**Tanja Karakamisheva – Jovanovska Ph.D.**

Full-time professor at the Faculty of Law, "Iustinianus Primus" Skopje, Republic of Macedonia

# THE EUROPEAN CONVENTION OF HUMAN RIGHTS AND THE EUROPEAN UNION-

# SITUATIONS, DILEMMAS, CHALLENGES…

**Summary**

Although there are numerous dilemmas, analyses and considerations concerning the EU's accession to the ECHR, the most general position is that it represents a huge step ahead in the development of the human rights within the EU, and issue to which the EU has been paying significant importance since the early seventies of the last century. Namely, the first general reference to the ECtHR can be found in the ***Nold case***[1] of 1973, as well as in the ***Rutili*** **decision**[2], further confirmed in ***Johnston***[3] and ***Heylens***[4]. The emergence and development of human rights protection in the Union must be attributed to a large extent to the ECJ's "activist" case law, and to its gradual judicial dialogue with the ECtHR (Harpaz, 2009, 32, 126). It was only in the late eighties that EU Member States started considering the insertion of human rights provision in EU primary law (Rodean, 2012). The Single European Act (1986) contained a reference to human rights (and to the ECHR), at least in its preamble. The Amsterdam Treaty (1997) referred to respect for human rights as of the principles on which the Union is founded, and in 2000, the EU adopted its own comprehensive catalogue of human rights. Today, this practically unanimously confirmed need for EU's joining to the ECHR finds its legal grounds in the Article 59, paragraph 2 of the European Convention of Human Rights, which says that: "The EU can join this Convention", and in context of the Protocol 14 of the ECHR, put into force on 1 June 2010. Although the fundamental rights, as a general principle of the European Community Law, i.e. the EU Law, are recognised and enjoy protection by the European Court of Justice of the EU, already in 1960, through the known cases of **Stauder and International Handelsgesellschaft**[5], it is still considered that it was with the Lisbon Treaty that the EU provided maximum protection of these rights. Namely, according to this Treaty, and in accordance with the EU Charter for Fundamental Rights, the human rights are more deeply and more profoundly determined as EU's core and essential values. The new establishment of the protection of the fundamental rights in Europe opened important issues and dilemmas about the relations between the EU legal order, the EU Charter and the European Court of Justice on one hand, and the ECHR, and the European Court of Human Rights case law, on the other. This paper will analyse the current issues related with the recent negative opinion issued by the ECJ concerning the draft-agreement for the EU accession to the ECHR despite the vast consensus for its acceptance by the Member States and by the European institutions that were present at the hearing on 5-6 May 2014. The debate on the role of the ECHR in EU law, and on the possible accession of the EU to the Convention, has actually intensified throughout the EU integration process.

**Key words: European Convention for the Protection of Human Rights (ECtHR), Charter of Fundamental Rights of the EU, European Court of Human Rights (ECHR), Court of Justice of the European Union (ECJ), European Union (EU), Draft Agreement on the Accession**

## 1. Several Aspects from the Chronology of the Process of the EU Accession to the ECHR

[1] **Case 29/69, Stauder v Ulm (1969) ECR 4119; Case 11/70, Internationale Handelsgesellschaft v Einfuhrund Vorratsstelle Getreide (1970) ECR 1125.**
[2] **Case 36/75, Rutili (1975) ECR 1219, para 32.**
[3] **Case 222/84, Johnston (1986) ECR 1651.**
[4] **Case 222/86, UNECTEF v Heylens (1987) ECR 4097.**
[5] **Case 29/69, Erich Stauder v City of Ulm-Socialamt, (1969) ECR 419; Case 11/70, International Handelsgesellschaft mbH v Einfuhr-und Vorratstelle für Getreide und Futtermittel, (1970) ECR 1125.**

The need for EU accession to the ECHR, for the first time, was suggested by the European Commission in 1979, as it would contribute to the coherence of the human rights protection in Europe, and more specifically in the EU.[6]

In this sense, it must be pointed out that the initial opinion of the European Commission in its 1976 report, considering accession as "not necessary" since fundamental rights laid down in the ECHR "are recognized as generally binding in the context of (EU) law".

In the years that followed, number of positive, as well as negative opinions, were presented. In 1996 for example, in Opinion 2/94, the ECJ ruled that as European Community law (as it then was) stood at that time, the EC could not accede to the ECHR. Only a Treaty amendment could overturn this judgment, and in 2009, the Treaty of Lisbon did just that, inserting a new provision in the Treaties that required the EU to accede to the ECHR (Article 6(2) TEU).

Namely, with article 6(2) of the Treaty for the Functioning of the EU[7], the Union secured the legal grounds for the EU accession to the ECHR, highlighting not only the commitment of the Member States to allow this process within the EU legal system, but also within their membership in the Council of Europe as co-signatories of the ECHR[8] and the Protocol No.14[9]. The Lisbon Treaty also added a Protocol No. 8 to the Treaties, regulating aspects of the accession, as well as a Declaration requiring that accession to the ECHR must comply with the "specific characteristics" of EU law. However, these new Treaty provisions could not by themselves make the EU a contracting party to the ECHR. To obtain that outcome, it was necessary for the EU to negotiate a specific accession treaty with the Council of Europe institutions (Peers, 2014).

In addition, let us see a brief chronology of this process (Nanclares, 2013).

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

The official talks for the EU accession to the ECHR started on 7 July 2010 between **Thorbjørn Jagland,** Secretary General of the Council of Europe and **Viviane Reding**, then vice-president of the EC. The Human Rights Committee assigned the first task to an informal group composed of 14 members (seven from the EU members states and seven from the non member states) to elaborate the accession instrument. These members were elected based on their expertise. In the period from June 2010 to July 2011, this informal group had eight

[6] **European Commission, 'Memorandum on the accession of the Communities to the European Convention on Human Rights', COM (79) 210 final.**

[7] **http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF.**

[8] **http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF.**

[9] **http://conventions.coe.int/Treaty/en/Treaties/Html/194.htm.**

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

In June 2011, the working group completed its work and submitted a draft accession agreement together with the report which contained the explanations. In January of 2011, delegations from both European courts discussed the EU accession to the ECHR, putting the emphasis on the future connection between the two courts in context of specific cases launched against the EU and within the ECHR system.

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

This ad-hoc group held four meetings in Strasbourg[10]. On 5 April 2013 the negotiators from the 47 member states of the Council of Europe and the EU finalized the draft treaty for the EU accession to the ECHR. After a long negotiation process, this accession treaty in 2013 was agreed in principle.

On 18 December, 2014, the ECJ delivered negative opinion of the EU accession to the ECHR, insisting that "accession must take into account the particular characteristic of the EU". It stated that the EU accession to the ECHR under the provisions of the current draft agreement would undermine the autonomy and primacy of EU law.[11]

The Court notably expressed concerns about the affect of the accession on internal relations between member states and the EU, given that "as regards the matters covered by the transfer of powers to the EU, the member states have accepted that their relations are governed by EU law to the exclusion of any other law", and that "EU law imposes an obligation of mutual trust between those member states".

The Court have also pointed out that under the current draft agreement the ECtHR would be able to adjudicate disputes on the interpretation of EU law, undermining the primacy of the ECJ in this regard.

The Court also rejected the co-respondent mechanism, considering that "the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States", and that it "could adopt a final decision in that respect which would be binding both on the Member States and on the EU."[12]

To permit the ECtHR to adopt such a decision would risk adversely affecting the division of powers between the EU and its Member States. The Court also expresses its view on the procedure for the prior involvement of the Court. The question whether the Court has already given a ruling on the same question of law as that at issue in the proceedings before

---

[10] On 21 June 2012, 17-19 September 2012, 7-9 November 2012 and 21-23 January 2013.

[11] In **its Opinion 2/13, ECHR, EU: C2014:2454, delivered on 18 December 2014, the Court of Justice has blocked the path for the accession of the EU to the European Convention of Human Rights**. This outcome may have come as a slight surprise for all the Member States and EU institutions that participated in the hearing before the ECJ on 5 and 6 May 2014, as part of the proceedings for an Opinion on the draft agreement on EU accession to the Convention. At that hearing there seems to have been a far-reaching consensus among the invited participants that the draft accession agreement should be considered compatible with the EU Treaties. It may also come as a surprise for all those commentators who have explored and accepted the compatibility of the final draft agreement with the fundamental principles of EU law. **Editorial comments, The EU's Accession to the ECHR- a "NO" from the ECJ!, Common Market Law Review 52, 1-16, 2015, Kluwer Law International,**
http://www.kluwerlawonline.com/abstract.php?id=COLA2015001.

[12] ECJ delivers negative opinion on draft accession agreement of EU to ECHR, 20 December, 2014, Research Project on Shared Responsibility in International Law, http://www.sharesproject.nl/news/ecj-delivers-negative-opinion-on-draft-accession-agreement-of-EU-to-ECHR.

the ECtHR can be resolved only by the competent EU institution, that institution's decision having to bind the ECtHR.

To permit the ECtHR to rule on such question would be tantamount to conferring on it jurisdiction to interpret the case-law of the Court. Also the Court observes that the draft agreement excludes the possibility of bringing a matter before the Court in order for it to rule on a question of interpretation of secondary law by means of that procedure. Limiting the scope of that procedure solely to questions of validity adversely affects the competences of the EU and the powers of the Court. In the light of the problems identified, the Court concludes that the draft agreement on the accession of the EU to the ECHR is not compatible with the EU law.[13]

## 2. Four key reasons why the EU needs to join the ECHR

Pointing out the legal grounds for the official EU accession to the ECHR, and having in mind the compulsory application of the EU Charter for Fundamental Rights (Douglas-Scott 2011; Weiss, 2011) there are two legal regimes that are undoubtedly created in context of the protection of the rights and freedoms in the Union, manifested through two different legal institutions: the European Court on Human Rights in Strasbourg and the EU Court of Justice in Luxemburg.

It is well known that the first court is a court of the Council of Europe, whose main authority is to protect the human rights and freedoms in Europe, as well as to monitor the protection of the rights in the CoE member states, in capacity which primarily involves the issues that concern the quality of the realization and the protection of the national rights in these countries.

Unlike this court, the EU Court of Justice (also known as ECJ) is not considered guardian of the human rights *per se*, but an EU legal institution whose main task, first and foremost, is to support the process of economic integration among the different member states, so then it can expand its mandate on issues related with the understanding and the application of the EU law, or the national law deriving from it or which is in accordance with the EU Law. This authority certainly includes the fundamental freedoms and rights within the EU law. There are at least four reasons why the EU accession to the ECHR is considered necessity. Let us see them in the following order.

The **first reason** for accession lies in the fact that individuals, in the present situation, can not file a complaint directly against the EU before the ECtHR in case of violation of one of the rights contained in the ECHR. As the EU is not a party to the Convention, complaints directed against the EU are considered today as inadmissible *ratione personae* by the ECtHR (Dollat 2010, 557). In practice, the individuals could only challenge EU decisions or legislation under very limited circumstances.

The **second reason** justifying the need for accession relates to the responsibility potentially endorsed by member states for violations of the ECHR having their origin in EU law. The Member States are responsible by the ECtHR for infringements of the Convention coming from the EU law. This principle is actually established by the European Commission of Human Rights in the ***X v Germany decision*** from 1958: "if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligation under the first treaty it will be answerable for any resulting breach of its obligations under the earlier treaty" (Paul De Hert; Fisnik Korenica 2012, 878).

[13] Opinion 2/13, Court of Justice of the EU, http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-12/cp140180en.pdf.

This statement combines with the generally accepted international law principle of the relativity of treaties.

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

The **fourth reason** that supports the EU accession is that this could globally contribute to a higher degree of consistency in the human rights protection framework in Europe. The accession would lead to the suppression of the "schizophrenic situation" (Salignant 2004, 72), between the EU and its member states concerning the attribution of responsibility before the ECtHR, whereby a member state is potentially held responsible for a violation of the ECHR rooted in EU law (Vanbellingen 2014, 11).

## 3. Plurality in the standards for protection of the human rights – positive and negative effects

Although there is no formal connection between the two courts, it is still worthwhile noting a certain degree of overlapping in the part where the EU member states are also members of the Council of Europe. With the entry into force of the EU Charter, the EU Member States undoubtedly became subject of three different systems for protection of the human rights: 1. The system set by the Charter within the Union; 2. The system set by the European Court on Human Rights in Strasbourg with the direct application of the European Convention on Human Rights; and 3. The national legal system of the EU member states (de Vries, 2013).

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

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

On the other hand, this plurality can serve as a ground for increased insecurity about the European human rights standards. For example, the two institutions can have different positions and opinions on the application of certain rights and can view these rights from a different perspective and in a different manner, which can lead, in certain cases, to contradictory messages to the member states. This is a very real and possible threat because of the fact that, unfortunately, there is no legal connection or hierarchy between the two institutions. A case which involves the right to private and family life, and in which Luxemburg Court decided that this right does not refer to the companies (***Hoechst AG v.***

***Commission*)**[14], while the Strasbourg Court case later decided that it can be applied (***Niemietz v. Germany)*[15]**,** is a direct example for the possibility of this difference in opinions. Although this case is an exception and not a general rule, its existence does demonstrate the possibility for similar cases in the future.[16]

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

For the sake of the truth, the two institutions, faced with real problems in the practicing of the law, have made several attempts to deal with these challenges through so called forms of informal cooperation in the legal cases (Kuijer, 2010).

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

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

## 4. Draft-agreement for the EU accession to the ECHR and the autonomy of the EU legal order

The issue of compatibility between the draft-agreement for the EU accession to the European Convention on Human Rights (ECHR) and the autonomy of the EU legal order is of crucial importance, having in mind the autonomous position of the institutions in the system and the EU law within this legal order. The main dilemma, as well as the main challenges that the EU is facing with, are related with the future relation between the EU Court of Justice and the European Court on Human Rights after the EU accession to the ECHR, and, on the other hand, on the impact of the decisions of the two courts.

---

[14] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61987CO0046:EN:PDF

[15] http://sim.law.uu.nl/sim/caselaw/Hof.nsf/e4ca7ef017f8c045c1256849004787f5/4a8709d98fbfacf5c1256640004c19eb?OpenDocument

[16] http://spice.stanford.edu/docs/human_rights_protection_in_europe_between_strasbourg_and_luxembourg/

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

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

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

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

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

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

In this context, Germany submitted additional clarifications regarding the effects that the ECJ will face with after the implementation of the so-called "margins of discretion" that would be implemented in the decisions of the European Court on Human Rights. But, it seems that these additional clarifications have omitted the fact that the principle of **self-sustainability of the international law is automatically part of** the EU legal order and that this principle has a direct effect.

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

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

On the other hand, we should pointed out that the ECJ practice regarding the autonomy of the EU legal order is not fully acceptable, because the EU concept for legal autonomy gives significant level of discretion to the ECJ. And it seems that the Court uses this discretion when it rejects every agreement that it finds unacceptable to a certain degree, without having to list the reasons for this rejection first. The assumptions are that this attitude of the ECJ come as a result of the provided "watchdogs" incorporated in the negotiating process, as early as in the time of writing the so-called "discussion document."

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

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

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

### 5. The EU accession to the ECHR and the New ECHR Protocol 16

On October 2, 2013, the Committee of Ministers of the Council of Europe opened for signing the Protocol 16 of the European Convention on Human Rights. This new protocol, titled as "Protocol of dialogue" by the President of the ECHR **Dan Spillman**, opened a possibility for the supreme courts of the ECHR signatories to ask on certain "principle issues related with the understanding or with the application of the rights and freedoms defined in the convention and its protocols."

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

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

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

The ECJ President **Mr Scouris** disagrees with this position, and engaged in an open debate with **Hans Cramer Ph.D., Commission's agent**, at the end of the hearing in the Court on the risks the Protocol 16 opposes to the EU legal autonomy. According to President Scouris, if one bare in mind the EC position that the ECHR can occupy the EU law in identical way as any other international treaty, according to the Article 216 of the EU Treaty, it will mean that the ECJ doctrine "Haegeman jurisprudence" will also be applied with regard to the ECHR. According to this doctrine, the ECHR provisions can be directly applicable also by the domestic courts within the scope of the EU Law. President Scouris also presented a hypothetical situation in a form of a question, asking what if the issue of ECHR application is put before a national court of an EU member states, can this be subject of prior procedure by the ECJ?

According to Mr Scouris, if the member state supports the Protocol 16, there is a possibility for so-called "forum shopping" also with the domestic courts. He pointed a hypothetical case: "**Let us assume that the ECJ has already given an opinion on a case presented by a national court in first instance. Does this mean that, according to the *CILFIT* doctrine, the same court should also consult the ECHR for a second prior opinion?"**

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

## 6. The scope of the problem

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

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

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

On the other hand, this problem will not come up when the national Supreme Court is obliged according to the Article 267 of the EU Treaty, to submit a request for prior procedure in front of the ECJ. In context of the Article 4(3) of the EU Treaty and the Article 344 of the Treaty for the Functioning of the EU, this provision will stand in the path of the so-called "forum shopping" by the domestic courts. The present concern is more focused on the cases where, because of the prior opinion of the of the ECJ asked by a lower court and **in accordance with the CILFIT doctrine, the Supreme Court of a certain member state will no longer be obliged with the Article 67 of the TFEU, when it can address the ECHR for a "second" prior opinion? What happens in these cases?**

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

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

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

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

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

Which are the alternatives for the ECHR in this case? To answer this question, we have to keep in mind that the ECHR has always been quite nervous, especially when it comes to the autonomy of the EU law. This nervousness is evident not only through the ECHR precedent law, but also through its efforts to secure participation in the EU institutions,

predominantly in the European Commission, as a third party when the application of the EU law is decided. Having in mind that the protection of the autonomy of the EU law is one of the key principles on which the draft-accession treaty is based, and in context of the Protocol 8 and the Lisbon Treaty, this principle is explicitly supported by all negotiating parties of the Council of Europe and the ECHR, who clearly manifested that the ECHR has no interest to get involved in the autonomy of the EU law.

It is not its competence, it's its hask.

Under these circumstances, the question is how realistically can we expects the panel of the ECHR, which is in charge of making the selection between the demands for advisory opinions, to accept the so-called "forum shopping court", having in mind the fact that this institute is the one that raises the question for the EU law.

**7. How much autonomy is needed in the field of the fundamental rights?**

One needs to make a general division between the fundamental rights on one hand, and all other rights on the other, and to answer the question whether all fundamental rights can be subject of analysis? It is a fact that there is only one area, more specifically the Article 52 and the Article 53 of the EU Charter on Fundamental rights through which the EU law limits its own autonomy, having in mind the fact that these rights are directly "borrowed" from the ECHR.

The provision reads: "When the Charter contains rights that correspond directly with the ECHR, the meaning and the scope of these rights remain the same as those determined in the ECHR. This provision does not obstruct the EU law to provide more extensive protection." According to this provision, the Charter calls on the Convention when determining the minimum level of protection of the determined rights, whereas the EU law agrees that it should not read this right completely autonomously and should indirectly rely on the ECHR.

In this limited space, the issues under the scope of the EU law can at the same time be issues under the Convention and vice-versa. There are two possible scenarios also for this situation. The first scenario is that in all cases where the Article 267 of the TFEU is applied there is no direct threat for the autonomy of the EU law, having in mind the fact that this provision protects the ECJ monopoly vis-à-vis the EU law, including the protection of the fundamental rights with the EU law.

On the other hand, in exceptional cases when this provision is not applied and when the ECHR is called to give an advisory opinion, and if the ECHR accepts to give this opinion, this by definition will be taken as "a principle issue related with the reading and the application of the rights and freedoms defined with the Convention and its protocols."

**As a result of the above said, it is quite logical for the national courts of the EU member states to be appropriately reminded of their obligations coming from the Article 267 of the TFEU when they apply the Protocol 16, but also of the supreme autonomy of the ECJ, when it comes to the reading of the EU law. Still, should this happen, the compulsory legal restrictions for the use of this Protocol will be considered**

**disproportionate and unjustified. They can be a threat for the future development of the system of the Convention as whole, much more than the Protocol can serve as a threat for the autonomy of the EU Law. This is considered the opposite from what is expected, that this is a purely internal issue for the EU Law.**

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

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

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

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

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

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

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

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

## 8. Conclusion

**The EU Court of justice has decided that the EU accession to the ECHR is not in accordance with the EU law.** The decision was published on 18 December 2014 in Luxemburg. In this decision, the Court, despite the conclusion that the problem with the lack of legal grounds for the EU accession to the ECHR has been overcome with the Lisbon Treaty, says that the EU cannot be considered as a state, which means that this accession should take into consideration the specifics of the Union, which is strictly demanded from the conditions under which the accession is subject of negotiations. By explaining this situation, the Court in fact says that as a result of the accession, the ECHR, as any other international agreement signed by the EU, will become compulsory for the EU institutions, as well as for its member states, and therefore it will be one integral part of the EU law. Under these circumstances, the EU, as any other agreed party, will become subject of external control aimed at securing the rights and freedoms foreseen with the ECHR.

Therefore, the EU and its institutions will be subject of the control mechanisms foreseen in the ECHR, and particularly of the decisions of the ECtHR. The Court further on underlines that it is necessary for the concept of external control to define that, on one hand, the decisions of the ECtHR based on the ECHR will be compulsory for the EU, and its institutions, and, on the other hand, to determine that the decisions of the EU Court of Justice related with the rights recognized with the ECHR will not be compulsory for the ECtHR.

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

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

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

So, for the EU and its members to be viewed as agreed parties not only in the relations with the non-EU states, but also in the relations among themselves, the ECtHR will be allowed to demand every member state to check whether the other members respect the fundamental rights, although the EU law determines the obligation for mutual trust among the

member states. In this situation, the Court believes, the accession can seriously obstruct the balance within the EU and can undermine the autonomy of the EU Law.

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

The Court further on concluded that the draft agreement does not contain provisions that will regulate the relations between these two mechanisms. Therefore, as a logical outcome of this hypothetical situation, the EU Court of Justice will have exclusive authority in overcoming disputes among the EU member states, but also in disputes involving EU member states when it comes to their coordination with the ECHR. Although the draft agreement does not consider the case law of the Court as an instrument that would be used for overcoming the disputes between the agreed parties in accordance with the ECHR, still this is not enough to protect the exclusive competence of the EU Court of Justice. The draft agreement still leaves a possibility for the EU or its members to be able to file an application to the ECtHR when it comes to violation of certain provisions from the ECHR by a given member state, or by the EU when it comes to the EU Law.

The existence of this possibility underestimates the conditions determined in the TFEU. Under these circumstances, the Court believes, the draft-agreement can be in accordance with the TFEU only if the disputes among the EU member states, or the disputes between the EU members with regard to the application of the ECHR in context of the EU law are excluded from the authority of the European Court on Human Rights. Also, the correspondent mechanism contained in the draft-agreement has for its goal to provide guarantees that the proceedings led in the EctHR by the non-EU countries and individual applicants are specifically addressed to the EU member countries and/or to the EU. The draft-agreement stipulates that the agreed party will become a correspondent either by accepting the invitation from the ECtHR, or with the decision passed by this Court, based on its request. If the request from the EU or its member state leaves space for intervention as correspondents in a case before the European Court on Human Rights, they must confirm that the conditions for their participation have been met.

The ECtHR can pass a final decision that would be compulsory for the member states, but not also for the EU. This, in fact, poses a risk of disturbing the division of power between the EU and its members.

With regard to the procedure for early involvement, the Court has taken a position that the issue whether the Court has given an opinion or whether it has decided on a specific issue

in a procedure led before the ECtHR, can be decided only by a competent EU institution which, as part of its decisions, should authorize the ECtHR judges. The Court has also said that the draft-agreement excludes the possibility for passing the case before the Court in context of deciding on issues related with the secondary EU law. Limiting the scope of the procedure only on issues related with their validity will seriously influence on the competences of the EU and on the power of the Court.

The Court has also analysed the specific characteristics of the EU Law when it comes to the prior procedure on issues related with the common foreign and security policy. The Court has noted that as the things are set at the present with the EU Law, the specific adopted acts do not fall under the scope of the prior procedure by the Court. This is important for the judicial power determined in the treaties, and as such it can only be explained through the EU Law.

However, with the EU accession to the ECHR, the European Court on Human Rights will have the competence to assess the compatibility of these acts, actions and activities with the ECHR. This will cause lack of trust not only in the part of the rights guaranteed with the ECHR, but also in the part of the exclusive prior procedure on these acts and their coordination with the EU Law to be entrusted to a non-EU body.

Therefore, the Court says that the draft-agreement has failed to take into consideration the specific characteristics of the EU Law vis-à-vis the early procedure on the acts, actions and activities and their coordination with the EU Law, in the part of the common foreign and security policy. Also in the part on the other indicated problems, the Court has concluded that the draft-agreement for the EU accession to the ECHR is not in accordance with the EU Law.

**REFERENCES:**

**Journal Article**

1. De Vries, Sybe A. 2013, "EU and ECHR: Conflict or Harmony?", Utrecht Law Review, Vol. 9, Issue 1, http://www.utrechtlawreview.org/Volume 9
2. Dollat, Patrick 2010, "Der teufel steckt im detail": de l'adhesion de l'Union Européene á la CEDH et de ses vicissitudes…", 542 Revue du Marché Commun et de l'UE 556,

3. Douglas-Scott, S. 2011, „The European Union and Human Rights after the Treaty of Lisbon", Human Rights Law Review: 645-682,

4. José Martín Y Pérez de Nanclares 2013, "The accession of the European Union to the ECHR: More than just a legal issue", WP IDEIR nº 15, Cátedra Jean Monnet, Prof. Ricardo Alonso Garcia, http://pendientedemigracion.ucm.es/centros/cont/descargas/documento38813.pdf.

5. Kuijer, Martin 2010, "The Accession of the European Union to the ECHR: a gift for the ECHR's 60th Anniversary or an unwelcome Intruder at the Party?", Amsterdam Law Forum, VU University Amsterdam,

6. Harpaz, Guy 2009, "The European Court of Justice and its relations with the European Court of Human Rights: The guest for enhanced reliance, coherence and legitimacy", 46 CML Rev. 105: 32-126.

7. Paul De Hert & Fisnik Korenica 2012, "The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the EU's Accession to the ECHR", 13 German L J 874

8. Peers, Steve 2014, EU Law Analysis, Expert insight into EU law developments, Thursday, 19 December, http://eulawanalysis.blogspot.com.2014.

9. Rodean, Neliana 2012, "Legal Aspects of Accession of EU to ECHR", 12 (15), Global Journal of Human Social Science 11,

10. Salignant, Claire 2004, "The Impact of the Emergence of the European Union as a Human Rights Actor on the Council of Europe", 4 BYIL 55:72.

11. Vanbellingen, Léopold 2014, LLM Paper, "The EU Accession to the ECHR, What's at Stake for the EU Institutions?", Universiteit Gent, Faculty of Law, LLM Advanced Studies in EU Law, Academic Year 2013-2014: 11.

12. Weiss, W. 2011, „Human Rights in the EU: Rethinking the Role of the European Convention of Human Rights after Lisbon", European Constitutional Law Review.