COMMENTS ON THE DRAFT AGREEMENT ON THE ACCESSION OF THE EUROPEAN UNION TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Jana Králová[1]

Abstract: This article comments on the draft *Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms* as agreed by the group of experts within the Council of Europe (CDDH-UE) in June 2011. The contribution describes the negotiation process and the procedural specificities of the Accession Agreement but focuses especially on the most important modifications of the Convention system that the EU's accession will bring. The article therefore analyses the functioning of the so-called "co-respondent mechanism" that aims to permit the EU and its Member States to defend EU law jointly before the European Court of Human Rights (ECtHR) as well as of the mechanism that should ensure the possibility of the Court of Justice of the EU to assess the compliance of the EU act with fundamental rights before its assessment by the ECtHR. With respect to the co-respondent mechanism, the article concentrates in particular on its scope of application as illustrated on the recent case-law of the ECtHR but also on the appearance of the co-respondents before the ECtHR as well as on the impacts of this mechanism on the applicant. In its last part, this contribution examines the institutional issues of EU accession to the Convention, especially the problems related to EU voting rights within the Committee of Ministers of the Council of Europe.

Resumé: Tento článek se zabývá návrhem *Dohody o přistoupení Evropské unie k Úmluvě o ochraně lidských práv a základních svobod*, na němž byla v červnu 2011 nalezena shoda skupinou expertů ustavenou v rámci Rady Evropy (CDDH-UE). Příspěvek popisuje proces vyjednávání Dohody a její procesní specifika, zaměřuje se však zejména na zásadní změny systému Úmluvy, které přistoupení Unie přinese. Článek proto analyzuje fungování tzv. „mechanismu spolužalovaných", jehož cílem je zajistit, aby EU a její členské státy mohly obhajovat právo EU před Evropským soudem pro lidská práva (ESLP) společně, stejně jako fungování mechanismu, který má Soudnímu dvoru EU umožnit posoudit soulad aktu EU se základními právy před tím, než tak učiní ESLP. V souvislosti s mechanismem spolužalovaných se článek soustředí zejména na jeho rozsah použití, který je ilustrován na judikatuře ESLP z poslední doby, zabývá se ovšem i způsobem vystupování spolužalovaných v řízení před ESLP, jakož i dopady tohoto mechanismu na stěžovatele. Poslední část příspěvku je věnována institucionálním otázkám přistoupení EU k Úmluvě

[1] The author works for the EU Law Department of the Ministry of Foreign Affairs of the Czech Republic. However, the opinions presented in this contribution are solely those of the author and do not express the official position of the Ministry. Many thanks to Mr. Emil Ruffer for his useful comments on the draft of this contribution.

a především problematice hlasovacích práv zástupce Unie ve Výboru ministrů Rady Evropy.

Key words: Accession, Convention for the Protection of Human Rights and Fundamental Freedoms, Committee of Ministers, co-respondent mechanism, Council of Europe, Court of Justice of the EU, European Court of Human Rights, European Union, Parliamentary Assembly, responsibility.

On the Author: Jana Králová graduated from the University of Economics in Prague, Faculty of International Relations, in 2005 (Bc.) and the Charles University in Prague, Faculty of Law, in 2010 (Mgr.). From 2005 to 2007 she studied at Université Paris II Panthéon-Assas and Université Paris I Panthéon-Sorbonne where she received a Master's degree in International Public Law and Law of International Organisations (2007). Since 2008 she has been working in the EU Law Department of the Ministry of Foreign Affairs of the Czech Republic. She specializes in external relations of the European Union and the protection of fundamental rights within the EU.

I. Introduction

The accession of the European Community to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "Convention") was originally intended to compensate for the non-existence of a catalogue of fundamental rights of the Community. The European Commission proposed such accession already in 1979 but it was refused at first by the Council and subsequently also by the Court of Justice of the European Communities due to the absence of competence on the part of the Community to accede to the Convention.[2] In this context, the EU opted for drafting its own fundamental rights catalogue. The Charter of Fundamental rights of the European Union was proclaimed in December 2000 and by virtue of the Treaty of Lisbon was accorded the same legal value as the Treaties.[3] However, the Treaty of Lisbon also enshrined in Art. 6 (2) of the Treaty on European Union the legal basis for the accession of the Union to the Convention. Although the accession itself may be considered as redundant since the Charter constitutes a legally binding act that confirms the rights guaranteed by the Convention, the preparatory work for accession started immediately after the entry into force of the Treaty of Lisbon. The negotiations were formally launched in July 2010 and within less than one year the group of experts set up within the Council of Europe (the so-called "CDDH-UE") reached an agreement on the draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "Accession Agreement").

The aim of this article is to comment on the most important modifications of the Convention system that the EU's accession is very likely to bring. I will base my analysis on the draft Accession Agreement as agreed by the CDDH-UE

[2] European Court of Justice opinion 2/94 of 28 March 1996.

[3] The notion of the "Treaties" comprises the Treaty on European Union and the Treaty on the Functioning of the European Union.

in June 2011[4] and focus on the specific co-respondent mechanism as well as on the participation of the EU in the Council of Europe institutions ensuring the application of the Convention. The functioning of the co-respondent mechanism will be illustrated on the existing case-law of the European Court of Human Rights (hereinafter referred to as the "ECtHR") relating to EU law. Nevertheless, since the Accession Agreement also represents several procedural specificities, we will start with several remarks on the negotiation process and the procedure of the accession.

II. Negotiations on EU accession to the Convention

The Accession Agreement will be concluded between the EU on the one hand and the forty seven Contracting Parties to the Convention on the other hand. The specificity of this Agreement resides in the fact that the representatives of the EU Member States have participated in the process of its negotiation on both sides: within the Council of the EU but also within the institutions of the Council of Europe. This situation has required paying particular attention to the close coordination of the Member States' positions presented in Brussels and in Strasbourg.

Within the EU, the process of negotiation and conclusion of the Accession Agreement is governed by Art. 218 of the Treaty on the Functioning of the European Union (hereinafter referred to as the "TFEU"). Therefore, on 17 March 2010, the European Commission submitted to the Council the draft of the directives for the negotiations and after long and difficult discussions, on 4 June 2010, the Council successfully adopted these directives and authorized the European Commission to negotiate accession on behalf of the Union.[5] Within the Council of Europe, on 26 May 2010, the Committee of Ministers' deputies conferred on the Steering Committee for Human Rights (hereinafter referred to as the "CDDH") a mandate to elaborate with the EU the necessary legal instrument for the EU's accession to the Convention.[6] For that purpose, the CDDH established the above-mentioned informal working group CDDH-UE composed of fourteen experts (seven coming from the Member States of the EU and seven from the other Contracting Parties of the Convention) and the representative of the European Commission.[7]

[4] Document CDDH-UE(2011) 16 available on the website of the Council of Europe (www.coe.int).

[5] It was believed that the accession does not relate to the common foreign and security policy and consequently no reason was found to establish a negotiating team with the participation of the European External Action Service.

[6] According to the original mandate of the CDDH, the Accession Agreement should have been approved no later than 30 June 2011. Nevertheless, at the 1114th meeting of the Committee of Ministers' deputies, on 25 June 2011, the mandate of the CDDH was extended until 31 December 2011.

[7] The CDDH-UE was composed of experts who were nationals of Albania, Armenia, Croatia, Finland, France, Germany, Latvia, the Netherlands, Norway, Romania, Russian Federation, Switzerland, Turkey and the United Kingdom. They had been, however, chosen mostly on the basis of their personal expertise and experience and did not necessarily represent the positions of the State of their origin. A representative of the CAHDI and of the Registry of the ECtHR participated in the meetings as observers. For further details on the mandate of the CDDH-UE, see documents CDDH(2010)008 and CDDH(2010)010.

The negotiations were formally launched on 7 July 2010 by Viviane Reding, Vice-President of the European Commission, and Thorbjørn Jagland, the Secretary General of the Council of Europe. The meetings of the CDDH-UE took place in Strasbourg, the group reported to the CDDH and kept it regularly informed and also had several exchanges of views with the representatives of civic society. After each round of negotiations, the representative of the European Commission informed the Heads of Member States' Missions to the Council of Europe as well as the Working party of the Council on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP) that was designed as a special committee in consultation with which the negotiations were conducted. The European Parliament was also regularly kept informed about the progress of the negotiations.

In June 2011, after eight rounds of negotiations, the CDDH-UE reached an agreement on the draft text of three instruments: the Accession Agreement, the Explanatory Report to this Agreement and the amendment to the Rules of the Committee of Ministers for the supervision of the execution of judgments of the ECtHR.[8] Nevertheless, before opening the Agreement for signing, both documents are subject to approval by the CDDH, to an assessment by the Parliamentary Assembly and, especially, they must be adopted by the Committee of Ministers of the Council of Europe. Notwithstanding the appeals for a rapid EU accession to the Convention,[9] it is very probable that on the part of the EU, the signing of the Accession Agreement will be deferred due to the request submitted to the Court of Justice of the EU (hereinafter referred to as the "CJEU") to assess the conformity of this specific Agreement with the Treaties.[10] Moreover, the Accession Agreement can enter into force only after being ratified by the forty seven Contracting Parties to the Convention as well as by the EU; the completion of the whole process of accession could thus still take several years.[11]

III. Method and scope of the Accession

Protocol No. 14 enshrined in the Convention the legal basis for the accession of the Union and its entry into force on 1 June 2010 was thus an important precondition

[8] The meeting reports and working documents of the CDDH-UE are available on the website of the Council of Europe (www.coe.int). The drafts of the Accession Agreement, of the Explanatory Report as well as of the amendment to the Rules of the Committee of Ministers for the supervision of the execution of judgments of the ECtHR are included in documents CDDH-UE(2011)16.

[9] See, for instance, the Stockholm Programme adopted by the European Council in December 2009 (published in OJ EU C 115/1 on 4 May 2010) that calls for a rapid accession of the EU to the Convention (point 2.1).

[10] Request for opinion under Art. 218 (11) TFEU.

[11] Within the EU, the Council decision authorizing the signing of the Agreement as well as its decision on concluding the Agreement will be adopted unanimously; the adoption of the latter will be conditioned on the consent of the European Parliament and its entry into force will be subject to approval by the Member States in accordance with their respective constitutional requirements. In the Czech Republic (in accordance with Art. 49 letters a) and e) of the Constitution of the Czech Republic), the consent of both Chambers of the Parliament of the Czech Republic will be necessary before the ratification of the Agreement by the president of the republic.

for the initiation of the negotiations.[12] When drafting Protocol No. 14, the EU did not have the requisite competence to negotiate the necessary modifications to the Convention with respect to its eventual future accession. Consequently, these modifications could not have been included into Protocol No. 14 and have to be made directly by the Accession Agreement.[13] Therefore, its specificity resides in the fact that it will modify the Convention in order to permit the accession of the European Union, but at the same time, at the moment of the entry into force of the Agreement, the EU will immediately become a Party to the Convention; two steps that usually follow one another are thus unified into one.

However, it appeared to be unnecessary to enshrine all the details concerning the EU's accession directly into the Convention. Hence, the Accession Agreement contains two types of provisions: provisions amending the Convention and the inherent provisions of the Accession Agreement. The proposed amendments to the Convention are limited to the insertion of the legal basis for EU accession to the additional Protocols to the Convention as well as for the creation of a specific co-respondent mechanism, to the inclusion of the interpretation clauses with regard to terms referring to State entities and to several other technical modifications. More detailed arrangements related to the co-respondent mechanism and also to the institutional and financial issues with regard to the accession will form the inherent provisions of the Accession Agreement. The future Art. 59 (2) of the Convention will nevertheless lay down that the status of the EU with regard to the Convention and its Protocols is defined in the Accession Agreement. This reference should ensure that this Agreement will also be binding for any future Member of the Council of Europe. A new Member would thus ratify only the Convention as modified by Protocols No. 11 and 14 as well as by the Accession Agreement but not the Agreement itself.

As mentioned above, the Accession Agreement permits the accession of the EU not only to the Convention, as amended by Protocols No. 11 and 14, but also to its additional Protocols. This issue was the subject of lengthy debates within the Council. In order to find a compromise between those Member States that wished accession to all of the additional Protocols and those that pleaded, by contrast, for only a very limited accession, two stages should be ultimately discerned. In the first stage, the EU should accede, along with the Convention, to Protocols No. 1 and 6 that are the only two additional Protocols ratified by all EU Member States. At the same time, it is proposed to amend the Convention in order to also permit accession to the other additional Protocols in the eventual future second stage. Nevertheless,

[12] According to Art. 59 (2) of the Convention, as amended by Protocols No. 11 and 14, *"The European Union may accede to this Convention."* The last instrument of ratification of Protocol No. 14 was deposited by the Russian Federation on 18 February 2010.

[13] The scope of the necessary amendments was nevertheless analysed already when Protocol No. 14 was being drafted. After the entry into force of the Treaty of Lisbon, the document *Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights* elaborated within the CDDH in 2002 [CDDH(2002)010Addendum2; hereinafter referred to as the "CDDH report (2002)"] served as the starting basis for the discussions on accession.

the eventual future accession of the EU to Protocols No. 4, 7, 12 or 13 should be accomplished by a unilateral act of the EU.

For the sake of completeness it should be mentioned that by virtue of the Accession Agreement, the EU will also be bound by three agreements concluded within the Council of Europe that relate to the application of the Convention.[14] In order to avoid a cumbersome accession of the EU to these instruments, Art. 10 of the draft Accession Agreement simply provides that the EU shall respect the provisions of these agreements and also that their Contracting Parties shall treat the EU as if it were a Contracting Party.

IV. The co-respondent mechanism

Without any doubt, the introduction of the co-respondent mechanism represents the most important modification to the Convention. According to the draft Accession Agreement, its legal basis should be enshrined in Art. 36 of the Convention, an article that should be renamed *"third party interventions and co-respondents"*. The other necessary arrangements should be laid down in Art. 4-3 of the Accession Agreement.

The need to create the mechanism of co-responsibility of the EU and its Member States for violations of the Convention by EU law results from the specificity of the EU system, where the entity enacting a legal act may differ from the entity implementing it. As pointed out by the ECtHR in the *Bosphorus v. Ireland* case *"the Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations."*[15] Therefore, a Contracting Party can be held responsible under the Convention even if it does not entirely control the act the compliance with which entails the alleged violation of the Convention.

In this context, the aim of the co-respondent mechanism is to correct the applications brought against the Contracting Party to the Convention that is the author of the "original" implementing act but not of the implemented act which in fact is the basis of the alleged violation of the Convention. In cases where the application is brought against both Contracting Parties (the authors of the implementing as well as of the implemented act), the co-respondent mechanism should prevent the application against the author of the implemented act from being declared inadmissible *ratione personae*. In both situations, the mechanism seeks to enable the author of the implemented act to defend it before the ECtHR with the

[14] European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights of 5 March 1996 (ETS No. 161), General Agreement on Privileges and Immunities of the Council of Europe of 2 September 1949 and its Protocol of 6 November 1952 (ETS No. 002 and 010), Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe of 5 March 1996 (ETS No. 162).

[15] ECtHR judgment of 30 June 2005 (Grand Chamber), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application No. 450368/09, p. 153.

full rights of a Party to the proceedings and to ensure that, in principle, both co-respondents are bound by the decision of the ECtHR.

The above-mentioned CDDH report (2002), which outlined the possibility to create a "co-defendant" mechanism[16] and its basic framework, served as the starting point for the elaboration of more detailed conditions for triggering the mechanism and for the appearance of the co-respondents before the ECtHR as well as for the analysis of the impacts of the mechanism on the applicant. Nevertheless, the two issues that appeared to be the most difficult to agree on consisted of the exact scope of application of the co-respondent mechanism and of its relationship to the mechanism that should make it possible for the CJEU to assess compatibility with the fundamental rights of the EU act before its assessment by the ECtHR. As we shall see hereinafter, although these two mechanisms were first considered separately, the co-respondent mechanism should finally cover also the involvement of the CJEU.

1. Scope of application of the co-respondent mechanism

Originally, the co-respondent mechanism was aimed especially at situations where the Member States were implementing secondary EU law without having any margin of manoeuvre and where there consequently appeared a possible conflict between the Convention and the secondary EU law challenged before the ECtHR indirectly.[17] In these scenarios, the co-respondent mechanism would enable the Union to join the proceedings before the ECtHR in order to defend the compatibility with the Convention of the legal acts of its institutions.

The question was, however, how the co-respondent mechanism should apply in the case of primary EU law.[18] The solution ultimately adopted was that the Treaties should be defended before the ECtHR by the Member States as well as by the EU. Therefore, in the case of an application brought against the EU where there might be a conflict between EU primary law and the Convention, the Member States – the authors of the Treaties – should join the proceedings as co-respondents in order to defend them before the ECtHR.[19] Moreover, should an application be brought against the Member State(s) and should the alleged violation again reside in the Treaties, then the EU should become a co-respondent due to the fact that EU institutions are also involved in the elaboration and adoption of primary EU law.

With respect to the recent case-law of the ECtHR, the co-respondent mechanism is designed especially for the scenarios of *Bosphorus v. Ireland*, *Matthews v. the United*

[16] The original term of „co-defendant" used in the CDDH report (2002) was subsequently modified to „co-respondent" since this term reflects more precisely the aim of the mechanism.

[17] Secondary EU law is formed by the legal acts of EU institutions.

[18] Primary EU law is understood to be formed by the Treaty on European Union, the Treaty on the Functioning of the European Union as well as by any other instrument having the same legal value pursuant to these Treaties.

[19] The question of whether Member States should be obliged to join the proceedings collectively has been considered to be an internal matter of the EU that should be settled in the internal EU rules on the functioning of the co-respondent mechanism.

Kingdom and *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands.* However, its triggering in the very recent *M.S.S. v. Belgium and Greece* case could be also appropriate.

***Bosphorus v. Ireland*[20]**

The application against Ireland was lodged by a company incorporated in Turkey, *The Bosphorus Hava Yolları Turizm*. The applicant company had leased an aircraft from *Yugoslav Airlines (JAT)*, the national airline of the former Yugoslavia, which had been impounded by the Irish authorities on the basis of the *Council Regulation (EEC) No. 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia* (the lawful application of the Regulation to the case was subsequently confirmed by the CJEU[21]). The applicant company alleged that the impounding of its leased aircraft had breached its rights under Article 1 of Protocol No. 1 to the Convention.

The ECtHR found that Ireland was not absolved from its Convention responsibility even if *"the impugned interference was not the result of an exercise of discretion by the Irish authorities, either under Community or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from Community law and, in particular, Article 8 of Regulation (EEC) no. 990/93."*[22] Nevertheless, after having reviewed the Community's substantive and procedural guarantees, the ECtHR found that, at the relevant time, the protection of fundamental rights within the European Community could have been considered as being equivalent to the standard guaranteed by the Convention. Therefore, as Ireland had only implemented its obligations arising from its membership in the Community, the ECtHR presumed that Ireland had not departed from the requirements of the Convention and only reviewed whether this presumption could have been rebutted due to the manifest deficiency of the protection of the applicant company's Convention rights. The ECtHR nevertheless felt that this had not been the case and concluded that the presumption of equivalent protection was not rebutted.[23]

However, it is not evident that the ECtHR will continue to apply the concept of the presumption of equivalent protection even after EU accession to the Convention. Moreover, had the Court found a violation of the Convention, Ireland would not have had the possibility to annul or amend the Regulation adopted by the Council. Therefore, should a Bosphorus case be brought before the ECtHR after EU accession to the Convention, the EU should join the proceedings and both co-respondents – EU and Ireland – should jointly defend the Convention compliance of the Regulation and its application by the Irish authorities.

[20] ECtHR judgment of 30 June 2005, *op. cit.*

[21] C-84/95 Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others [1996] ECR I-3953.

[22] ECtHR judgment of 30 June 2005, op. cit., p. 148 and 152.

[23] *Ibid*, p. 165-166.

***Matthews v. the United Kingdom*[24]**

In contrast with the *Bosphorus* case, in *Matthews v. the United Kingdom* it was EU primary law that was at stake. The case originated in a refusal by the Electoral Registration Officer for Gibraltar of the applicant's application to be registered as a voter for elections to the European Parliament. The Office applied the *Act concerning the election of the representatives of the Assembly by direct universal suffrage* annexed to the *Council Decision 76/787/ECSC, EEC, Euratom* and recommended to the Member States for adoption in accordance with their respective constitutional requirements. The ECtHR found that the alleged violation of the right to vote (Art. 3 of Protocol No. 1 to the Convention) stemmed from the Act taken together with the Maastricht Treaty that had extended the competences of the European Parliament, which consequently started to play a decisive role in the legislative process of the Community. Since the Act as well as the Maastricht Treaty constituted international instruments freely entered into by the United Kingdom, and Art. 3 of Protocol No. 1 was applicable to the European Parliament, the United Kingdom was found responsible for the violation of the applicant's right to vote.[25]

When discussing the co-respondent mechanism within the Council, it was decided that the application of the mechanism should be limited only to the relationship between the EU and its Member States. Therefore, in the scenario of the *Matthews* case, the co-respondent mechanism would not enable other Member States to join the proceedings even if the Act as well as the Maastricht Treaty were adopted by all of them. On the contrary, the EU would become a co-respondent next to the United Kingdom because its institutions participated in the elaboration and adoption of both respective instruments.

***Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands*[26]**

The applicant association complained under Art. 6 (1) of the Convention that its right to adversarial proceedings had been violated as a result of a refusal by the CJEU to allow it to respond to the Opinion of the Advocate General in the preliminary ruling proceedings. The association lodged the application before the ECtHR against the Netherlands as well as against the European Community. As the Community was not a party to the Convention, the ECtHR found the application inadmissible *ratione personae* in so far as it was directed against it. However, the ECtHR considered the complaint against the Netherlands. Referring to the *Bosphorus* case, the ECtHR examined whether the procedure before the CJEU was accompanied by guarantees ensuring equivalent protection of the applicant's rights. The ECtHR gave weight to the possibility to reopen the oral proceedings, if the CJEU finds it necessary,

[24] ECtHR judgment of 18 February 1999, *Matthews v. the United Kingdom*, Application no. 24833/94.

[25] *Ibid,* p. 33, 44 and 54.

[26] ECtHR decision as to the admissibility, *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands,* Application no. 13645/05.

after the Advocate General delivers his or her opinion as well as to the fact that the request to reopen the proceedings is considered on the merits. Since the applicant association had not shown that the protection afforded to it had been manifestly deficient, the ECtHR found that the association failed to rebut the presumption of equivalent protection and rejected the application (in so far as it was directed against the Netherlands) as manifestly ill-founded.

In this case, the concern was again primary EU law and especially the Statute of the CJEU which has the form of a Protocol to the Treaties. After EU accession to the Convention, it should be possible to consider the application brought in this scenario against the EU as well as against the Netherlands with respect to both of them. In my view, the status of the Netherlands should be changed from that of the respondent to that of the co-respondent and the case should be assessed by the ECtHR against the EU and the Netherlands jointly.

M.S.S. v. Belgium and Greece[27]

The very recent judgment of the ECtHR in the *M.S.S. v. Belgium and Greece* case raised the question of compliance with the Convention of the so-called "Dublin II Regulation".[28] The applicant was an Afghan national who entered the European Union through Greece but applied for asylum in Belgium. However, the Belgian authorities felt that Belgium was not the country responsible for examining the asylum application under the Dublin II Regulation and transferred him back to Greece. The applicant then alleged before the ECtHR that by sending him to Greece, the Belgian authorities exposed him to a risk of inhuman and degrading treatment and that he was indeed subjected to such a treatment.

With respect to Belgium, the ECtHR first examined whether the Belgian authorities had a margin of appreciation when applying the Dublin II Regulation. Since Art. 3 (2) of the Regulation allows Member States to derogate from the general criteria of the Regulation determining the Member State responsible for examining an application for asylum,[29] the ECtHR found that there was clearly an important margin of manoeuvre and consequently did not apply the presumption of equivalent protection as, for instance, in the above mentioned *Bosphorus* case.

In the second step, the ECtHR reviewed whether the Belgian authorities should have regarded as rebutted the presumption that the Greek authorities respected their international obligations in asylum matters. In this respect the ECtHR gave weight to the fact that reliable sources reported practices which were manifestly contrary to

[27] ECtHR judgment of 21 January 2011, *M.S.S. v. Belgium and Greece*, Application no. 30696/09.

[28] Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 50, 25 February 2003).

[29] *"By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility..."*

the principles of the Convention as well as to the fact that the diplomatic reassurances given by Greece to the Belgian authorities were not sufficient. Moreover, the ECtHR also stated that the Belgian authorities systematically applied the Dublin II Regulation to transfer the applicants to Greece without considering the possibility of making an exception pursuant to Art. 3 (2) of the Regulation.[30] Therefore, the ECtHR found that the Belgian authorities knew or ought to have known that the applicant had no guarantee that his asylum application would be seriously examined by the Greek authorities and that they also had the means to refuse to transfer him to Greece.[31]

In my view, it would be appropriate to trigger the co-respondent mechanism also in this scenario. Regardless of the ECtHR's final findings, the allegations called into question the compatibility of the Dublin II Regulation with the rights enshrined in Art. 2 and 3 of the Convention. Therefore, after EU accession to the Convention, in my opinion the EU should join the proceedings in order to defend the Regulation before the ECtHR.[32] Moreover, as we will see in the next section, the application of the co-respondent mechanism would make it possible to submit the case to the CJEU for its assessment before it is decided by the ECtHR. This would be a way to avoid the delicate situations where the ECtHR reviews a situation covered by EU law without the prior involvement of the CJEU.

2. Involvement of the CJEU

The triggering of the co-respondent mechanism is closely related to the mechanism that should ensure the so-called "prior involvement of the CJEU". Even if the co-respondent mechanism and the involvement of the CJEU were originally considered separately, ultimately the application of the former is a precondition for the latter. In compliance with the principle of subsidiarity of proceedings before the EctHR, the aim of the involvement of the CJEU is to ensure it has the possibility to assess compliance with the fundamental rights of the EU act that is at stake in Strasbourg prior to the ECtHR ruling on the merits of the case.

After the EU's accession to the Convention, applications brought to the ECtHR against the EU will be admissible only if the applicant exhausts the remedies available to him before the CJEU. However, if EU law is challenged before the ECtHR indirectly through an act of a Member State implementing or applying it, the case could be brought before the ECtHR without being assessed by the CJEU. Since the request to the CJEU to give a preliminary ruling is not in the hands of the applicant, it cannot be viewed as an internal domestic remedy the exhaustion of which could condition the admissibility of the application before the ECtHR. Moreover, it could happen that the CJEU would not be requested to give a preliminary ruling even if the national jurisdiction would have an obligation to do so.

[30] ECtHR judgment of 21 January 2011, *op. cit.*, p. 352.

[31] *Ibid*, p. 358.

[32] However, the defense of the decision of the Belgian authorities not to make an exception pursuant to Art. 3 (2) of the Regulation and to transfer the applicant to Greece, as well as the defense of the situation in Greece, should be the responsibility of these two Member States.

Therefore, the draft Accession Agreement provides that if an action is brought against a Member State, the EU becomes a co-respondent to the proceedings and if the CJEU has not yet assessed the compatibility of the relevant EU law provision with the Convention rights at issue, it shall be afforded sufficient time to make such an assessment.[33] In order not to delay the proceedings before the ECtHR, the CJEU should give its ruling in the accelerated procedure. Its decision will not prejudice the subsequent consideration of the Convention compatibility by the ECtHR; it is however expected that the ECtHR will take into account the CJEU decision.

The mechanism is based on a proposal from judge Ch. Timmermans presented in the European Parliament in March 2010 and on the CJEU discussion document issued in May 2010.[34] Moreover, the necessity to ensure the prior involvement of the CJEU was confirmed in January 2011 in the *Joint Communication from Presidents of the ECtHR and the CJEU*.[35] Nevertheless, the Accession Agreement will provide only the basis for the mechanism and its concrete modalities will have to be laid down in the internal EU rules. Should these rules follow the conception expressed in the CJEU discussion document, the CJEU would be involved only when EU secondary law is concerned and would examine the validity of the EU act concerned.[36] However, we could think of a possibility to involve the CJEU also when primary EU law would be at stake before the ECtHR. Indeed, in this case the CJEU would not assess the validity of primary EU law but, by virtue of interpretation, could reconcile its interpretation with the fundamental rights. In my view, the draft Accession Agreement leaves room for this application.[37]

In any case, we can expect that the CJEU will be requested to give its ruling only in a very limited number of cases. With respect to the above-analyzed case-law of the ECtHR, the involvement of the CJEU would seem to be appropriate in the *M.S.S. v. Belgium and Greece* case and, if the possibility to involve the CJEU is also extended to primary EU law, than also in the *Matthews v. the United Kingdom* case.

3. Appearance of the co-respondents in the proceedings

During the negotiations, the aim of the EU was to ensure that the conditions for the triggering of the co-respondent mechanism are considered in Brussels rather than in Strasbourg. Therefore, the idea taken into account in the CDDH report (2002) that in certain circumstances the ECtHR could have the possibility to oblige the EU/the Member State(s) to join the proceedings as co-respondent(s) was rejected.

[33] Art. 4-3 (6) of the draft Accession Agreement.

[34] Document *"L'adhésion de l'Union Européenne à la Convention européenne des Droits de l'homme"* (available at: http://www.europarl.europa.eu/document/activities/cont/201003/20100324ATT71235/20100324ATT71235EN.pdf) and *"Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms"* (available at: http://curia.europa.eu/jcms/jcms/P_64268/).

[35] Document available at: http://curia.europa.eu/jcms/jcms/P_64268/.

[36] In its judgment the CJEU could thus declare the EU act invalid but could not annul it.

[37] Art. 4-3 (6) of the draft Accession Agreement read together with its Art. 3 (2) permits the involvement of the CJEU *"if it appears that … allegation calls into question the compatibility with the Convention rights at issue of a provision of European Union law…"* meaning the secondary but also the primary EU law.

Since the mechanism will permit holding the co-respondent entity responsible for the violation of the Convention even if the applicant's application is not directed against it, it was considered inappropriate to entitle the ECtHR to oblige the EU/ the Member States(s) to join the proceedings. In my view, the solution ultimately proposed in the draft Accession Agreement presents a balanced compromise that respects the powers of the ECtHR as the master of the proceedings but also takes into account the EU's concerns regarding the possible ECtHR assessment of the obligations of the EU Member States arising from EU law.

According to the draft Accession Agreement, the decision on the triggering of the mechanism should be left to the ECtHR. However, the reasoned request by the EU or the Member State(s) to become co-respondent(s) should be an important precondition for this decision and the ECtHR should only assess whether it is plausible that the conditions for triggering the mechanism are met. Thus, the triggering of the mechanism should in fact remain in the hands of the EU and the ECtHR decision should have a procedural character only. Moreover, if it appears at a later stage of the proceedings (again on the basis of the submissions of the co-respondents) that the conditions for triggering the mechanism are not met, it will be possible to terminate the participation of the co-respondent in the proceedings. In my view, this could be appropriate, for instance, in the *M.S.S. v. Belgium and Greece* case (should the co-respondent mechanism be triggered) if the CJEU is involved and finds that the exercise by the Belgian authorities of the discretion on the basis of Art. 3 (2) of the Dublin II Regulation does not fall under the scope of application of the EU law.

It is inherent to the co-respondent mechanism that the co-respondents should appear jointly in the proceedings before the ECtHR and, in order to prevent the ECtHR from assessing the modalities of implementation of EU law, the co-respondents should also be held jointly responsible in the ECtHR judgment. There may nevertheless be exceptions from this principle based especially on joint submissions of the co-respondents or on the decision of the CJEU, if involved.

The joint appearance of the co-respondents in the proceedings will require a high level of coordination between them when elaborating and presenting the submissions to the ECtHR. The functioning of the co-respondent mechanism therefore demands an important set of internal EU rules that should provide, among other things, the modalities of coordination of the co-respondents and their representation before the ECtHR, the rules on the execution of ECtHR decisions as well as on the payment of any just satisfaction potentially awarded by the ECtHR.

4. Situation of the applicant

In my opinion, the co-respondent mechanism will remedy the undesirable consequences of a cumbersome system of implementation of EU law and its introduction is therefore to the benefit of applicants. Without the co-respondent mechanism it would not be possible to bring an admissible application jointly against the author of the alleged violation of the Convention and the author of the act that

forms the legal basis for it. Also, the co-respondent mechanism could contribute to a more effective execution of ECtHR judgments since they should also bind the entity that enacted the act that was at the basis of the violation of the Convention and it is only the author of this act that is entitled to annul or to modify it.

Moreover, the co-respondent mechanism will not impose any additional duties on the applicants. The criteria of exhaustion of domestic remedies pursuant to Art. 35 (1) of the Convention and the admissibility of the application will be assessed only with respect to the respondent. Also, in the case of applications directed against the EU as well as against the Member States(s), the triggering of the mechanism will prevent the application against the author of the implemented act from being declared as inadmissible *ratione personae*. The applicant will also be given the possibility to submit its observations on the request of the EU/the Member State(s) to trigger the co-respondent mechanism, to intervene in the eventual proceedings before the CJEU and to make observations on its decision.

V. Institutional issues

Even though the co-respondent mechanism with the prior involvement of the CJEU could be considered as the most controversial issue of the accession, other problematic issues emerged during the negotiations – especially the EU requirement to have a right to vote in the institutions of the Council of Europe. The EU will be the first Party to the Convention that will not become a Member of the Council of Europe. Nevertheless, since Council of Europe institutions are supervising the application of the Convention, the aim of the EU was to ensure the right of its representatives to participate in the functioning of these institutions on an equal footing with the other Parties to the Convention.

According to the draft Accession Agreement, the EU should have its judge at the ECtHR with the same status and duties as the judges elected with respect to other Contracting Parties. Also, 18 Members of the European Parliament (MEPs) should be entitled to participate with the right to vote in the election of all judges of the ECtHR by the Parliamentary Assembly of the Council of Europe as well as in other functions exercised by the Assembly in relation with the election of judges.[38] In my view the MEPs could thus also participate, for instance, in the adoption of resolutions clarifying the criteria for the nomination of candidates to the ECtHR or concerning other related issues.[39] Although these rights of the EU as such had not been disputed during the negotiations, the most problematic issue would be the participation of EU representatives within the Committee of Ministers, where it appeared to be difficult to distinguish between the functions related to the application of the Convention and the other functions.

[38] According to Art. 6 of the draft Accession Agreement, the EU should be entitled to the same number of MEPs as the highest number of representatives to which a State is entitled pursuant to Art. 26 of the Statute of the Council of Europe.

[39] *Resolution 1646 (2009) on the Nomination of candidates and election of judges to the European Court of Human Rights*.

The Convention entrusts the Committee with more functions than the Parliamentary Assembly.[40] When exercising the explicit "conventional" functions of the Committee, the EU representative should participate with the same rights and duties as the representatives of the other Contracting parties to the Convention. The same should, however, also apply when the Committee acts on the basis of Art. 15 of the Statute of the Council of Europe and adopts the amending and additional Protocols to the Convention or other acts that are directly linked to the functioning of the Convention system.[41]

What proved to be problematic, however, was the common participation of the EU and its Member States in the supervision of the execution of ECtHR judgments. In practice, the decisions of the Committee are adopted by consensus and only exceptionally does the Committee resort to formal voting. Moreover, although the Committee of Ministers is a political institution of the Council of Europe, the execution of ECtHR judgments is not considered to be a matter falling under the common foreign and security policy of the EU and the positions and voting of the Member States are not coordinated. The situation will, however, partly change after the EU's accession. In cases where EU law will be at stake and the EU will be a respondent or a co-respondent in the proceedings before the ECtHR, the co-respondent mechanism and the principle of loyalty enshrined in Art. 4 (3) of the Treaty on European Union will oblige the EU and the Member States to coordinate their positions and voting.

The related concerns of the non-EU Parties to the Convention that these coordinated positions could prejudice the effective functioning of the Committee should be nevertheless cleared up by two guarantees. First, Art. 7 (2) of the draft Accession Agreement provides that the legal obligation to adopt coordinated positions of the EU and its Member States will arise only with respect to judgments against the EU and the judgments where the EU and the Member State(s) will be held jointly responsible. On the contrary, the obligation of coordination will not exist with respect to the judgments against the non-EU Parties to the Convention or judgments against EU Member State(s). Second, *the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements* (hereinafter referred to as the "Rules") should be modified in order to increase the participation of the non-EU Parties to the Convention in the adoption of resolutions concerning judgments where the EU and its Member States will be obliged to coordinate their positions.[42]

Both measures seem to be acceptable. The proposed text of Art. 7 (2) of the Accession Agreement only declares in which situations there exist a legal obligation to coordinate the positions within the EU and in which situations this obligation does not derive from the

[40] On the basis of the Convention, the Committee of Ministers may decide on a reduction of judges of the Chambers [Art. 26 (2)], it supervises the execution of friendly settlements [Art. 39 (4)] and of ECtHR judgments [Art. 46 (2-5)] and may request the Court to give advisory opinions on the interpretation of the Convention (Art. 47).

[41] Art. 7 of the draft Accession Agreement.

[42] The proposed modification of the Rules shall not form an integral part of the Agreement; it should be adopted by the Committee of Ministers at the same time as the Accession Agreement.

EU law. Moreover, this reassurance will not prejudice the potential coordination of Member States' positions also in these latter matters should a political will for such coordination appear. As a consequence of the intended modification of the Rules of the Committee, the non-EU Parties to the Convention will have a decisive role in the adoption of resolutions concerning judgments against the EU. This guarantee could thus be perceived as more questionable than the first one. However, as the formal voting is used only exceptionally at the Committee, the modified Rules will apply only very rarely. Therefore, this guarantee appears to be a quite satisfactory compromise compensating the non-EU Parties to the Convention for the specificities of the EU arising from its legal system

VI. Conclusion

The Agreement on the Accession of the EU to the Convention for the Protection of Human Rights and Fundamental Freedoms has an important number of specificities. The procedural ones arise from the fact that the EU Member States have not only formulated the EU position within the Council of the EU but at the same time they have participated in the negotiations within the Council of Europe as one of the Contracting Parties to the Convention. Another uncommon aspect seems to consist of the two simultaneous effects that the entry into force of the Accession Agreement will have: the Convention will be modified in order to permit the accession of the Union and, at the same time, the EU will be included among the Parties to the Convention. As regards the modifications of the Convention system that the EU's accession will bring, the most important is certainly the introduction of the co-respondent mechanism with the prior involvement of the CJEU. For the EU, these unprecedented instruments are a necessity arising from the complex system of implementation of EU law by EU Member States and the application of such law by EU institutions. It seems that the EU managed to convince the non-EU Parties to the Convention that these mechanisms do not create any inequitable benefits for the EU and its Member States but correspond only to the specificities of the EU legal system. However, its requirements as concerns the functioning of these mechanisms had to be reconciled with the characteristics of the system of the Convention. In my opinion, the draft Accession Agreement as agreed by the CDDH-UE represents a balanced compromise. The Agreement is subject to approval by the institutions of the Council of Europe and by the Union, and especially to ratification by all of the Contracting Parties to the Convention. Therefore, there is still a long way to go for the Agreement to enter into force. However, it is only after the EU becomes a Party to the Convention that it will be possible to evaluate whether the above mentioned specific mechanisms successfully contribute to preserving the specificities of EU law and to assess the effects of the joint participation of the EU and its Member States in the Convention system.