an EU court of the Convention right before the claimant brings the case to the Strasbourg Court. It is true that the *locus standi* rules have been liberalized by the Lisbon Treaty, such that individual concern is not required in relation to a regulatory act that is of direct concern and does not entail implementing measures.<sup>55</sup> The term regulatory act appears to cover legal acts other than legislative acts.<sup>56</sup> There are therefore instances in which the reforms will not avail the claimant, who will have to prove individual concern within the confines of the *Plaumann* test,<sup>57</sup> with all the difficulties that this entails.<sup>58</sup> It should moreover be added that the CJEU and GC have reaffirmed their conclusion that possession of an individual right does not suffice to establish standing under Article 263 TFEU.<sup>59</sup> There is something decidedly odd about the infringement of an individual right not counting as a matter of individual concern. This may be capable of being formally reconciled with the test for individual concern, but this simply reveals the infirmities with that test, rather than removing the tension flowing from the fact that individual rights do not qualify as individual concern.

If the GC and CJEU persist with this reasoning, claimants will have a strong incentive to go to the ECtHR and argue either

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54. *See id.* at 1018.

55. *See* TFEU, *supra* note 6, art. 263 ¶ 4.

56. *See* *Inuit Tapiriit Kanatami v. Parliament and Council*, Case T-18/10, [2011] E.C.R., at ¶ 39–46 (delivered Sept. 6, 2011) (not yet reported); *Microban Int'l Ltd v. Commission*, Case T-262/10, [2011] E.C.R., ¶ 21 (delivered Oct. 26, 2011) (not yet reported).

57. *See* *Plaumann & Co. v. Commission*, Case 25/62, [1963] E.C.R. 95.

58. *See* Paul Craig & Gráinne de Búrca, *EU LAW: TEXT, CASES & MATERIALS* Ch. 14 (5th ed., 2011).

59. *See* *Bactria Industriehygiene-Service Verwaltungs GmbH v. Commission*, Case C-258/02 P, [2003] E.C.R. I-15108, ¶ 50–59; *Arcelor SA v. European Parliament and Council*, Case T-16/04, [2010] E.C.R., ¶ 92–93 (delivered Mar. 2, 2010) (not yet reported).

that they have exhausted domestic remedies since they have tried to use Article 263, or that they do not have to do so because they will clearly not be admitted, and hence pursuant to Convention case law there is no need to pursue a remedy that will not work.<sup>60</sup> They might in addition argue that the standing rules under Article 263 are themselves in breach of Article 6 ECHR since they prevent access to justice.

It nonetheless remains paradoxical that the EU courts should be able to use Article 3(6) of the Draft Agreement in order to “pause” the case at Strasbourg in order for the CJEU to adjudicate on the substance of Convention rights, where it was the CJEU’s very own restrictive standing criteria that prevented the EU courts from doing so before the case was taken to Strasbourg.

#### *D. Implications of Schema for Claimants: The Problem of Delay*

The discussion thus far has been concerned with the constraints on claimant choice flowing from EU accession to the ECHR. This included the problem of delay flowing from the fact that a case might well have to be put on hold in order that it can be referred to the CJEU in circumstances where it has not been able to take a view on the alleged violation prior to the case being heard by the ECtHR.

There is however a much more prominent issue of delay flowing from EU accession to the ECHR, which stems from the difficulties with the backlog of cases awaiting adjudication before the ECtHR itself. The number of such cases currently stands at circa 150,000, the consequence being that claimants will wait at least a year before there is any initial examination of the case, although the ECtHR has the power to fast track cases deemed urgent, particularly where the claimant is in physical danger. The reality is that cases that are not fast-tracked will often take many years before being resolved by the ECtHR.

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60. See European Court of Human Rights, *Practical Guide on Admissibility Criteria* ¶ 44–65 (2011), <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Case-law+analysis/Admissibility+guide>; P. VAN DIJK ET AL., *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 136–53 (3rd. ed. 1998).

The problem has been exacerbated by the fact that the number of applications made each year has doubled since 2004<sup>61</sup>. Space precludes detailed examination of suggestions made to alleviate this difficulty.<sup>62</sup> Suffice it to say for the present that a variety of proposals have been advanced in this respect, including: more rapid dismissal of inadmissible cases; better application of the ECHR principles by contracting parties in order to reduce the incidence of the many well-founded cases that are brought before the ECtHR; greater reliance on national courts through increased focus on precepts such as subsidiarity and margin of appreciation; and appointment of more judges to the ECtHR. It is also important to note that there are real differences of opinion as to the relative priority/significance of these different ways of alleviating the underlying problem.

The difficulties of delay before the ECtHR are especially significant, given that there have been concerns about the length of time to process a case within the EU system. The information can be readily gleaned from the Court's annual reports.<sup>63</sup> The number of references for a preliminary ruling rose from 221 in 2005 to 302 in 2009<sup>64</sup>. In 2011, the number of references for a preliminary ruling submitted was, for the third year in succession, the highest ever reached 423, which exceeded the number in 2009 by almost 41%.<sup>65</sup> The time taken to secure a preliminary ruling has fallen from a high of 25 months in 2003, to just over 17 months in 2009, but there were still 438 preliminary references pending in December 2009. In

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61. See EUR. COURT OF H.R., HIGH LEVEL CONFERENCE ON THE FUTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS, BRIGHTON DECLARATION ¶ 16, (2012), <http://www.echr.coe.int/ECHR/EN/Header/The+Court/Reform+of+the+Court/Conferences/>.

62. See EUR. COURT OF H.R., HIGH LEVEL CONFERENCE ON THE FUTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS, INTERLAKEN DECLARATION ¶ 7 (2010), <http://www.echr.coe.int/ECHR/EN/Header/The+Court/Reform+of+the+Court/Conferences>; EUR. COURT OF H.R., HIGH LEVEL CONFERENCE ON THE FUTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS, IZMIR DECLARATION ¶¶ 5, 7 (2011), <http://www.echr.coe.int/ECHR/EN/Header/The+Court/Reform+of+the+Court/Conferences>.

63. See European Court of Justice, Annual Report 2011, at 10 (2011)[hereinafter Annual Report 2011], available at [http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-06/ra2011\\_activite\\_cour\\_en.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-06/ra2011_activite_cour_en.pdf).

64. See *id.*

65. See *id.*

2011 the average time taken to deal with references for a preliminary ruling was 16.4 months, as compared to 16 months in 2010.

The reduction in the time to secure a preliminary ruling was in part due to changes made to expedite the process. Thus there is now an obligation on the ECJ to decide cases with a minimum of delay where a person is in custody.<sup>66</sup> There is provision for expedited preliminary ruling hearings,<sup>67</sup> and for urgent preliminary ruling procedure.<sup>68</sup> Preliminary rulings can be given by reasoned order where the CJEU refers to prior case law in certain types of cases: those where the request is identical to a point dealt with by existing case law, or where the answer can clearly be deduced from existing cases, or where the answer admits of no reasonable doubt.<sup>69</sup> A case can moreover be decided without an Opinion from the Advocate General,<sup>70</sup> and this power was used in approximately forty-six percent of cases in 2011.<sup>71</sup> The reduction in time to secure a preliminary ruling was also in part due to the increase in the number of CJEU judges as a result of enlargement. The net increase of 13 judges has allowed more through-put of cases.

There are, however, reasons to question whether the recent and welcome diminution in the time taken for preliminary rulings can be maintained in the coming years. The benefits of extra judges from the newer accession countries will be offset by an increase in the number of references from those national courts, as the lawyers in those countries become more accustomed to the possibilities of using EU law. The impact of the Lisbon Treaty is equally important. The fact that the Charter of Rights is now legally binding, and that the Area of Freedom, Security and Justice is now subject to the normal Article 267 procedure, will mean a net increase in preliminary references,

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66. See TFEU, *supra* note 6, art. 267

67. See Rules of Procedure of the Court of Justice, 2012 O.J. L 265/1, art. 105–06, [http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp\\_cn.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_cn.pdf).

68. See *id.* arts. 107–14.

69. See *id.* art. 99.

70. See TFEU, *supra* note 6, art. 252.

71. See Annual Report 2011, *supra* note 63, at 11.

more especially because many AFSJ measures are controversial and touch on civil liberties.

The difficulty for claimants becomes readily apparent when one aggregates the problems concerning delay attendant on the preliminary ruling procedure with those that beset the ECHR regime. The reality is that even if the claimant ultimately wins justice is not going to be swift in either of the following two scenarios.

In the first, the claimant begins an action under Article 267 TFEU which indirectly challenges an EU legal norm on rights-based grounds. The national court does make a preliminary reference, which we can assume for the sake of argument will be heard within the normal time period for such rulings, which is circa 16 months. The CJEU is able to pass judgment on the rights-based challenge prior to the matter being heard by the ECtHR. The claimant is not however satisfied with the CJEU's ruling and takes the case to the ECtHR. This aspect of the claim will then be subject to the delays attendant on the Convention case law, with the consequence being that it may be several more years before the substance of the case is resolved. The ECtHR may of course choose to fast track some such cases, which will thereby alleviate the overall time for seeking justice. However it is questionable whether it will or indeed should do so for all cases that emanate from the EU, since this would be unfair on those bringing cases from other contracting states, who might also have suffered long delays at national level before bringing the case to the ECtHR.

In the second scenario, the claimant begins the action via Article 267 TFEU, but the national court declines to make a reference, since it believes that the rights-based challenge to the EU legal norm is without foundation. The claimant might then seek to take this matter on appeal within the national legal system, or might proceed to the ECtHR and seek to convince it that the EU legal norm is in violation of a Convention right. The claimant will be subject to the normal delays of the Strasbourg regime, coupled with the six to eight month further delay that referral of the case by the Strasbourg Court to the CJEU is expected to take to allow the latter to give its view on the rights-based claim before the Strasbourg Court gives final judgment.

## III. SUBSTANCE

A. *The Bosphorus Ruling post Accession*

The substantive relationship between the EU and the ECHR prior to accession will continue to be governed by existing case law. From the perspective of the European Court of Human Rights the leading decision on the relationship between fundamental rights protection afforded by the EU and the ECHR was the *Bosphorus* case.<sup>72</sup> The applicant had leased two planes from the Yugoslav Airlines, JAT, and one of these planes was impounded in Ireland. The plane was impounded pursuant to an EC Regulation and this Regulation had been enacted in furtherance of United Nations (“UN”) sanctions against the former Federal Republic of Yugoslavia. The applicant argued that the seizure infringed its property rights under the Convention. This issue was considered by the ECJ, which found against the applicant, the essence of its decision being that the Regulation implementing the UN sanctions policy was proportionate.<sup>73</sup>

The applicant then brought an action against Ireland before the ECtHR arguing that the impounding of the plane violated Article 1 of Protocol No 1, which protects property rights.<sup>74</sup> The Strasbourg Court held that it was legitimate for contracting parties to the ECHR to transfer power to an international organization such as the EU, even if the organization was not itself a contracting party under the ECHR.<sup>75</sup> The state contracting party however remained

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72. *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, Eur. Ct. H.R. No. 45036/98 (2005); See Cathryn Costello, *The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*, 6 HUM. RTS. L. REV. 87, 96 (2006).

73. See *Bosphorus Hava Yollari Turizm Ve Ticaret AS v. Minister for Transport, Energy and Communications and others*, Case C-84/95, [1996] E.C.R. I-3953; Iris Canor, *‘Can Two Walk Together, Except They be Agreed?’ The Relationship Between International Law and European Law: The Incorporation of United Nations Sanctions against Yugoslavia into European Community Law Through the Perspective of the European Court of Justice*, 35 COMMON MARKET L. REV. 137 (1998); Noreen Burrows, *Caught in the Cross-Fire*, 22(2) EUR. L. REV. 170, 171 (1997).

74. See *Bosphorus Hava Yollari*, Eur. Ct. H.R. No. 45036/98 ¶ 121.

75. See *id.* ¶ 150.

responsible for all acts and omissions of its organs, irrespective of whether they were the result of domestic law, or the need to comply with an international obligation flowing from membership of an international organization. If this were not so then the state's obligations under the ECHR could be evaded when power was transferred to an international organization.

State action taken in compliance with such international obligations could nonetheless be justified as long as the relevant international organization was considered to protect fundamental rights "as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides."<sup>76</sup>

The Strasbourg Court made it clear that "equivalent" meant comparable, not identical and that the finding of equivalence might alter if there was a relevant change in fundamental rights' protection by the international organization.<sup>77</sup> Where equivalent protection was provided by the international organization, there was a presumption that a state had not departed from the ECHR when it did no more than implement legal obligations flowing from its membership of that international organization. This presumption could be rebutted if it could be shown in the circumstances of a particular case that the protection of Convention rights was manifestly deficient.<sup>78</sup> The Strasbourg Court found that the protection afforded to fundamental rights by the EU was equivalent in the preceding sense and that the protection afforded in the instant case was not manifestly deficient so that the presumption was not rebutted.<sup>79</sup>

The Strasbourg Court however also emphasized that a "State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations",<sup>80</sup> that numerous Convention cases had confirmed this and that such cases concerned review by the Strasbourg Court "of the

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76. *Bosphorus Hava Yollari*, Eur. Ct. H.R. No. 45036/98 ¶ 155.

77. *Id.* ¶ 155.

78. *See id.* ¶ 156.

79. *See id.* ¶¶ 165–66.

80. *Id.* ¶ 157.



exercise of State discretion for which EC law provided.”<sup>81</sup> The majority did not regard the *Bosphorus* case on its facts as raising such an issue, since the impugned act concerned solely compliance by Ireland with an EC obligation flowing from a directly applicable Regulation that left no discretion to the Irish authorities.<sup>82</sup>

Lawyers, academics, and practitioners alike are, however, properly mindful of exceptions or qualifications to general rules. The need for caution in this respect is exemplified by the *Bosphorus* judgment. This is because it is less clear what the Strasbourg Court meant when it said that the state would remain fully responsible under the Convention for all acts falling outside its strict international legal obligations, and that this enabled the Strasbourg Court to review the exercise of state discretion for which EC law provided. The case law cited by the ECtHR provides some guidance in this respect.

There were some cases where the review of “state discretion for which EC law provided”<sup>83</sup> was uncontroversial in terms of principle and entailed no real conflict or tension between the EU and the ECHR. This included cases where the Strasbourg Court considered whether the state had complied with Article 6 of the Convention when applying EC agricultural regulations,<sup>84</sup> or whether a state that failed to implement a Directive within the assigned time, with the consequence that it levied taxes that it should not have done if the Directive had been properly implemented, was thereby in breach of Article 1 of Protocol No. 1.<sup>85</sup>

There were, however, other cases that raised more problematic issues concerning the relationship between the EU and the ECHR. It is significant that the case singled out for special mention<sup>86</sup> as being one in which the Strasbourg Court would review the exercise of discretion for which EC law

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81. *Id.* ¶ 157.

82. *See id.* ¶¶ 148, 158.

83. *Id.* ¶ 157.

84. *See Van de Hurk v. Netherlands*, App. No. 16034/90 ¶ 1 (1994).

85. *See S.A. Dangeville v. France*, Eur. Ct. H.R. No. 36677/97 ¶ 62 (2002).

86. *See Bosphorus Hava Yollari*, Eur. Ct. H.R. No. 45036/98 ¶ 157.

provided was *Cantoni*, a judgment of the Grand Chamber.<sup>87</sup> The applicant was prosecuted for unlawfully selling pharmaceutical products in supermarkets contrary to French law. The applicant argued by way of defence that the products in question were not medicinal products within the meaning of the French law and that the definition of such products was not sufficiently clear to satisfy the requirements of Article 7(1) of the Convention. The French approach allowed a product to be defined as medicinal by virtue of its function, presentation or composition. It followed in this respect the meaning given by the ECJ to medicinal product in the relevant Community Directive. This Directive was primarily concerned with the authorization for placing medicinal products on the market and the application of the test for medicinal product was often left to national authorities, subject to review by the ECJ. The ECJ held moreover that in principle a Member State could reserve to pharmacists the sale of medicinal products, since this would safeguard public health, subject to a proportionality test designed to check whether such a monopoly was really required for products the use of which would not involve any serious danger to public health.<sup>88</sup> The Strasbourg Court concluded that the French definition of medicinal product was not in breach of Article 7 of the ECHR.

The judgment throws into sharp relief the relationship between the general principle propounded by the majority in *Bosphorus* with its endorsement of the principle flowing from *Cantoni*. The position appeared to be that where the state was simply applying a legal obligation pursuant to a Community Regulation, as in *Bosphorus*, then the Strasbourg Court would consider whether the EU provided equivalent protection for fundamental rights, and if it did so it would then only intervene if it felt that this was manifestly deficient in the instant case.

The *Cantoni* decision and its endorsement in *Bosphorus* meant however that the Strasbourg Court would continue to hold the state “fully responsible” for acts done “outside its strict international legal obligations” and that this included review by

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87. *Cantoni v. France*, Eur. Ct. H.R. App. No. 17862/91 (1996).

88. See *Criminal Proceedings Against Jean Monteil and Daniel Samanni*, Case C-60/89, [1991] E.C.R. I-1547, ¶ 46.

the Strasbourg Court of the “exercise of state discretion for which EC law provided”.<sup>89</sup> The Strasbourg Court would exercise its normal review in such cases as exemplified by *Cantoni* itself, and this was clearly more extensive than review bounded by the ideas of equivalence and manifest deficiency. There are at least two kinds of situation in which *Cantoni* as interpreted in *Bosphorus* could apply, both of which could give rise to problems, especially the latter.

The first type of situation was where the Strasbourg Court reviewed the way in which a state implemented a Directive, and the way in which it applied the Directive to particular cases. The assumption underlying the *Cantoni* judgment is that the Strasbourg Court can and will review such matters and this reading was reinforced by the *Bosphorus* judgment, which held that *Cantoni* exemplified “review by this Court of the exercise of state discretion for which EC law provided”.<sup>90</sup> There is however potential for tension between Strasbourg and Luxembourg because the ECJ already exercises review over such matters.

The second type of case was more problematic. It is important to recognize that in *Cantoni* the Strasbourg Court was indirectly assessing whether the definition given to a term in Community legislation, which was then applied by a Member State, was compatible with the ECHR. This was the actual legal issue posed by *Cantoni*. It was the definition of medicinal product adopted by the ECJ and then applied in French law that was said by the applicant to be contrary to Article 7 ECHR. Thus the Strasbourg Court held that the fact that the French law was based almost word for word on the ambit of the Community Directive did not remove it from the ambit of Article 7 of the Convention.<sup>91</sup>

The difficulty is apparent once it is recognized that in *Cantoni* France did not have, nor was it exercising, discretion for which EC law provided. The case was not concerned with the way in which a state chose to implement a Community Directive. The essence of the applicant’s claim was not simply that the

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89. *Bosphorus Hava Yollari*, Eur. Ct. H.R. No. 45036/98 ¶ 157.

90. *Id.* ¶ 157.

91. *See Cantoni v. France*, Eur. Ct. H.R. App. No. 17862/91 ¶ 30.

French authorities had misapplied the definition, but that the very definition was contrary to Article 7. That was how the case was pleaded, reasoned and decided. The salient issue was therefore whether the meaning accorded to a certain term in a Community Directive by the ECJ, which was then applied in French law, was compatible with Convention rights. On this issue the French authorities had no discretion provided by EC law. They could not have adopted a definition of medicinal product that differed in substance from that laid down by the Community courts.

The precise dividing line between the limited review provided for by *Bosphorus* and the fuller scrutiny exemplified by *Cantoni* was unclear. The reasoning in the latter would appear to have allowed the Strasbourg Court indirect review over the definition of terms in a Community Directive through the claimant's ability to argue that its application by a state was contrary to the Convention, even where the state had no discretion as to whether to apply that definition. If this was so then the '*Cantoni* exception' could well overshadow the '*Bosphorus* rule.' It was moreover difficult in terms of logic to see why the *Cantoni* reasoning should not apply to Regulations as well as Directives. If Strasbourg was willing indirectly to engage in fuller review as to whether the meaning of a term in a Community Directive was compatible with the Convention, it was unclear why it should not do so when the disputed meaning related to a term in a Regulation. The state against whom the action was brought had no discretion in the relevant sense in either such instance.

It should be emphasized that *Bosphorus* and *Cantoni* preceded the Lisbon Treaty, which contained the obligation on the EU to accede to the ECHR, and preceded also the Accession Agreement between the EU and the ECHR. This leads naturally to the inquiry as to the status of the precepts established in this case law concerning the relationship between the ECHR and the EU so far as compliance with Convention rights is concerned. The principled answer is as follows.

When the Accession Agreement is ratified by both sides, there is no rationale for the EU to be given the benefit of the "equivalence principle" as enunciated in *Bosphorus*. The EU should be treated in this respect no differently than any other

signatory state to the ECHR. This means that the ECtHR should test the substance of EU rules for conformity with Convention rights in the same way that it does for any other signatory. Thus if the ECtHR feels that the meaning accorded to a term in a Directive or Regulation is contrary to Convention rights for reasons of the kind exemplified by *Cantoni* then the ECtHR should rule accordingly. Indeed the very fact that *Cantoni* was treated by the Strasbourg Court as a qualification to *Bosphorus* attests to its determination, even prior to EU Accession, to maintain some indirect control over the content of EU legislation as applied by the Member States. This is reinforced by the Draft Agreement which provides that an act of a Member State of the EU, or of persons acting on its behalf, shall be attributed to that State, even if the act occurs when the State implements EU law, including decisions taken under the TEU and TFEU, although this does not preclude the EU from being responsible as a co-respondent in accord with the principles in Article 3 of the Draft Agreement.<sup>92</sup>

It is however entirely consistent with the preceding proposition, indeed it is entailed by it, that the EU should benefit from the same precepts developed by the ECtHR as any other signatory state. Thus the fact that the equivalence principle from *Bosphorus* is no longer appropriate does not preclude the EU benefiting from ECtHR doctrines such as the margin of appreciation if and when such a margin would be accorded to any other signatory. It might also be contended that when applying the margin of appreciation the ECtHR should be properly mindful of the fact that the choices embodied in EU legislation are the result of deliberations by 28 Member States, who have in that sense endorsed the meaning of, or balance between, rights contained within the EU legislation. There is, in any event, reason to hope that tensions in this respect will be relatively rare. The ECJ has always regarded the ECHR as an important source of inspiration for its decisions on fundamental rights,<sup>93</sup> and the Charter contains an obligation that Charter

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92 Fifth Negotiation Meeting, *supra* note 13, art. 1(4).

93. See *Freres SA v. Directeur General de la Concurrence, de la Consommation et de la Repression des Fraudes* and *Commission*, Case C-94/00, [2002] E.C.R. I-9039,

rights that correspond to rights under the ECHR should be given the same scope and meaning.<sup>94</sup>

### B. *Autonomous Interpretation post Accession*

As a result of the accession, the acts, measures and omissions of the EU, like every other High Contracting Party, will be subject to the external control exercised by the Court in the light of the rights guaranteed under the Convention. This is all the more important since the EU Member States have transferred substantial powers to the EU. At the same time, the competence of the Court to assess the conformity of EU law with the provisions of the Convention will not prejudice the principle of the autonomous interpretation of the EU law.<sup>95</sup>

This paragraph is finely balanced. The statement of principle at the outset is clear and forceful, viz that the EU will, as a result of accession, be treated in the same way as other contracting parties, more especially because EU Member States, who are also party to the ECHR, have transferred substantial powers to the EU. This is then balanced by the assurance that the ECtHR's testing of EU law for conformity with the ECHR will not prejudice the principle of the autonomous interpretation of EU law. It is nonetheless important to determine how far this delicate balance is sustainable. In addressing this issue it is important for the sake of conceptual clarity to disaggregate three different senses of the autonomy of EU law.

#### 1. An Autonomous Legal Order

The concept of an autonomous legal order may connote the idea of a separate legal system, with its own rule of recognition. Such a system has its own primary and secondary legal norms produced by an admixture of legislature and courts. It has relationships *de jure* and *de facto* with other legal orders,

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¶ 29; *Limburgse Vinyl Maatschappij (LVM) v. Commission*, Joined Cases C-238, 244, 245, 247, 250–252, 254/99 P, [2002] E.C.R. I-8618, ¶ 273–75.

94. See Charter of Rights, *supra* note 2, art. 52(3), 2010 O.J. C 83, at 21.

95. Fifth Negotiation Meeting, *supra* note 13, Appendix V ¶ 5.

even if, as exemplified by the issue of the supremacy of EU law, the precise nature of the relationship remains contested to some degree at least.

EU accession to the ECHR does not in reality jeopardize the autonomy of EU law in this first sense. The mere fact that a legal order chooses to become party to an international treaty that entails some subjection to the norms applied therein does not thereby entail the conclusion that the legal order ceases to be autonomous. If this were indeed so then no legal order would be autonomous. All national legal orders are party, albeit to varying degrees, to different international treaty obligations, including the many countries that are party to the ECHR. Participation in such regimes does not thereby undermine the features that constitute a separate legal system, although it does of course qualify the freedom of action for any such polity, which will, given basic precepts of *pacta sunt servanda*, have to ensure that international obligations are adhered to.

## 2. A Distinctive Legal Order

The concept of autonomy can also be used to connote the idea that a particular legal order has features that are regarded as, or may be regarded as, distinctive from other legal orders, with the consequence that it should be interpreted differently in certain respects.

This was indeed the argument in the famous *Van Gend en Loos* decision.<sup>96</sup> The ECJ was asked whether Article 12 EEC could give rise to individual rights, which could be invoked before national courts to challenge national action, which was said to be in breach of EEC law. The Member States argued, inter alia, that the EEC Treaty was no different from a standard international Treaty, and that the concept of direct effect would contradict the intentions of those who had created the Treaty. Thus on this view, international treaties did not normally create rights for individuals that they could enforce in national courts, and hence the EEC Treaty should not be interpreted in this manner.

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96. See *van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] E.C.R. 1, 12.

The ECJ's response was in essence to distance the EEC Treaty from other international treaties and thereby justify the conclusion that the former could in principle have direct effect, even if this was a rarity in international treaties more generally. Its reasoning was therefore directed towards showing that the EEC Treaty had distinctive features as judged by its spirit, general scheme and wording. The ECJ pointed to the fact that the EEC Treaty was designed to establish a common market, which was of direct concern to interested parties, and that this carried the implication that the Treaty was more than an agreement creating mutual obligations between the contracting states. This view was, said the ECJ, confirmed by the preamble, which referred not only to governments but to peoples; by the establishment of institutions endowed with sovereign rights, the exercise of which affected Member States and their citizens; by bodies such as the European Parliament and the Economic and Social Committee, in which Member State nationals came together and cooperated; and by Article 177 EEC, which was said to show that Member States acknowledged that nationals could rely on EEC law before national courts.

It was from these foundations that the ECJ drew the conclusion that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Thus the message was that even if direct effect was a rarity in international treaty law, it was warranted in the EEC, because it constituted a new legal order, as judged by its spirit, general scheme and wording. The ECJ's reasoning was sound insofar as there was foundation in the Treaty for the conclusion reached, and also circular, in the sense that the degree to which the EEC Treaty could be regarded as a 'new' legal order depended in part at least on whether it could have direct effect, which was the very question in issue.

There is, in any event, no reason why EU accession to the ECHR should undermine the claim that the EU Treaty is autonomous in the sense of distinctive, as interpreted in the preceding sense. Commentators may continue to disagree on the extent to which the EU Treaty is distinct, but membership of the ECHR does not markedly affect such debate, since the claim



for novelty or distinction never rested on the idea that the EU was immune from external obligations.

### 3. Autonomous Interpretation of EU Law

The language from the quotation adumbrated above is framed in terms of Strasbourg oversight of EU law not prejudicing the autonomous interpretation of EU law. The reality is however that notwithstanding the diplomatically framed quotation this conception of autonomy is affected by EU accession to the ECHR.

Prior to accession the ECJ exercised what has been appropriately termed a “hermeneutic monopoly”<sup>97</sup> over the interpretation of EU law. It had both a jurisdictional and a substantive connotation. In jurisdictional terms, it captured the idea that the ECJ would be the ultimate repository of meaning of EU law, this jurisdiction deriving from Article 19 TEU, which charges what is now the Court of Justice of the European Union, CJEU, with the task of ensuring that in the interpretation and application of the Treaties the law is observed. In substantive terms, it connoted the idea that the meaning accorded to EU concepts would be autonomous, in the sense that it would not be tied to that of analogous terms in national law, but would be the meaning felt by the ECJ to fit best with the wording and aims of the Treaty.<sup>98</sup> The ECJ might well take cognizance of national law, or indeed the ECHR, in reaching its conclusion, but this did not alter the fact that it made the substantive determination.

Both aspects of the hermeneutic monopoly are affected by EU accession to the ECHR. The jurisdictional dimension is modified because the EU will in reality no longer be the ultimate repository of meaning concerning fundamental rights and EU law, at least insofar as those rights are covered by the ECHR. This is indeed recognized from within EU law by Article

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97. See generally Federico Mancini, *The Free Movement of Workers in the Case-Law of the European Court of Justice*, in CONSTITUTIONAL ADJUDICATION IN EUROPEAN COMMUNITY AND NATIONAL LAW 67 (Deirdre Curtin & David O’Keeffe eds., 1992).

98. See, e.g., *Hoekstra v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten*, Case 75/63, [1964] E.C.R. 177, 184; *Sotgiu v. Deutsche Bundespost*, Case 152/73, [1974] E.C.R. 153, 156–57; *Commission v. Luxembourg*, Case C-473/93, [1996] E.C.R. I-3255, ¶ 26–27.

52(3) of the EU Charter of Rights, which provides that in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by ECHR, subject to the proviso that this does not prevent EU law providing more extensive protection.<sup>99</sup> The substantive dimension of the hermeneutic monopoly is also modified, since the meaning of Convention rights will be ultimately determined by the ECtHR, as will the balance between such rights and pursuit of other goals mediated through a proportionality test. The ECtHR will be sensitive to the imperatives of the EU, and will not lightly conclude that the interpretation accorded by the EU courts to Convention rights was mistaken. This does not alter the fact that, as made patently clear by the preceding quotation, the ECtHR will exercise external control over EU acts to ensure that they comply with the Convention, in the same way as for any other contracting party.

### *C. Convention and Charter post Accession*

It is axiomatic that post accession the ECHR will only bind the EU in relation to the rights contained in the former document. This is a trite proposition, but it nonetheless has a number of ramifications that are less self-evident.

#### 1. Multiple Rights-Based Claims

Legal issues arising from real-world cases do not fit into neat, hermetically-sealed compartments. It is not uncommon for such cases to feature multiple rights-based claims. This is not problematic in terms of principle. It may however give rise to difficulties, where the claim invokes certain rights that are protected by the ECHR and the EU Charter, and other rights that are protected only by the EU Charter. The ECtHR will, post accession, have the final say as to the meaning of Convention rights that are also contained in the Charter, while the CJEU remains authoritative in relation to rights that go beyond those

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99. See Charter of Rights art. 52(3), 2010 O.J. C 83/389.

in the ECHR. The difficulties are both procedural and substantive.

The procedural difficulties flow from the fact that the claimant may seek to have the meaning of Convention rights contested before the ECtHR. Thus in the simple scenario where the case begins in the national court, and is referred to the CJEU under Article 267 TFEU, the case will be finally resolved in relation to rights-based claims found only in the Charter and not in the ECHR when the CJEU has pronounced on those issues and sent its ruling to the national court. The national court will however not be able to resolve the case fully until the ECtHR has decided whether the CJEU's interpretation of Charter rights that are equivalent to those in the ECHR was correct, with the attendant problems of delay charted above.

The substantive difficulties flow from the fact that there may be some overlap between the two species of right in the same case, with the consequence that interpretation by the CJEU of a Charter right that corresponds to a Convention right will be affected by its interpretation of a Charter right that is not contained in the ECHR and which is pleaded in the same case. This might occur in a variety of ways. The claimant may contend, for example, that the two rights must be balanced because they are tension, or that the Charter right that is not a Convention right should be interpreted in a particular way in order that it can have a meaning distinct from a related Convention right that is contained in the Charter.

## 2. Charter Rights that “Correspond” to Convention Rights

The ECtHR has the ultimate interpretive authority over Convention rights. It should however be remembered that, even prior to accession, Article 52(3) of the EU Charter imposes an obligation on the EU to ensure that Charter rights that correspond to rights guaranteed by the ECHR shall have the same scope and meaning as those in the ECHR, subject to the caveat that Union law can provide more extensive protection.<sup>100</sup>

Article 52(3) therefore requires the identification of those rights which “correspond” to those guaranteed by the ECHR.

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100. *See id.*

The task is facilitated by guidance from the drafting process, and was addressed by the Explanatory Memorandum. It concluded that the right to life, the prohibition of torture, the prohibition on slavery and forced labour, the right to liberty and security, respect for private and family life, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and association, right to property, protection in the event of removal, expulsion or extradition, and the presumption of innocence and right of defence, had the same meaning and scope as the corresponding Articles of the ECHR.<sup>101</sup>

There are, however, Charter articles where the relationship with ECHR rights is more complex,<sup>102</sup> albeit for different reasons. Some Charter rights, such as Article 5 dealing with slavery and forced labour, are based on an ECHR right in part, but go beyond it, by expressly prohibiting trafficking in human beings. Other rights, such as Article 8 dealing with personal data, are based on more than one source, in this instance a Treaty article plus directive, as well as an ECHR right. Yet other Charter rights modify the analogous ECHR right. This is exemplified by Article 9, which countenances the possibility of marriage by those of the same sex, where this is permitted by the relevant national law. There are also instances where the Charter article is based on more than one source, and modifies the relevant ECHR right. This is so for the right to education, and for the important right to equality. This complexity is recognized by the Explanatory Memorandum, which lists Charter articles where the meaning is the “same” as the corresponding ECHR right, but the scope is wider.<sup>103</sup>

### 3. Same Meaning and Scope

The other major injunction in Article 52(3) is that the “meaning and scope” of Charter rights that correspond to ECHR rights should be the same as those laid down in the

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101. *See* Explanations Relating to the Charter of Fundamental Rights, 2007 O.J. C 303/17.

102. *See id.* at 18.

103. *Id.* arts 9, 12(1), 14(1), 14(3), 47, 50.

ECHR.<sup>104</sup> Earlier versions of the Charter were crucially different in this respect, requiring only that the meaning and scope of such Charter rights were “similar” to the corresponding ECHR right.<sup>105</sup> This would have given rise to significant problems of interpretation. While the present formulation does not refer expressly to the case law of the Strasbourg court this must be implicit in the injunction that the meaning and scope of Charter rights corresponding to rights contained in the ECHR should be the same. This view is supported by the Explanatory Memorandum,<sup>106</sup> and by the CJEU.<sup>107</sup>

It should however be recognized that the present formula, requiring the interpretation of corresponding rights to be the same, may still be problematic. This will especially be so in areas where the ECHR jurisprudence on the point is unclear, or where the point is a novel one. The CJEU will then have to face the issue that has been addressed by national courts of states that are contracting parties to the ECHR, which is the extent to which they should press beyond the current boundaries of ECHR law and thereby play a role in the evolution of Charter rights.

It is clear that the ECtHR regards the Convention as a living instrument, and that the meaning of the rights therein evolve over time.<sup>108</sup> It has moreover been convincingly argued that evolutionary interpretation is common within public international law.<sup>109</sup> The CJEU’s interpretive freedom is

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104. *J. McB. v. L.E.*, Case C-400/10 PPU, [2010] E.C.R. I-8965, ¶ 53.

105. See Explanations Relating to the Provisions of the Draft Charter of Fundamental Rights of the European Union 2000 Charter 4423/00, Convent 46, at 36.

106. See Explanations Relating to the Charter of Fundamental Rights, *supra* note 101, art. 2, at 17.

107. *Schecke GbR & Eifert v. Land Hessen*, Cases C-92-93/09, [2010] E.C.R. I-11117, at ¶¶ 51–52; *DEB Deutsche Energichandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, Case C-279/09, [2010] E.C.R. I-13852, at ¶ 35.

108. *Goodwin v. United Kingdom*, App. No. 28957/95, ¶ 74 (July 11, 2002), <http://hudoc.echr.coc.int/sites/cng/pages/search.aspx?i=001-60596>; *Stafford v. United Kingdom*, App. No. 46295/99, ¶ 68 (May 28, 2002), <http://hudoc.echr.coc.int/sites/cng/pages/search.aspx?i=001-22163>; Opinion of Advocate General Trstenjak, *N. S. v. Secretary of State for the Home Department*, Case C-411/10, [2011] E.C.R. I\_\_\_\_, ¶ 145 (delivered Sept. 22, 2011) (judgment not yet reported).

109. Eirik Bjorge, *EVOLUTIONARY INTERPRETATION OF TREATIES* (forthcoming 2014).

enhanced in this respect by the very fact that Article 52(3) of the Charter makes express provision for EU protection of rights to be greater than that provided by the ECtHR.<sup>110</sup> The CJEU should in addition be willing to interpret Convention rights in accord with their spirit and apply them to situations that have not yet been addressed by the ECtHR, thereby participating in the process whereby Convention rights evolve over time.

### CONCLUSION

Discussion concerning EU accession to the ECHR is, as stated earlier, as old as the EEC itself. The Lisbon Treaty provided the formal catalyst for change by imposing an obligation on the EU to accede. The obligation had no formal time line, but the EU began the accession process shortly after ratification of the Lisbon Treaty, treating the issue of rights-protection as part of the broader Stockholm programme, which set out the political priorities for the Area of Freedom, Security and Justice for five years.<sup>111</sup> There will be challenges, both procedural and substantive, flowing from accession, but they will be resolved, even if the precise manner in which this occurs may not always be easy to predict. Accession will signal a new chapter in the protection of rights in the EU and a new dimension to inter-institutional judicial relationships.

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110. Opinion of Advocate General Sharpston, *Proceedings Relating to the Execution of European Arrest Warrants Issued Against Ciprian Vasile Radu*, Case C-396/11, [2012] E.C.R. I \_\_\_, ¶ 80 (delivered Oct. 18, 2012),

111. The Stockholm Programme—An Open and Secure Europe Serving and Protecting the Citizen, Brussels, 25 Nov. 2009, Council 16484/1/09 at 3; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Delivering an Area of Freedom, Security and Justice for Europe's Citizens, Action Plan Implementing the Stockholm Programme, COM (2010) 171 Final (Apr. 2010), § 1.