DH-SYSC-II(2019)34

25/03/2019

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
(DH-SYSC)

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DRAFTING GROUP ON THE PLACE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE EUROPEAN AND INTERNATIONAL LEGAL ORDER (DH-SYSC-II)

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Draft chapter of Theme 3:

Challenge of the interaction between the Convention and the legal order of the EU and other regional organisations

(as written by the Rapporteur, Ms Kristīne LĪCIS, in view of the 6th DH-SYSC-II meeting, May 2019)

THEME 3: CHALLENGE OF THE INTERACTION BETWEEN THE CONVENTION AND THE LEGAL ORDER OF THE EU AND OTHER REGIONAL ORGANISATIONS

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1. INTRODUCTION

1. The present Chapter examines the challenges posed by the interaction between the European Convention of Human Rights (ECHR) and the legal order of the European Union (the EU, the Union), and between the ECHR and the Eurasian Economic Union (the EAEU).

2. The 2015 report on the longer-term future of the system of the European Convention on Human Rights (the Report) recalled the well-established position of the European Court of Human Rights (the ECtHR) that the principles underlying the ECHR cannot be interpreted and applied in a vacuum[1]. In this regard the Report noted that the ever increasing institutional framework of international mechanisms operating in the field of (specific parts of) international human rights law increased the risk of diverging interpretations of one and the same or interrelated (human rights) norm(s), which, in turn, could lead to conflicting obligations for States under various mechanisms of international law. With respect to the EU and the EAEU, the Report stated, *"[t]he risks of diverging interpretations of fundamental rights by the [Court of Justice of the European Union] and the Strasbourg Court are likely to undermine the coherence of the European legal space. Similar problems may also arise in the future on account of the activities of the [EAEU] and the emerging case law of the Court of Justice of the EAEU which binds some of the Council of Europe member States*"[2].

3. To address the issues identified in the Report, this Chapter will examine in separate sections the interaction between the ECHR and the legal order of the EU, and between the ECHR and the EAEU. Each section will first describe the main features of the respective regional organization and the most relevant legal provisions and principles, and will then analyse the challenges, as well as identify possible responses.

2. INTERACTION BETWEEN THE CONVENTION AND THE EU LEGAL ORDER

a. Main features of the EU

4. The EU is an economic and political union of 28 Member States, all of which are also Members of the Council of Europe.

Origins and current structure of the EU as a legal order

5. The EU has evolved from the 1951 Treaty of Paris establishing the European Coal and Steel Community, and the 1957 Treaties of Rome establishing the European Economic Community and European Atomic Energy Community, all together known as the Communities. The European Coal and Steel Community was the first organization where the States delegated their sovereignty to a

[1] CDDH report on the longer-term future of the system of the European Convention on Human Rights, document CDDH(2015)R84, Addendum I, 11 December 2015, para 171.
[2] CDDH report on the longer-term future of the system of the European Convention on Human Rights, document CDDH(2015)R84, Addendum I, 11 December 2015, para 181.

supranational authority[3]. The Treaty of Rome on the European Economic Community established the common market with "four freedoms": free movement of goods, services, capital and persons, as well as further developed the institutional structure of the Communities. In 1987, the Single European Act entered into force; it amended the Treaties and established European political cooperation.

6. Formally the EU was established on 1 November 1993, when the Treaty on European Union, commonly known as the Maastricht Treaty, entered into force, bringing together the three Communities into a new entity – the "European Union"[4]. It consisted of three "pillars" – one supranational pillar comprising the three Communities, and two intergovernmental pillars on intergovernmental cooperation in the areas of Common Foreign and Security Policy and Justice and Home Affairs.

7. The current structure and competences of the EU are established by the Treaty of Lisbon, which was signed in 2007 and entered into force on 1 December 2009, and which amended and modified the existing treaties. Following these amendments, there now are two instruments – the Treaty on the European Union and the Treaty on the Functioning of the European Union, the latter having evolved from the 1957 Treaty on the European Economic Community. The EU is the sole structure, and it inherited all of the powers of the Communities, including the legal personality and institutions. The amendments introduced by the Treaty of Lisbon also included a provision that the Charter of Fundamental Rights of the European Union has the same legal value as the Treaties.

8. The main EU institutions are the European Parliament, which is elected directly; the European Council, which consists of the Heads of State or Government of the EU Member States; the Council of the EU, which consists of the respective ministers from each EU Member State; the European Commission, which is a politically independent executive body with 1 Commissioner from each EU Member State; and the Court of Justice of the European Union (the CJEU). The CJEU, then known as the European Court of Justice, was created by the 1951 Treaty on the European Coal and Steel Community, while the term "Court of Justice of the European Union" was introduced by the Treaty of Lisbon.

Sources of EU law, their application

9. There are <u>two main sources of EU law</u>: primary law and secondary law. Primary law consists of the Treaties establishing the EU, namely, the Treaty on the European Union (TEU) and the Treaty on the Functioning of the EU (TFEU). Both Treaties set out the distribution of competences between the EU and the EU Member States, as well as describe the powers of the EU institutions, and therefore are the basis for all EU action.

[3] Michelle Cini, Nieves Pérez-Solórzano Borragán, *European Union Politics*, Oxford University Press, 2016, p.15.
[4] Michelle Cini, Nieves Pérez-Solórzano Borragán, *European Union Politics*, Oxford University Press, 2016, p.21.

10. Secondary law consists of legal instruments based on the Treaties, in particular, legal acts listed in Article 288 TFEU: regulations, directives, decisions, opinions, and recommendations. *Regulations* are legislative acts adopted by the EU institutions under the ordinary or special legislative procedure, they have general direct application and are binding in their entirety. *Directives* also are legislative acts adopted by the EU institutions under the ordinary or special legislative procedure, but, unlike regulations, directives are not directly applicable. *Decisions*, depending on the institution adopting it, are either legislative acts (when adopted by the European Parliament or the Council of the EU under ordinary or special legislative procedure), or non-legislative acts (when adopted, for example, by the European Council or the European Commission). Decisions can specify their addressees (e.g., one or more EU Member States, one or more companies or individuals), and such decisions can directly create rights and obligations for the addressees. Finally, *recommendations* and *opinions* are not legislative acts, and are not legally binding.

11. As to the application of the EU law, the Treaties as primary law and regulations and decisions as secondary law are directly applicable, that is to say, they apply immediately as the norm in all EU Member States and no other acts of Member States are required. The directives, however, must be incorporated (transposed) into national law by the deadline set at the adoption of every directive. According to Article 288 TFEU, a directive is binding upon each Member State to which it is addressed, as to the result to be achieved, while leaving national authorities the competence to choose the form and means to achieve this result.

12. Another concept relevant for the application of the EU law is that of direct effect that enables individuals to invoke an EU law provisions directly before the national courts. This concept was formulated by the CJEU in the *Van Gend en Loos* case[5] where it was asked to respond to a question whether a provision in the Treaty on European Economic Community had direct application in national law in the sense that nationals of Member States may on the basis of an Article of this Treaty lay claim to rights which the national court must protect. The CJEU held that the objective of this Treaty – to establish a common market – implied that this Treaty was more than an agreement which merely created mutual obligations between the Contracting States and that the Community constituted a new legal order of international law for the benefit of which the States had limited their sovereign rights, albeit within limited fields, and the subjects of which comprised not only Member States but also their nationals. The CJEU further held that independently of the legislation of Member States, Community law therefore not only imposed obligations on individuals but was also intended to confer upon them rights[6]. Direct effect can be vertical (an individual can invoke an EU law provision in relation to the Member State) or horizontal (an individual can invoke an EU law provision in relation to another individual). According to the jurisprudence, for a primary law (Treaty) provision to have direct effect, it must be precise, clear and unconditional and must not call for additional measures, either national or European. As to the secondary law, under Article 288 TFEU

[5] Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, judgment of 5 February 1963.
[6] Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, judgment of 5 February 1963, part II.B.

regulations always have direct effect. A directive also can have direct effect when its provisions are unconditional and sufficiently clear and precise and when the EU Member State has not transposed the directive by the deadline[7]. However, a directive can only have direct vertical effect. Decisions may have direct vertical effect when they refer to an EU Member State as the addressee[8].

13. Furthermore, the EU law has supremacy over national law. In the *Costa v. E.N.E.L.* case[9] the CJEU reiterated that the Treaty on European Economic Community created its own legal system, which has become an integral part of the legal system of the Member States and which their courts are bound to apply. According to the CJEU, such an integration makes it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. In other words, the CJEU held that the domestic legal provisions could not override the EU law without the latter being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

Role and competence of the Court of Justice of the European Union

14. Article 13 TEU lists the CJEU as one of the Union's institutions. Article 19 TEU further states that the main task of the CJEU is to "ensure that in the interpretation and application of the Treaties the law is observed". This Article also states that the competence of the CJEU is to (a) rule on actions brought by a Member State, an institution or a natural or legal person; (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the EU institutions; (c) rule in other cases provided for in the Treaties.

15. The most common types of case before the CJEU are[10]:

    a. interpreting the law (preliminary rulings) – cases where a national court of an EU Member State has asked the CJEU questions on the interpretation or validity of EU law, or on the compatibility of a national law or practice with EU law. Preliminary rulings are binding both on the referring court and on all courts in EU Member States;
    b. enforcing the law (infringement proceedings) – cases started by the European Commission or an EU Member State against a national government for failing to comply with EU law;
    c. annulling EU legal acts (actions for annulment) – cases where an EU Member State, the Council of the EU, the European Commission or (in some cases) the European Parliament has asked the CJEU to annul an EU act if it is believed to violate EU Treaties or fundamental rights. Private individuals can also ask the CJEU to annul an EU act that directly concerns them;

[7] Case 41-74 *Yvonne van Duyn v Home Office*, judgment of 4 December 1974.
[8] Case C-156/91 *Hansa Fleisch Ernst Mundt GmbH & Co. KG v Landrat des Kreises Schleswig-Flensburg*, judgment of 10 November 1992.
[9] Case 6/64 *Flaminio Costa v E.N.E.L.*, judgment of 15 July 1964.
[10] https://curia.europa.eu/jcms/jcms/Jo2_7024/en/

d. ensuring the EU takes action (actions for failure to act) – cases where the EU Member States, other EU institutions or (under certain conditions) individuals or companies claim that the European Parliament, the Council of the EU or the European Commission have failed to make certain decisions under certain circumstances;
e. sanctioning EU institutions (actions for damages) – any person or company who has had their interests harmed as a result of the action or inaction of the EU or its staff can take action against them through the CJEU.

16. The CJEU consists of 2 courts: the Court of Justice that deals with requests for preliminary rulings from national courts, and certain actions for annulment and appeals; and the General Court that rules on actions for annulment brought by individuals, companies and, in some cases, EU Member States. A CJEU judge is appointed jointly by national governments for a renewable 6-year term.

History of interaction between the ECHR and the EU legal order

17. Neither of the Treaties establishing the then European Communities (see paragraph 5 above) included any references to fundamental rights. The focus on economic matters was also reflected in the early case law of the CJEU, for example, in cases like *Stork*, *Geitling* and *Sgarlata*[11] the CJEU refused to consider the application of human rights standards since they were not explicitly based on any Article of the Treaties[12]. However, from the early 1970s, in response to the concerns expressed by domestic constitutional courts that the supremacy of EU law might otherwise undermine the protection of fundamental rights under national constitutions[13], the CJEU has incorporated fundamental rights in its case law. Thus in the *Nold* judgment of 14 May 1974, the CJEU held that "fundamental rights form an integral part of the general principles of law, the observance of which [the CJEU] ensures"[14]. As to the content of these rights, the CJEU stated as follows: "In safeguarding these rights, the [CJEU] is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those States. Similarly, international treaties for the protection of human rights on which the

[11] Case 1/58 *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community*, judgment of 4 February 1959; joined cases 36, 37, 38 and 40/59 *Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v High Authority of the European Coal and Steel Community*, judgment of 15 July 1960; Case 40/64, *Marcello Sgarlata and others v Commission of the EEC*, judgment of 1 April 1965.
[12] Martin Kuijer, *The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession*, The International Journal of Human Rights, 2018, https://doi.org/10.1080/13642987.2018.1535433.
[13] Olivier De Schutter, *Notes of the presentation on Theme 3 – The challenge of the interaction between the Convention and the legal order of the EU and other regional organisations*, document DH-SYSC-II(2019)33, 4 February 2019.
[14] Case C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, judgment of 14 May 1974.

member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law"[15].

18. The *Nold* judgment does not explicitly refer to the ECHR, but it fell under the concept of "international treaties /../ of which member States are signatories", and consequently the CJEU "sought to apply the [ECHR] as if it were part of EU law, within the framework of the EU"[16]. In 1989, the CJEU recognized the "special significance" of the ECHR in the EU legal order[17], which also meant that the CJEU would treat the jurisprudence of the ECtHR as authoritative[18].

19. At the level of the primary law, the reference to the ECHR was first included in the preamble of the Single European Act, where the EU Member States expressed their determination "to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the [ECHR] and the European Social Charter, notably freedom, equality and social justice". This institutional link between the ECHR and the EU initially established by the CJEU in its case law was later codified in the Maastricht Treaty (see paragraph 6 above), where Article F (currently Article 6 TEU) stated that the EU "shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

20. The latest step in the gradual constitutionalisation of fundamental rights in the EU legal order was the proclamation of the Charter of Fundamental Rights of the European Union (the EU Charter of Fundamental Rights) in December 2000. With the entry into force of the amendments brought by the Lisbon Treaty, as of 1 December 2009, the EU Charter of Fundamental Rights has the same legal force as the Treaties.

b. Overview of the relevant legal provisions and case law

Main provisions and principles relevant for the interaction between the systems

21. The following paragraphs with look at the main legal provisions and main principles developed in the case law of the CJEU and the ECtHR that are relevant for the interaction between the two systems but that do not directly address such interaction.

22. As regards the EU legal order, a number of provisions in the Treaties and in the EU Charter of Fundamental Rights are relevant. Firstly, paragraph 2, Article 4 TEU enshrines the principle of equality of the Member States and provides,

[15] Case C-4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, judgment of 14 May 1974, para 13.
[16] Olivier De Schutter, *Notes of the presentation on Theme 3 – The challenge of the interaction between the Convention and the legal order of the EU and other regional organisations*, document DH-SYSC-II(2019)33, 4 February 2019.
[17] Joined cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*, judgment of 21 September 1989, para. 13.
[18] Notes of the presentation on Theme 3 – The challenge of the interaction between the Convention and the legal order of the EU and other regional organisations as submitted by the ad hoc expert, Professor Olivier De Schutter, University of Louvain (UCL), Belgium

"[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government". Secondly, paragraph 3 of the same Article establishes the principle of sincere cooperation and states, "[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives."

23. Furthermore, paragraph 3, Article 6 TEU defines the place of fundamental rights in the EU legal order and states, "[f]undamental rights, as guaranteed by [the ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

24. In addition to the above-mentioned legal provisions, the principles of mutual recognition and mutual trust are relevant for the interaction between the ECHR and the EU legal order. Both principles stem from the duty of sincere cooperation. Thus, under the principle mutual recognition one EU Member State will accept and enforce decisions from another EU Member State as if they were its own. Mutual recognition as a method of cooperation and integration was developed in the context of the internal market, whereby the EU Member States are obliged to recognize each other's rules with the consequence that lawfully manufactured products or professional qualifications obtained in one EU Member State should be allowed to be commercialized or recognized in another Member State[19]. Currently the concept of mutual recognition is extended also to the Area of Freedom, Security and Justice, and Article 67 TFEU envisages mutual recognition of the judgments in criminal matters, as well as the mutual recognition of judicial and extrajudicial decisions in civil matters.

25. The principle of mutual recognition is closely related to the concept of mutual trust. This notion is not mentioned in the EU Treaties, but in the *N.S.* case[20] the CJEU held that the *raison d'être* of the EU and the creation of an area of freedom, security and justice are based on mutual confidence and a presumption of compliance, by other Member States, with EU law and, in particular, fundamental rights. In Opinion 2/13 on the accession of the EU to the ECHR[21] the CJEU further stated that "the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained". Furthermore, in accordance with the principle of mutual trust, the court in the EU Member State in which recognition is sought is not allowed to substitute its own assessment of

[19] Sacha Prechal, *Mutual Trust Before the Court of Justice of the European Union*, European Papers, Vol. 2, 2017, No 1, pp. 75-92, http://www.europeanpapers.eu

[20] Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department*, judgment of 21 December 2011.

[21] Opinion 2/13 on the Accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 18 December 2014.

that of the court in the Member State of origin[22]. However, in the *Aranyosi* case[23] that dealt with the execution of the European Arrest Warrant and surrender of a person from one EU Member State to another, the CJEU confirmed that in exceptional circumstances, where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, the principle of mutual trust may be disregarded and the executing Member State must evaluate the individual situation of the person[24].

26. As regards the EU Charter of Fundamental Rights, Article 52(3) states, "[i]n so far as this 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 the said Convention. This provision shall not prevent Union law providing more extensive protection." In order to promote consistency, the drafters of the EU Charter of Fundamental Rights sought to ensure that the rights and freedoms of the Charter that "correspond" to rights and freedoms listed in the ECHR would be interpreted in accordance with the case law of the ECtHR; for example, the Explanations appended the EU Charter of Fundamental Rights [25] provide the list of such correspondances, distinguishing between those Articles of the Charter "where both the meaning and the scope are the same as the corresponding Articles of the ECHR", and the Articles "where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider"[26].

27. Article 53 of the EU Charter of Fundamental Rights states, "[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including [the ECHR], and by the Member States' constitutions."

28. The effects of Article 53 of the EU Charter of Fundamental Rights were addressed by the CJEU in the *Melloni case*[27] that concerned the execution of the European Arrest Warrant and surrender of the person from Spain to Italy, where he was tried in absentia and convicted for bankruptcy fraud and where he would be required to serve the prison sentence. In the proceedings before the Spanish courts, the surrender was challenged on the grounds of the Spanish Constitution which requires that, if a person has been convicted in his absence, a surrender for the execution of that conviction must be made conditional on the right to challenge the conviction in order to safeguard that person's rights of defence. The Spanish law therefore offered a higher protection that the relevant EU Framework Decision on the European Arrest Warrant, which allows the executing State to refuse the surrender or to make it conditional on the right to a retrial only in a

[22] Sacha Prechal, *Mutual Trust Before the Court of Justice of the European Union*, European Papers, Vol. 2, 2017, No 1, pp. 75-92, http://www.europeanpapers.eu
[23] C-404/15 and C-659/15, *Pál Aranyosi and Robert Căldăraru*, judgment of 5 April 2016.
[24] C-404/15 and C-659/15, *Pál Aranyosi and Robert Căldăraru*, judgment of 5 April 2016, paras 88-92.
[25] OJ C 303, 14 December 2007, pages 17-35.
[26] Olivier De Schutter, *Notes of the presentation on Theme 3 – The challenge of the interaction between the Convention and the legal order of the EU and other regional organisations*, document DH-SYSC-II(2019)33, 4 February 2019.
[27] Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, judgment of 26 February 2013.

limited number of situations. If the person convicted in his absence was defended and represented by a lawyer, as in the *Melloni* case, the Framework Decision does not allow the executing State to refuse the surrender.

29. In this context, the CJEU was asked to give a preliminary ruling on the question of whether the EU Member States were allowed to impose a higher level of fundamental rights' protection for cross-border cooperation in criminal matters than the standard set by EU law. In the judgment the CJEU the Framework Decision effected a harmonisation of the conditions of execution of a European Arrest Warrant in the event of a conviction rendered *in absentia*, which reflected the consensus reached by all EU Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted *in absentia* who are the subject of a European Arrest Warrant[28]. The CJEU further held that allowing a Member State to avail itself of Article 53 of the EU Charter of Fundamental Rights to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that Framework Decision, would undermine the principles of mutual trust and recognition which that Decision purports to uphold and would, therefore, compromise the efficacy of that Framework Decision[29]. As a result, the CJEU in essence ruled that Article 53 the EU Charter of Fundamental Rights must be interpreted as not allowing the EU Member States to apply a standard of protection of fundamental rights guaranteed by their Constitutions if that standard is higher than that deriving from the Charter[30].

30. As regards the ECHR system, Article 1 of the ECHR sets out the primary, legal obligation on the Contracting Parties to respect and protect the ECHR rights of those within their jurisdiction. In this regard, the principle of subsidiarity as developed by the ECtHR means that each High Contracting Party retains primary responsibility for finding the most appropriate measures to implement the Convention, taking into account national circumstances as appropriate. The doctrine of the margin of appreciation is an important aspect of subsidiarity. The jurisprudence of the ECtHR makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the ECHR, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the ECHR system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions[31].

31. In turn, Article 53 "Safeguard for existing human rights" of the ECHR states, "[n]othing in this Convention shall be construed as limiting or derogating from

[28] Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, judgment of 26 February 2013, para 62.
[29] Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, judgment of 26 February 2013, para 63.
[30] See also Martin Kuijer, *The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession*, The International Journal of Human Rights, 2018, https://doi.org/10.1080/13642987.2018.1535433.
[31] Explanatory Report to Protocol No.15, para 9; see also CDDH report on the longer-term future of the system of the European Convention on Human Rights, document CDDH(2015)R84, Addendum I, 11 December 2015, paras 15-17.

any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party".

Main principles as developed by the ECtHR with respect to interaction between the ECHR and the EU legal order

32. The following paragraphs will examine the case law of the ECtHR and the principles it has developed specifically concerning the interaction between the ECHR and the EU legal order. In this regard, three main issues can be identified: first, the responsibility of the Member States after a transfer of competences to international organisations; second, responsibility of the Member States for national measures giving effect to EU law; third, the "Bosphorus presumption" of equivalent protection.

33. As regards the first issue, namely, the responsibility of the Member States after a transfer of competences to international organisations, in the case of *Matthews v. the United Kingdom*[32] the ECtHR examined a question of whether the United Kingdom could be held responsible under Article 1 of the ECHR for the absence of elections to the European Parliament in Gibraltar, that is to say, whether the United Kingdom was required to "secure" elections to the European Parliament notwithstanding the Community character of those elections. In this connection the ECtHR noted that the ECHR did not exclude the transfer of competences to international organisations provided that the ECHR rights continued to be "secured". According to the ECtHR, Member States' responsibility therefore continued even after such a transfer[33]. In the *Matthews* case it meant that the United Kingdom was responsible under Article 1 of the Convention for securing the rights guaranteed by Article 3 of Protocol No.1 in Gibraltar regardless of whether the elections were purely domestic or European.

34. The conclusion about the continued responsibility of the Member States has been reiterated in the subsequent case law of the ECtHR. For example, in the *Bosphorus* case[34] the ECtHR recalled that a Contracting Party was responsible under Article 1 of the ECHR 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 obligations. The ECtHR further recalled that Article 1 made no distinction as to the type of rule or measure concerned and did not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the ECHR[35]

35. The ECtHR addressed the issue of the responsibility of the Member States for national measures giving effect to EU law in the case of *Cantoni v. France*[36]. In this case the applicant complained under Article 7 of the ECHR and alleged that

[32] *Matthews v. the United Kingdom* (application no.24833/94), judgment of 18 February 1999.
[33] *Matthews v. the United Kingdom* (application no.24833/94), judgment of 18 February 1999, para 32.
[34] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (application no.45036/98), judgment of 30 June 2005.
[35] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (application no.45036/98), judgment of 30 June 2005, para.153.
[36] *Cantoni v. France* (application no.17862/91), judgment of 15 November 1996.

his conviction for unlawfully selling pharmaceutical products had not been foreseeable because the definition of a "medical product" found in the French legislation, which was based almost word for word on a Community directive, failed to afford the requisite foreseeability and accessibility. Commenting on the argument of the respondent Government that the respective provision of the domestic law was based on the EU law, the ECtHR held that this fact not remove it from the ambit of Article 7 of the ECHR[37].

36. The "Bosphorus presumption" of equivalent protection originates from the above-mentioned *Bosphorus* case[38] where the applicant company complained that impounding of its aircraft was a violation of Article 1 of Protocol No.1 to the ECHR. The aircraft was seized under an EU regulation which, in turn, had implemented the UN sanctions regime against the Federal Republic of Yugoslavia (Serbia and Montenegro). The domestic proceedings where the applicant company challenged the impounding included a preliminary reference to the CJEU, which examined the respective regulation also in terms of compliance with the applicant company's right to peaceful enjoyment of its possessions and its freedom to pursue a commercial activity.

37. In examining the legal basis for the impugned interference, the ECtHR concluded that once adopted, the regulation was "generally applicable" and "binding in its entirety", so that it applied to all EU Member States, none of which could lawfully depart from any of its provisions. Therefore, the impugned interference was not the result of an exercise of discretion by the Irish authorities, but rather amounted to compliance by the Irish State with its legal obligations flowing from the regulation[39].

38. The ECtHR then turned to the question of whether, and if so to what extent the general interest of compliance with Community obligations could justify the impugned interference by the Irish State with the applicant company's property rights. In this regard the ECtHR recalled its conclusions from the *Matthews* case (see paragraphs 34 above) on the continued responsibility of the Contracting Parties under Article 1 of the ECHR for all acts and omissions of its organs after it has transferred part of its sovereignty, and noted that absolving Contracting Parties completely from their ECHR responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the ECHR, because the guarantees of the ECHR could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards[40].

39. The ECtHR then held that the State action taken in compliance with legal obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty was justified as long as the

[37] *Cantoni v. France* (application no.17862/91), judgment of 15 November 1996, para 30.
[38] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (application no.45036/98), judgment of 30 June 2005.
[39] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (application no.45036/98), judgment of 30 June 2005, paras 145-148.
[40] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (application no.45036/98), judgment of 30 June 2005, para 154.

relevant organisation was considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which could be considered at least equivalent to that for which the ECHR provides. The ECtHR underlined that by "equivalent" it meant "comparable", as any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued. The ECtHR also underlined that any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection. The ECtHR concluded that if such equivalent protection was considered to be provided by the organisation, the presumption would be that a State had not departed from the requirements of the ECHR when it did no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption could be rebutted if, in the circumstances of a particular case, it was considered that the protection of ECHR rights was manifestly deficient[41].

40. As to the question of whether there was a presumption of ECHR compliance at the relevant time and whether any such presumption had been rebutted in the circumstances of the present case, the ECtHR noted that while the founding Treaties of the European Communities did not initially contain express provisions for the protection of fundamental rights, the CJEU had subsequently recognised that such rights were enshrined in the general principles of [then] Community law protected by it, that the ECHR had a "special significance" as a source of such rights, and that the respect for fundamental rights had become "a condition of the legality of Community acts". Recalling that the effectiveness of substantive guarantees of fundamental rights depended on the mechanisms of control in place to ensure their observance, the ECtHR referred to the jurisdiction of the CJEU and found that actions initiated before the CJEU by the EU institutions or a Member State constituted important control of compliance with Community norms to the indirect benefit of individuals. The ECtHR further noted that it was essentially through the national courts that the EU system provided a remedy to individuals against a Member State or another individual for a breach of EU law[42].

41. In light of these considerations, the ECtHR concluded that the protection of fundamental rights by EU law could be considered to be, and to have been at the relevant time, "equivalent" to that of the ECHR system, and that, consequently, the presumption arose that Ireland did not depart from the requirements of the ECHR when it implemented legal obligations flowing from its membership of the EU[43]. Finally, the ECtHR considered that having regard to the nature of the interference, to the general interest pursued by the impoundment and by the sanctions regime, and the ruling of the CJEU, there was no dysfunction of the mechanisms of control of the observance of ECHR rights. In the ECtHR's view, therefore, it could not be said that the protection of the applicant company's

[41] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (application no.45036/98), judgment of 30 June 2005, paras 155-156.
[42] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (application no.45036/98), judgment of 30 June 2005, paras 159-164.
[43] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (application no.45036/98), judgment of 30 June 2005, para 165.

ECHR rights was manifestly deficient, with the consequence that the relevant presumption of ECHR compliance by the respondent State had not been rebutted.

42. Since the judgment in the *Bosphorus* case, the application of the presumption of equivalent protection has been examined in a number of cases. For example, in the case of *M.S.S. v. Belgium and Greece*[44] the ECtHR examined a complaint by an asylum seeker who had been transferred from Belgium to Greece under the so-called Dublin Regulation that establishes the EU Member State responsible for the examination of the asylum application. The ECtHR recalled that a State would be fully responsible under the ECHR for all acts falling outside its strict international legal obligations, notably where it exercised State discretion[45], and considered that the Belgian authorities could have refrained from transferring an asylum seeker from Belgium to another EU Member State if they had considered that the receiving country, namely Greece, was not fulfilling its obligations under the ECHR[46]. For these reasons the ECtHR found that the presumption of equal protection was not applicable in this case, proceeded with the examination of the merits of the complaint, and concluded that Belgium had violated Articles 3 and 13 of the ECHR.

43. In the case of *Michaud v. France*[47] the ECtHR further clarified the presumption of equivalent protection and noted that this presumption was intended to ensure that a State Party was not faced with a dilemma when it was obliged to rely on the legal obligations incumbent on it as a result of its membership of an international organisation which was not party to the ECHR and to which it had transferred part of its sovereignty, in order to justify its actions or omissions arising from such membership vis-à-vis the ECHR[48]. The ECtHR also noted that the presumption served to determine in which cases the ECtHR may, in the interests of international cooperation, reduce the intensity of its supervisory role, as conferred on it by Article 19 of the ECHR, with regard to observance by the States Parties of their engagements arising from the ECHR. It concluded that it would accept such an arrangement only where the rights and safeguards it protects are given protection comparable to that afforded by the ECtHR itself[49]. In this regard the ECtHR noted that its finding in the *Bosphorus* case about the EU offering equivalent protection of the substantive guarantees, applied *a fortiori* since 1 December 2009, the date of entry into force of Article 6 TEU, which conferred on the EU Charter of Fundamental Rights the same value as the Treaties and gave fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, the status of general principles of EU law. In examining the fact of the *Michaud* case, however, the ECtHR concluded that the case concerned France's implementation of directives which bound the EU Member States with regard to the result to be attained, but left them free to choose the method and form. Considering this discretion and the fact that the *Conseil d'Etat* had decided not to request a preliminary ruling from the CJEU, which in turn meant that the relevant

[44] *M.S.S. v. Belgium and Greece* (application no.30696/09), judgment of 21 January 2011.
[45] *M.S.S. v. Belgium and Greece* (application no.30696/09), judgment of 21 January 2011, para 338.
[46] *M.S.S. v. Belgium and Greece* (application no.30696/09), judgment of 21 January 2011, 340.
[47] *Michaud v. France* (application no.12323/11), judgment of 6 December 2012.
[48] *Michaud v. France* (application no.12323/11), judgment of 6 December 2012, para 104.
[49] *Michaud v. France* (application no.12323/11), judgment of 6 December 2012, para 104.

international machinery for supervision of fundamental rights, in principle equivalent to that of the ECHR, had been able to demonstrate its full potential, the ECtHR found that the presumption of equivalent protection was not applicable.

44. In the case of *Avotiņš v. Latvia*[50] about whether the enforcement in Latvia of a judgment delivered in Cyprus in the debtor's absence violated Article 6 of the ECHR, the ECtHR reiterated that the application of the presumption of equivalent protection in the legal system of the EU was subject to two conditions, namely, the absence of any margin of manoeuvre on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided for by EU law. In this case the ECtHR held that the presumption of equivalent protection was applicable, as both conditions mentioned above had been satisfied. First, the relevant provisions of the applicable EU regulation allowed the refusal of recognition or enforcement of a foreign judgment only within very precise limits and subject to certain preconditions, which in turn meant that the Latvian Supreme Court had not enjoyed any margin of manoeuvre. Second, the Latvian Supreme Court had not requested a preliminary ruling from the CJEU regarding the interpretation and application of the relevant provisions of the EU regulation, but the ECtHR noted that the applicant had not advanced any specific argument concerning the interpretation of the relevant provision of the regulation and its compatibility with fundamental rights such as to warrant a finding that a preliminary ruling should have been requested from the CJEU, nor had he submitted any request to that effect to the Latvian Supreme Court; for these reasons the ECtHR considered that the fact that the matter had not been referred for a preliminary ruling was not a decisive factor in the present case[51]. Having found the presumption of equal protection applicable, the ECtHR then concluded that the protection of fundamental rights afforded by the Latvian Supreme Court had not been manifestly deficient in the present case such that the presumption of equivalent protection was rebutted, with regard to both the provision of EU law that had been applied and its implementation in the specific case of the applicant, and therefore concluded that there had been no violation of Article 6 of the ECHR.

Opinion 2/13 of the CJEU on the compatibility of the draft Accession Agreement of the EU to the ECHR with the EU Treaties

45. The possible accession of the EU to the ECHR has been discussed since the late 1970s. The objective of the accession is to further strengthen the protection of human rights, to contribute to the creation of a single European legal space, and to enhance coherence in human rights protection in Europe by strengthening participation, accountability and enforceability in the ECHR system. Having examined the issue in 1996, the CJEU adopted Opinion 2/94[52] and ruled that as the Community law stood at that time, the Community had no competence to accede to the ECHR.

[50] *Avotiņš v. Latvia* (application no.17502/07), judgment of 23 May 2016.
[51] *Avotiņš v. Latvia* (application no.17502/07), judgment of 23 May 2016, paras 105-111.
[52] Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 28 March 1996.

46. The amendments introduced by the Lisbon Treaty inserted a new provision in the Treaties (Article 6(2) TEU) requiring the EU to accede to the ECHR. This provisions further specifies that such accession "shall not affect the Union's competences as defined in the Treaties". Additionally, Protocol (No 8) stipulates that the agreement on the accession of the EU to the ECHR "shall make provision for preserving the specific characteristics of the Union and Union law".

47. On 26 May 2010, the Ministers' Deputies adopted ad hoc terms of reference for the CDDH to elaborate, no later than June 2011, in co-operation with the representatives of the EU, of legal instruments setting out the modalities of accession of the EU to the ECHR, including EU's participation in the ECHR system, and, in this context, to examine any related issue. In accordance with these ad hoc terms of reference, the CDDH decided to entrust this task to an informal group of 14 members, chosen on the basis of their expertise (CDDH-UE). The CDDH-UE held in total eight working meetings between July 2010 and June 2011. The CDDH submitted a report to the Committee of Ministers on the work carried out by the CDDH-UE, with draft legal instruments appended, on 14 October 2011. On 13 June 2012, the Committee of Ministers gave a new mandate to the CDDH to pursue negotiations with the EU, in an ad hoc group ("47+1"), with a view to finalising the legal instruments setting out the modalities of accession of the EU to the ECHR. In the context of the meetings of the CDDH-UE and of the "47+1" group three exchanges of views were held with representatives of civil society, who regularly submitted comments on the working documents. The "47+1" group held five negotiation meetings with the EU Commission[53].

48. The draft revised instruments on the accession of the EU to the ECHR were finalised on 5 April 2013. They consist of a draft Agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (draft Accession Agreement), a draft declaration by the EU, a draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the EU is a party, a draft model of a memorandum of understanding and a draft explanatory report to the Accession Agreement.[54].

49. In accordance with Article 218(11) TFEU, the European Commission asked the CJEU's opinion on whether the draft Accession Agreement was compatible with TEU and TFEU.

50. On 14 December 2014, the CJEU delivered Opinion 2/13 ruling that draft Accession Agreement was not compatible with Article 6(2) TEU and Protocol (No 8). In the Opinion, the CJEU stated that the draft Accession Agreement was incompatible with the Treaties for the following reasons:

[53] Final report to the CDDH of the CDDH Ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights, document 47+1(2013)008rev2, 10 June 2013.
[54] Final report to the CDDH of the CDDH Ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights, document 47+1(2013)008rev2, 10 June 2013.

a. it was liable adversely to affect the specific characteristics and the autonomy of EU law in so far it did not ensure coordination between Article 53 of the ECHR and Article 53 of the EU Charter of Fundamental Rights, did not avert the risk that the principle of Member States' mutual trust under EU law may be undermined, and made no provision in respect of the relationship between the mechanism established by Protocol No 6 and the preliminary ruling procedure provided for in Article 267 TFEU;
b. it was liable to affect Article 344 TFEU in so far as it did not preclude the possibility of disputes between the EU Member States or between the EU Member States and the EU concerning the application of the ECHR within the scope *ratione materiae* of EU law being brought before the ECtHR;
c. it did not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the CJEU that enable the specific characteristics of the EU and EU law to be preserved;
d. it failed to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters in that it entrusted the judicial review of some of those acts, actions or omissions exclusively to a non-EU body.

51. According to Article 218(11) TFEU, where the opinion of the CJEU is adverse, the agreement envisaged may not enter into force unless it is amended or the EU Treaties are revised.

52. On 15 May 2017, the EU Commission published "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 2016 Report on the Application of the EU Charter of Fundamental Rights"[55], and in the accompanying document it was recalled that there was an obligation on the EU to accede to the ECHR, emphasising that the EU accession to the ECHR remained a priority for the EU Commission. However, the document also noted that the CJEU's opinion of December 2014, raised a number of significant and complex questions. The EU Commission acknowledged that as a result, the draft Accession Agreement would have to be re-negotiated on a series of points. The EU Commission confirmed that in its capacity as EU negotiator, it continued to consult with the relevant Council working party on solutions to address the various objections raised by the CJEU.

c. Analysis of the challenges

53. The interaction between the two complex systems – that of the EU legal order and of the ECHR system – can raise a number of challenges in various areas. The following paragraphs will examine these challenges, using as examples the case decided by both, the ECtHR and the CJEU.

[55] https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59189

54. The first set of challenges arise from the co-existence in the same geographic area of two human rights instruments, namely, the ECHR and the EU Charter of Fundamental Rights. Even though these instruments are very close in substance, and Article 6(3) TEU and Article 52(3) of the Charter establish a strong link between them, they are not identical. Thus the EU Charter of Fundamental Rights includes rights and freedoms which were not yet acknowledged in the ECHR adopted in 1950, such as the right to good administration (Article 41 of the Charter) or the right of access to documents (Article 42 of the Charter)[56]. Furthermore, some of the rights are worded differently, for example, the right to life (Article 2 of the ECHR and Article 2 of the Charter). As noted previously (see paragraph 27 above), efforts have been made to promote consistency. It should be also born in mind that absolute uniformity in the development of interpretation and practice under two distinct legal instruments is unrealistic, and that differences can be a source of mutual enrichment.

55. However, it has also been noted that as the EU legal order now has its own human rights catalogue, i.e., the EU Charter of Fundamental Rights, the CJEU is not referring as often to the case law of the ECtHR as it did prior to the Charter obtaining the same legal force as the EU Treaties. Thus from 1998 to 2005, the ECHR was referred to 7.5 times more often than all other human rights instruments the CJEU relied on, including the EU Charter of Fundamental Rights. In the period between December 2009 and December 2012, the CJEU made reference to or drew on provisions of the Charter in at least 122 judgments, while to the ECHR – only in 20 cases[57]. The question therefore arises whether fewer references by the CJEU to the ECHR and the case law of the ECtHR weaken the link between the two systems, and are indicative of divergence, not convergence.

56. Moreover, the differences in wording of the relevant text coupled with fewer cross-references in the case law could mean that human rights standards are interpreted differently, which could result in different levels of protection for the individuals and in the lack of clarity for the Member States about the content of their obligations. For example, in the cases raising an issue of compliance by the respective State with the principle of *non-refoulement*, the CJEU has held that Article 4 of the EU Charter of Fundamental Rights "Prohibition of torture and inhuman or degrading treatment or punishment" must be interpreted as meaning that the EU Member States may not transfer asylum seeker to the Member State that is responsible for the examination of the asylum application under the Dublin Regulation, "where they cannot be unaware that *systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment" (emphasis added)[58]. The ECtHR, however, in comparable cases, for example, in

[56] Martin Kuijer, *The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession*, The International Journal of Human Rights, 2018, https://doi.org/10.1080/13642987.2018.1535433.
[57] Gráinne de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator*, New York University School of Law, Public law & legal theory research paper series, Working paper no.13-51, September 2013.
[58] Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department*, judgment of 21 December 2011, paras 86-94.

the case of *Tarakhel v. Switzerland*[59] that concerned a transfer of person from Switzerland to Italy, has constantly referred to the obligation of the respondent State to examine the individual situation of the person, in addition to the evaluation of the overall situation. According to the ECtHR, the source of the risk does nothing to alter the level of protection guaranteed by the ECHR or the obligations of the State ordering the person's removal. In other words, the fact the overall situation is not found to be problematic, "does not exempt that State from carrying out a *thorough and individualised examination* of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established" (emphasis added)[60]. It could therefore be argued that from the perspective of the individual, the level of protection varies, which, in turn, is at odds with the idea of single European legal space.

57. From the perspective of an EU Member State, the need to simultaneously comply with the principles of mutual recognition and mutual trust as developed in EU law, and with the obligation to carry out the above-mentioned individualised examination of the applicant's situation appears particularly challenging. As noted previously (see paragraphs 24-25 above), mutual recognition and mutual trust in essence delimit the extent to which an EU Member State can engage into individualised examination without running the risk of being found in breach of its obligations stemming from EU law. In the case of *Avotiņš v. Latvia* the ECtHR agreed that the creation of an area of freedom, security and justice in Europe, and the adoption of the means necessary to achieve it, was wholly legitimate in principle from the standpoint of the ECHR; nevertheless, the ECtHR further noted that

> "*the methods used to create that area must not infringe the fundamental rights of the persons affected by the resulting mechanisms, as indeed confirmed by Article 67(1) of the TFEU. However, it is apparent that the aim of effectiveness pursued by some of the methods used results in the review of the observance of fundamental rights being tightly regulated or even limited. Hence, the CJEU stated recently in Opinion 2/13 that "when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that ..., save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU". Limiting to exceptional cases the power of the State in which recognition is sought to review the observance of fundamental rights by the State of origin of the judgment could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient*"[61].

[59] *Tarakhel v. Switzerland* (application no.29217/12), judgment of 4 November 2014.
[60] *Tarakhel v. Switzerland* (application no.29217/12), judgment of 4 November 2014, para 104.
[61] *Avotiņš v. Latvia* (application no.17502/07), judgment of 23 May 2016, paras 113-114.

58. The use of the presumption of equivalent protection could pose another set of challenges. Firstly, in order to establish whether the presumption is applicable and whether it is rebutted, the ECtHR is in fact required to interpret the provisions of EU law. Thus, in deciding whether the first condition for the application of the presumption of equivalent protection exists, namely, whether there was no margin of manoeuvre on the part of the domestic authorities, the ECtHR examines the substance of the applicable EU legal act. It could be argued that such substantive examination of EU law provisions is formally outside the competence of the ECtHR as defined in Article 19 of the ECHR. This, in turn, might pose challenge regarding the authority of the ECtHR's case law.

59. Second, it could also be argued that from the perspective of the individual, the application of the presumption of equivalent protection that allows the ECtHR in some cases to "reduce the intensity of its supervision" could lead to a non-uniform level of protection of the rights of persons from different Member States of the Council of Europe.

60. Another set of challenges could arise regarding the admissibility of the cases that concern cross-border issues involving application of EU law where, in compliance with the principles of mutual recognition and mutual trust, the decisions and actions of one EU Member State are intrinsically linked to, and dependent upon, the actions of another EU Member State. Such situations occur, most notably, in the cases before the ECtHR where the applicant alleges that his/her rights under the ECHR have not been respected because of the way the European Arrest Warrant has been executed, or because of the way a judgment in criminal or civil matters of one EU Member State has been recognized and enforced in another EU Member State. In such cases, the requirement to exhaust the domestic remedies coupled with the six-month time limit set by Article 35 of the ECHR, effectively means that the applicant can only challenge the decisions and actions of the executing EU Member State, even if the source, at least partially, of the applicant's grievances are to be found in the issuing EU Member State[62]. This could create a situation of "wrong respondent State", or at least make it more complex for the ECtHR to fully evaluate the causes of the alleged violation.

61. Finally, as regards the delay in the EU's accession to the ECHR, several different challenges could be identified. The most significant effect of the delay in the accession is that individuals cannot challenge before a human rights court those decisions and actions of the EU that affect their fundamental rights as protected by the ECHR. At the Opening of the Judicial Year in 2013, the then president of the ECtHR underlined, "For my part, the important thing is to ensure that there is no legal vacuum in human rights protection on the [ECHR's] territory, whether the violation can be imputed to a State or to a supranational institution". Therefore, as long as the EU is not a Contracting Party to the ECHR and therefore not subject to external scrutiny, it could be argued that a protection gap exists.

[62] See, for example, the case of *Avotiņš v. Latvia* (application no.17502/07), judgment of 23 May 2016, para 4.

62. The delay in the accession also delays establishing formal link between the proceedings before the ECtHR and the CJEU and the possibility to formally channel the views of the CJEU as the court competent to interpret EU law provisions into the ECtHR proceedings. As already argued (see paragraph 58 above), the fact that the ECtHR itself interprets EU law provisions might pose a challenge regarding the authority of the ECtHR's rulings.

63. Another challenge relates to the arguments put forward by the CJEU in the Opinion 2/13 to arrive at a negative conclusion about the compatibility of the draft Accession Agreement with the EU Treaties. It has been suggested that these arguments places the effectiveness of the system above the protection of fundamental rights and that the general tone of the Opinion was not conducive for constructive cooperation. It has also been suggested that accession of the EU to the ECHR in accordance with the CJEU's Opinion "would significantly diminish" the human rights protection in the EU legal order[63].

d. Possible responses

64. Among the possible responses to the challenges outlined in the previous section, judicial dialogue should be mentioned as one of the most powerful tools to ensure harmonious cooperation between the ECtHR and the CJEU and enhance consistency of the case law. Therefore, measures that strengthen such dialogue and allow constructive discussions on the recent case law and developments within both system, are welcome and should be promoted. In this regard the working visit by a delegation from the CJEU to the ECtHR on 16 October 2017, should be mentioned as a positive example of the dialogue.

65. Next, in addition to the dialogue between the judges of the two courts, the Council of Europe Member States that are also EU Member States can play a constructive role both, in identifying the cases before the ECtHR that involve EU law, as well as in drawing the attention of the EU institutions to the jurisprudence of the ECtHR.

66. Furthermore, involvement of the EU institutions, namely, the EU Commission as the third party, as it happened in the case of *Avotiņš v. Latvia*, could serve as a tool to assist the ECtHR in the cases that concern the interpretation and application of EU law provisions.

67. As regards the EU's accession to the ECHR, it should firstly be recalled that it remains an obligation provided for in the primary EU law instrument. Taken together with the assurances contained in the recent publications of the EU Commission (see paragraph 52 above), it can be assumed that the consultations will be resumed in near future. However, it remains to be seen how the concerns expressed by the CJEU in the Opinion 2/13 can be accommodated in the draft Accession Agreement, and to what extent possible changes to this draft Agreement could be accepted by the Council of Europe Member States that are not Member States of the EU. Meanwhile, the instruments mentioned in the

[63] 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

preceding paragraphs, namely, the judicial dialogue, the involvement of the EU institutions, as well as the efforts by the Council of Europe Member States that are also EU Member States, should be used to avoid fragmentation of the human rights law in Europe.

3. INTERACTION BETWEEN THE CONVENTION AND THE EURASIAN ECONOMIC UNION

a. Brief description of the EAEU

68. The EAEU is an international organization for regional economic integration that consists of 5 Member States, 2 of which – the Russian Federation and the Republic of Armenia – are also Member States of the Council of Europe.

Origins and current structure of the EAEU

69. The EAEU was established by the Treaty on the Eurasian Economic Union that entered into force on 1 January 2015. The EAEU replaces the Eurasian Economic Community that existed from 2000 until the end of 2014.

70. The main EAEU institutions are the Supreme Eurasian Economic Council that consists of the Heads of the Member States and acts as the main political body of the organization; the Eurasian Intergovernmental Council that consists of the Heads of Governments of the Member States; the Eurasian Economic Commission with 2 Commissioners from each Member State that is a permanent supranational regulatory body of the EAEU and acts as the main executive institution; and the Court of the Eurasian Economic Union.

Sources of EAEU law, their adoption and application

71. According to Article 6 of the Treaty on the EAEU, the sources of the EAEU law are as follows: the Treaty on the EAEU; international treaties within the EAEU; international treaties of the EAEU with a third party; and decisions and regulations of the EAEU institutions adopted within their respective competence. Furthermore, paragraph 50 of the Statutes of the Court annexed to the Treaty on the EAEU stipulate that for the purposes of administration of justice, the Court of the EAEU also applies generally recognized principles and regulations of international law; international agreements to which the States that are parties to the dispute are participants; and international custom as evidence of the general practice accepted as a legal norm.

72. Article 6 of the Treaty on the EAEU further establishes the hierarchy of the sources of the EAEU law and stipulates that in case of conflict between the international treaties within the EAEU and the Treaty, the latter prevails. Article 6 also states that the decisions and regulations of the EAEU must be consistent with the Treaty and international treaties within the EAEU, and that international treaties of the EAEU with a third party must not contradict the basic objectives, principles and rules of the functioning of the EAEU. Finally, Article 6 provides that the decisions of the EAEU institutions are enforceable by the Member States according to the procedure provided for by their national legislation.

73. The Treaty on the EAEU does not contain explicit rules on the application of the EAEU law in relation to the national legislation. However, the Court of the EAEU in its jurisprudence has established the principle of the primacy of the relevant provisions of the EAEU law. For example, in the *Kaliningrad transit*

case [64] the Court found that one of the agreements applicable in this case that was part of the EAEU law and had priority in customs control. In other words, the Court established that the Member States had to apply the relevant provisions of the EAEU law instead of the national rules conflicting with the EAEU law[65]. In the same case, as well as in its Advisory opinion in the *Vertical Agreements* case[66] the Court also established direct applicability and direct effect of the relevant provisions of the EAEU law.

Role and competence of the Court of the EAEU

74. According to Article 19 of the Treaty on the EAEU, the Court of the EAEU is a permanent judicial body of the EAEU. The Statutes of the Court annexed to the Treaty on the EAEU state that the objective of the Court's activities is to ensure that the Member States and the institutions of the EAEU apply in a uniform manner the Treaty on the EAEU, international treaties within the EAEU, international treaties of the EAEU with the third parties, as well as the decisions of the EAEU institutions.

75. The Statutes of the Court provides that the Court resolves disputes arising in connection with the implementation of the Treaty on the EAEU, international treaties within the EAEU and/or decisions of the EAEU institutions. In doing so, the Court:

    a. has the jurisdiction over all disputes between the Member States of the EAEU and between the Member States and the EAEU institutions on the compliance with the EAEU law;
    b. has jurisdiction to examine complaints brought by business undertakings (i.e., legal persons and natural persons registered as economic entities under the laws of an EAEU Member State) about the compliance of the decisions or actions (omissions) of the EAEU Commission with the EAEU Treaty and/or international treaties within the EAEU, provided such decisions or actions (omissions) affect the rights and legitimate interests of the business undertakings;
    c. can give advisory opinions on the interpretation and application of the Treaty on the EAEU and the decisions of the EAEU intuitions.

76. The Court of the EAEU consists of 2 judges from each Member State elected for a 9-year term.

b. Overview of the relevant legal provisions and the case law

77. The Treaty on the EAEU does not contain express provisions on the protection of fundamental rights. However, the preamble of the Treaty states that the Member States of the EAEU are "guided by the principle of the sovereign equality of states, the need for unconditional respect for the rule of constitutional rights and freedoms of man and national". In the Opinion regarding the interpretation of the

[64] Case SE-1-1/1-16-BK, *Russia v Belarus (Kaliningrad Transit)*, judgment of 21 February 2017.
[65] See also Opinion SE-2-3/1-17- БК, *Adilov*, 11 December 2017.
[66] Opinion SE-2-1/1-17-BK, *Vertical Agreements,* 4 April 2017.

provisions concerning pensions of the employees of the EAEU institutions[67], the CJEU has referred to this preamble provisions to find that the level of protection of the rights and freedoms offered by the EAEU cannot be lower than the level of protection ensured in the Member States[68].

78. As the regards the case law, the above-mentioned lack of human rights provisions in the founding Treaty explains why the Court of the EAEU, as well as its predecessor, the Court of the Eurasian Economic Community, has rarely dealt with human rights issues. Nevertheless, the Court of the EAEU has referred to the practice of the ECtHR, albeit sporadically. For example, in the Opinion explaining certain provisions adopted by the Eurasian Economic Commission regarding the evaluation of employee performance[69], the Court of the EAEU referred to the ECtHR case of *Pellegrin v. France*[70] to argue that civil servants are exempted from the scope of labour law regulation[71]. Furthermore, on several occasions the judges of the Court of the EAEU have referred to the case law of the ECtHR in their dissenting opinions[72].

79. So far the ECtHR has referred to the EAEU (more precisely, to its predecessor organization) only in one case, namely, in the case of *Gyrlyan v. Russia*[73] concerning a complaint under Article 1 of Protocol No.1 to the ECHR. The applicant in this case alleged that the decision of the domestic authorities in the administrative-offence proceedings to confiscate USD 90,000 of the applicant's money for having failed to declare the sum of USD 100,000 at customs had been excessive and disproportionate to the legitimate aim pursued. When describing the relevant domestic law, the ECtHR noted the treaty on the procedure for the movement by individuals of cash and/or monetary instruments across the customs border of the Customs Union approved by the Inter-State Council of the Eurasian Economic Community on 5 July 2010.

c. Analysis of the challenges

80. At the moment the interaction between the ECHR system and the EAEU, in so far as it concerns the adjudication of cases, is limited, and does not appear to raise immediate challenges in terms of fragmentation of human rights law.

81. However, should the Court of the EAEU continue to refer to the case law of the ECtHR, it is necessary to ensure that the references are to the current lase law. For example, with respect to the above-mentioned reference to the *Pellegrin* case

[67] Opinion CE-2-2/7-18-БК, 20 December 2018.
[68] Opinion CE-2-2/7-18-БК, 20 December 2018, para 3.1.
[69] Opinion CE-2-3/1-16-БК, 3 June 2016.
[70] *Pellegrin v. France* (application no.28541/95), judgment of 8 December 1999.
[71] Opinion CE-2-3/1-16-БК, 3 June 2016, para 12.
[72] For example, dissenting opinion of Judge Zholymbet Baishev on the ruling of the Court of the Eurasian Economic Community in the case no.2-4/8-2014 of 27 February 2014; dissenting opinion of Judge Denis G. Kolos on the judgment of the Court of the EAEU in the case no.CE-1-1/1-16-БК of 25 February 2017; dissenting opinions of Judge Tatiana N. Neshataeva on the ruling of the Court of the Eurasian Economic Community in the case no.1-6/1-2013 of 10 July 2013, on the ruling of the Court of the Eurasian Economic Community in the case no.2-4/10-2014 of 7 October 2014, on the judgment of the Court of the EAEU in the case no. CE-2-1/3-17-БК of 17 January 2018.
[73] *Gyrlyan v. Russia* (application no.35943/15), judgment of 9 October 2018.

it should be noted that the ECtHR's conclusions in that particular case concerning the applicability of Article 6 of the ECHR have been superseded by those in the case of *Vilho Eskelinen and Others v. Finland*[74].

d. Possible responses

82. As the interaction between the ECHR and the EU legal order, the interaction between the ECHR and the EAEU could benefit from strong and constructive judicial dialogue that would help the judges to exchange information about the relevant developments in the two systems, as well as would help ensure that both systems maintain proper cross-references.

83. Furthermore, the Council of Europe Member States that are also Member States of the EAEU could bring to the attention of the EAEU institutions, where appropriate, the relevant case law of the ECtHR and in that way assist harmonious development of case law in both systems.

4. CONCLUSIONS

84. Europe's architecture of human rights protection has been described as a "crowded house"[75]. The systems making up this European architecture should develop in full cognizance of each other to ensure that the right-holders can effectively benefit from the rights and freedoms guaranteed by these systems.

[74] *Vilho Eskelinen and Others v. Finland* (application no.63235/00), judgment of 19 April 2007.

[75] Jörg Polakiewicz, *EU Law and the ECHR: Will EU Accession to the European Convention on Human Rights Square the Circle?* 26 September 2013. Available at SSRN: https://ssrn.com/abstract=2331497 or http://dx.doi.org/10.2139/ssrn.2331497