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A New Framework for Allocating International Responsibility: the EU Accession to the European Convention on Human Rights

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SHARES Briefing Paper

A New Framework for Allocating International Responsibility: the EU Accession to the European Convention on Human Rights

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Edited by Maarten den Heijer and André Nollkaemper¹

This briefing paper reflects on the manner in which the Draft Agreement on the Accession of the European Union (EU or Union) to the European Convention on Human Rights (ECHR or Convention) allocates international responsibility between the EU and its member States. In particular, it reviews whether the Agreement adequately addresses the gaps in human rights protection that presently arise from the specific relationship between the EU and its member States. It signals several outstanding issues and unresolved questions which require further attention in the negotiation and ratification process, but also in the application of the Agreement after it enters into force.

The briefing paper presents the outcomes of the expert seminar on *A New Framework for Allocating International Responsibility: the EU Accession to the European Convention on Human Rights*, held on 18 October 2013 in Amsterdam. The seminar was organised by the Amsterdam Center for International Law of the University of Amsterdam as part of the research project on Shared Responsibility in International Law (SHARES).²

The text of the briefing paper is based on the contributions by eight experts to the seminar: Pieter Jan Kuijper, Tobias Lock, Jörg Polakiewicz, Christiaan Timmermans (speakers), Antoine Buyse, Martijn de Grave, Maarten den Heijer and Cedric Ryngaert (discussants), as well as by other participants in the seminar.³ It also incorporates the views of the editors of this briefing paper.

¹ André Nollkaemper is professor of Public International Law at the University of Amsterdam and director of the SHARES Project. Maarten den Heijer is assistant professor of Public International Law at the University of Amsterdam and member of the SHARES Project. Thanks are due to the SHARES team for organising the seminar, especially Jessica Schechinger, and to Celine Vossen for research assistance.

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While the text seeks to integrate the views of all those experts, it is inevitable that not all speakers share all views expressed in this briefing paper. The final responsibility for the briefing paper rests with the editors.

1. The Draft Accession Agreement in context

EU accession to the ECHR has since long been deemed a necessary step in the maturation of the EU legal order, counterbalancing its incremental increase of powers, also in direct legal relations with individuals, with a set of well-defined fundamental rights. Even though fundamental rights have already acquired the status of primary EU law and are consolidated in the EU Charter of Fundamental Rights which became binding in 2009, EU accession to the Convention remains a decisive moment for the protection of fundamental rights in the EU. It will subject the EU to external human rights supervision, thereby ensuring adherence to international standards, specialized human rights scrutiny and the enforcement of human rights compliance. It is generally expected that it also fosters coherence in fundamental rights protection in the European Union and the Council of Europe.

The draft revised instruments pertaining to the EU accession to the ECHR are the outcome of negotiations between the Steering Committee for Human Rights (CDDH), which is an intergovernmental committee set up by the Committee of Ministers of the Council of Europe, and the European Commission, representing the EU. The instruments consist of a [Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms \(Draft Accession Agreement\)](#); a [Draft Declaration by the EU](#); a [Draft Rule to be added to the Rules of the Committee of Ministers concerning the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the EU is a party](#); a [Draft Model of Memorandum of Understanding](#); and a [Draft Explanatory Report to the Accession Agreement](#). The whole package is necessary for the accession of the EU to the ECHR. The Accession Agreement will only enter into force when all parties to the ECHR and the European Union have expressed their consent to be bound. The signature by the EU depends on several internal political and procedural steps. The European Commission has requested an opinion of the Court of Justice of the European Union (CJEU) on the compatibility of the instruments with the EU Treaties.⁴ Furthermore, a Council Decision must authorize the signature of the Accession Agreement.

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⁴ Opinion 2/13 (pending), [2013] OJ C260/32.

2. Issues of attribution and international responsibility

2.1. Closing responsibility gaps

The possibility to bring proceedings directly against the EU closes existing accountability gaps in the supervisory mechanism of the ECHR. The European Court of Human Rights (ECtHR or Court) is in its present case law mindful of the distinct legal order of the EU, and does not always subject actions of member States which originate in EU law to full judicial scrutiny.

On this point a distinction needs to be made between four types of scenarios involving the possible responsibility of the EU and one or more member States for human rights violations resulting from the legal intertwining between the EU and the member States.

The first scenario concerns activity of the EU itself, without involvement of the member States. Complaints concerning such activity are currently declared inadmissible by the ECtHR, as there are no actions or omissions on the part of a member State capable of initiating their responsibility, unless there are structural human rights weaknesses in the internal structure of the EU.⁵

The second are cases where an alleged human rights violation stems from primary EU law, i.e. the Treaties. Such violations may entertain the responsibility of the member States, which derives from them having entered freely into treaty commitments subsequent to the ECHR. Such pronouncements have been scarce however.⁶

The third and fourth scenarios concern member States implementing EU law. If implementation involves an exercise of discretion by the member State, it is subject to the full scrutiny of the ECtHR.⁷ If it is the result of a strict obligation stemming from membership of the EU, the ECtHR only verifies whether the EU protects fundamental rights in a manner equivalent to that of the Convention, and whether protection in the circumstances of the case has not been manifestly deficient. If there was a manifest deficit, then a full review would follow.⁸

The Draft Accession Agreement changes this picture as follows. It first and foremost ensures that the EU can be held responsible for violations resulting from its own sphere of activity. This follows from the very fact of accession and is also specified in Article 1(3) of the Draft Agreement (see Box 1). Second, in respect of primary Union law being incompatible with the ECHR, it provides for the possibility that both the member States and the EU can become respondent parties, and be held jointly responsible for any ensuing incompatibility with the ECHR (Articles 3(3) and 7).

⁵ E.g. ECtHR 9 December 2008, *Connolly v. 15 Member States of the European Union*, no. 73274/01; ECtHR 12 May 2009, *Gasparini v. Italy and Belgium*, no. 10750/03.

⁶ So far, the only case in which a violation of a member State on this basis was found was ECtHR 18 February 1999, *Matthews v. the United Kingdom*, no. 24833/94.

⁷ ECtHR 30 June 2005, *Bosphorus v. Ireland*, no. 45036/98, paras. 148, 157; ECtHR 21 January 2011, *M.S.S. v. Belgium and Greece*, no. 30696/09, paras. 338-40.

⁸ *Bosphorus v. Ireland*, n. 7, paras. 152-6.

Box 1

Article 1 – Scope of the accession and amendments to Article 59 of the Convention

3. Accession to the Convention and the protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf. Nothing in the Convention or the protocols thereto shall require the European Union to perform an act or adopt a measure for which it has no competence under European Union law.

4. For the purposes of the Convention, of the protocols thereto and of this Agreement, an act, measure or omission of organs of a member State of the European Union or of persons acting on its behalf shall be attributed to that State, even if such act, measure or omission occurs when the State implements the law of the European Union, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union. This shall not preclude the European Union from being responsible as a co-respondent for a violation resulting from such an act, measure or omission, in accordance with Article 36, paragraph 4, of the Convention and Article 3 of this Agreement.

In respect of implementing activity, the Draft Agreement confirms that such activity is to be attributed to the member State, regardless of whether the activity is discretionary or obligatory (Article 1(4), see Box 1). This does not, however, preclude the EU from being jointly responsible with a member State for a violation resulting from such an act (Articles 3(2) and 7, see Box 3).

2.2. The basis for responsibility

Perhaps the most fundamental set of questions raised by the Draft Agreement and the related instruments is on what basis wrongful conduct or responsibility under the Convention will be attributed to the EU and/or the member States.

Attribution of conduct is chosen as the basic rule in Article 1, paragraphs 3 and 4 of the Draft Agreement (see Box 1). This corresponds with the basic principle of international law that each State is responsible for its own conduct in respect of its own international obligations.⁹ The same principle applies to international organizations.¹⁰ The attribution clauses of the Draft Agreement are also in line with the ECtHR's case law that a Contracting Party can be held responsible under Article 1 of the Convention for all

⁹ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001) UN GAOR Supplement No. 10 (A/56/10) ch. IV.E.1, p. 33.

¹⁰ International Law Commission, *Draft Articles on the Responsibility of International Organizations, with commentaries* (2011) UN GAOR Supplement No. 10 (A/66/10) ch. V.E.1, p. 13.

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.¹¹

In the situation where a member State implements Union law, Article 1(4) does not preclude the EU from being responsible as co-respondent (see Box 1). This form of responsibility, also known as derivative responsibility or attribution of responsibility, is also recognised in international law. The International Law Commission (ILC) laid down in the 2011 Draft Articles on the Responsibility of International Organizations the rule, that an international organization incurs international responsibility if it circumvents one of its international obligations by adopting a decision binding member States, or authorizing member States to commit a wrongful act.¹²

Further, the Draft Agreement foresees that member States may be held responsible, together with the EU, for a violation of the ECHR that stems from primary Union law (Articles 3(3) and (7) Draft Agreement). This rule corresponds with Article 61 of the ILC Draft Articles on the Responsibility of International Organizations, which stipulates that a member State is responsible if it circumvents an obligation by transferring powers to an international organization, resulting in wrongful conduct. The inclusion of that rule in the Draft Articles on the Responsibility of International Organizations was in part based on the case law of the ECtHR. In *Matthews*, for example, the ECtHR held that the Convention does not exclude the transfer of competences to international organizations, provided that Convention rights continue to be secured and that member State responsibility therefore continues even after such a transfer. Responsibility then derives from the member State having entered into treaty commitments subsequent to the conclusion of the ECHR.¹³

Overall, the basic rules on attribution and responsibility in the Draft Agreement are in harmony with existing case law of the ECtHR and the work of the International Law Commission. In respect of the two derivative forms of responsibility foreseen in the Draft Agreement – member State responsibility for violations stemming from primary Union law and EU responsibility for violations stemming from implementing activity of member States – the Draft Agreement sets however a lower threshold than the corresponding provisions drafted by the ILC. According to Articles 17 and 61 of the Draft Articles on the Responsibility of International Organizations, derivative responsibility of a member State or an international organization for having providing the legal basis for a wrongful act will only arise if the legal basis was created with the intention to avoid compliance with a particular international obligation. Responsibility will not arise when the ensuing breach of international law is an unintended result.¹⁴

¹¹ *Bosphorus v. Ireland*, n. 7, para. 153.

¹² Art. 17 of the Draft Articles on the Responsibility of International Organizations, n. 10.

¹³ *Matthews v. the United Kingdom*, n. 6, para. 34. Also see ECtHR 18 February 1999, *Waite and Kennedy v. Germany*, no. 26083/94, para. 67; ECtHR 12 May 2009, *Gasparini v. Italy and Belgium*, n. 5; *Bosphorus v. Ireland*, n. 7, para. 154.

¹⁴ Draft Articles on the Responsibility of International Organizations, with commentaries, n. 10, pp. 41 and 93.

2.3. *Departure from earlier position of the European Commission*

Article 1(4) of the Draft Accession Agreement makes explicit (see Box 1), upon request of the European Union representatives, the attribution rule whereby acts of member States are and remain only attributable to them, even if they are acts of implementation of EU law. This rule was inserted to avoid that the ECtHR will attribute an act to the EU, which would not be attributable to it according to its internal legal order. Within the system of EU law, member States are obliged to make good damage caused to individuals by breaches of Community law attributable to them.¹⁵ As noted above, this also complies with the approach of the ILC and that of the ECtHR.

This approach is however not self-evident. The EU has in other contexts argued that when a member State implements an EU law obligation which leaves it no discretion, it acts quasi as agent of the EU.¹⁶ In the World Trade Organization dispute settlement mechanism, the panels have followed the approach that the EU is solely responsible for acts of member States in carrying out EU customs and trade law, under the reasoning that they act as organs of the EU in taking decisions pursuant to fields of law in which the EU is exclusively competent.¹⁷ That approach is not without merit, as the EU will, in the WTO system, be the only actor which can ensure any restitution that is ordered under the WTO dispute settlement mechanism.

However, the solution chosen in the Draft Agreement is to be preferred. Firstly, accession of the EU to the ECHR concerns the full extent of EU law and not merely the field of trade law in which the EU is exclusively competent. It follows that violations of the ECHR stemming from implementing acts under Union law of member States may require different types of remedies, not only by the EU but also by a member State. Even if a violation originates in an obligation under EU law, it may well be that it falls to the member State to provide effective remedies, such as the re-opening of national proceedings, the return of assets, or the release of persons deprived of their liberty. To hold only the EU responsible in such situations could jeopardize the effective execution of judgments.

Further, the Draft Agreement does not absolve the EU of its responsibility if it obliges a member State to violate the ECHR by virtue of the additional sentence in Article 1(4), stipulating that it “shall not preclude the European Union from being responsible as a co-respondent for a violation resulting from such an act, measure or omission” (see Box 1). This ensures that it remains possible for the ECtHR to hold the EU responsible for providing the legal basis for the violation, bringing with it an obligation to abide by the judgment, which will typically imply a duty to amend EU legislation from which the violation has resulted.

¹⁵ E.g. Case C-46/93 *Brasserie du Pêcheur* [1996] ECR I-1029; Case C-224/01 *Köbler* [2003] ECR I-10239.

¹⁶ See extensively Draft Articles on the Responsibility of International Organizations, with commentaries, n. 10, pp. 100-102. This view was developed by e.g. P.J. Kuijper and E. Paasivirta, ‘Further Exploring International Responsibility: The European Community and the ILC’s Project on Responsibility of International Organizations’, *International Organizations Law Review*, vol. 1 (2004), pp. 111-138 at p. 127.

¹⁷ WTO Panel Report, *European Communities — Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs — Complaint by the United States (“EC — Trademarks and Geographical Indications (US)”)*, WT/DS174/R, adopted on 20 April 2005, para. 7.725; WTO Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R and WT/DS293/R, adopted on 29 September 2006, para. 7.101.

2.4. *Joint responsibility*

An important aspect of the Draft Accession Agreement is the possibility that the ECtHR can find the EU and a member State jointly responsible.

What does it mean to speak of joint responsibility? Does it imply that each party is held responsible for the acts of the other party, from which it would logically follow that each party can be sued alone and be held responsible for making full reparation? Or does it mean “joint inseverable” responsibility in which only the parties as a collective, and not individually, are responsible for making reparation?¹⁸ The latter, narrower, meaning is apparently chosen in the Draft Agreement, since a finding of joint responsibility can happen only in proceedings to which both the EU and a member State are (co-)respondent. This is in line with the responsibility of the European Union and its member States under “mixed agreements”, where the Union and all or some members are parties in their own name and under which responsibility can be distributed between them in accordance with internal rules between the EU and the members.¹⁹ One consequence of this type of joint responsibility is that it remains unclear which party should execute the judgment and make reparation. It appears that this is also the explicit intention of the Draft Agreement, because such questions may touch upon the division of competences between the EU and the member States. The issue of reparation obligations is further discussed in section 4 in this briefing paper.

Another question is how much freedom the Court has to decide on single responsibility in situations where the co-respondent mechanism is applied. The words “on the basis of the reasons given by the respondent and the co-respondent” are a compromise solution which require further interpretation. An earlier version of this provision stipulated that a joint request for single responsibility would bind the Court.²⁰ The current wording appears to respect the Court’s autonomy, while at the same time giving a strong indication that the Court will take the parties’ submissions on this seriously.

The default rule of joint responsibility is not unproblematic. Firstly, if joint responsibility is the ordinary outcome of any procedure under the co-respondent mechanism where a violation is found, it may negatively impact the willingness of parties to request to become a co-respondent, or to accept an invitation to that effect by the Court.

Secondly, it makes a decision to set the co-respondent mechanism in motion, which is ultimately made by the Court pursuant to Article 3(4) and (5) Draft Accession Agreement, particularly consequential. However, the material criteria for triggering the co-respondent mechanism are formulated broadly. The

¹⁸ On these two types of joint responsibility, see J. Crawford, ‘Third Report on State Responsibility’, A/CN.4/507/Add.2, p. 74, para. 272.

¹⁹ See for example United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3. Annex IX, Article 6(2): “Any State Party may request an international organization or its member States which are States Parties for information as to who has responsibility in respect of any specific matter. The organization and the member States concerned shall provide this information. Failure to provide this information within a reasonable time or the provision of contradictory information shall result in joint and several liability.”

²⁰ Common paper of Andorra, Armenia, Azerbaijan, Bosnia-Herzegovina, Iceland, Liechtenstein, Monaco, Montenegro, Norway, Serbia, Switzerland, Russian Federation, Turkey and Ukraine on major concerns regarding the Draft revised Agreement on the Accession of the European Union to the European Convention on Human Rights, CDDH-UE 47+1(2013)003, 21 January 2013.

mechanism applies if the compatibility of a provision of European Union law with the ECHR is in question (Article 3(2) and 3(3), see Box 3). This may include, for example, discretionary implementing activity of member States (see also section 3.1. below). It is not self-evident that such activity should also entail the responsibility of the EU.

Thirdly, decisions as to whether single or joint responsibility is the most appropriate form should be informed not only by the issue of division of competences between the EU and member States, but involve a range of further considerations. It can be for example, that one party may successfully invoke the derogation clause of Article 15 ECHR, or a reservation which it has made to the Convention; that either the EU or a member State can successfully invoke a circumstance precluding wrongfulness; or that only one party is able to effectively provide redress. It is not necessarily so that all these issues are dealt with in the admissibility stage, before a decision on triggering the co-respondent mechanism – and therewith on the default rule of joint responsibility in case a violation is found – is made.

Relatedly, the default rule of joint responsibility might force the Court to deviate from its existent rules on allocating responsibility between member States and an international organization. In such cases as *Behrami* and *Al-Jedda*, the Court developed specific rules for attributing conduct to either the State or the organization in situations where it was unclear whether a particular organ acted under the control of the State or the international organization.²¹ It is at least questionable whether the Court in such instances should as a rule decide on joint responsibility.

In light of the above, it is preferable that the ECtHR retains ultimate competence in deciding on the form and basis of responsibility, and that Article 3(7) of the Draft Agreement does not deprive the ECtHR of its judicial autonomy to define and apply all grounds relevant for allocating international responsibility (see Box 2).

It would anyhow seem that one way for the Court to circumvent the rule of joint responsibility would be to terminate the participation of the co-respondent, as is stipulated in paragraph 59 of the Draft Explanatory Report.

Box 2

Article 3 – Co-respondent mechanism

7. If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.

²¹ ECtHR 2 May 2007, *Behrami v. France*, no. 71412/01; ECtHR 7 July 2011, *Al-Jedda v. the United Kingdom*, no. 27021/08.

2.5. *The EU Common Foreign and Security Policy*

The attribution clause of the Draft Accession Agreement is sufficiently wide to include matters relating to the EU common foreign and security policy (CFSP). This is confirmed in paragraph 23 of the Draft Explanatory Report. Even though the CJEU is not fully competent in relation to that policy, the choice to include it in the jurisdiction of the ECtHR must be commended. The main reason for the limited competence of the CJEU over the CFSP is to preserve the intergovernmental and political character of the CFSP and thereby the sovereignty of the member States. This objective would not be in danger if the ECtHR were to exercise jurisdiction over violations of human rights committed under the CFSP, because member State activity in the CFSP is already subject to the supervision of the ECtHR, and because it does not prejudice the essentially intergovernmental nature of the policies of the member States under the CFSP.²² Further, from the fact that the CJEU is not competent in the area of CFSP, it cannot be inferred that the ECtHR should not be given the mandate to exercise jurisdiction. After all, the CJEU also is not competent to review primary Union law, yet, such review by virtue of accession becomes subject to the ECtHR's supervision.²³

One area within the CFSP which requires specific attention are military operations under an EU mandate such as the EU Maritime Operation against piracy (EU- NAVFOR-Atalanta). It is to be welcomed that Article 1(6) of the Draft Accession Agreement has the effect of not precluding the EU from incurring human rights obligations extraterritorially, congruent with the extraterritorial obligations of member States.

In the context of military operations under the mandate of an international organization, the ECtHR has developed its own attribution rules, partly modelled on those of the ILC. In *Al-Jedda*, the ECtHR held that the criteria of “effective control” or “ultimate authority” are decisive for attributing conduct in a military operation to either the troop-contributing State or the international organization.

It is problematical if the attribution clause in the Draft Accession Agreement has the effect of precluding the ECtHR from developing or applying its own rules on attribution in respect of military operations. These rules do not deal with the division of competences between the EU and member State but reflect, rather, primordial notions within the law on international responsibility, such as the conditions for considering a State organ to have been put at the disposal of an international organization or acting under the latter's control. Such determinations are particularly consequential for issues of compensation or other forms of redress, and the cessation of unlawful conduct. As noted above, should the Draft Accession Agreement have the effect of steering the ECtHR towards pronouncing merely on the joint responsibility of the EU and a member State in such contexts, this could result in a situation where it is left to applicable EU law to decide whether particular unlawful conduct is to be attributed to a troop contributing State, the EU, or both. This was the position taken by the negotiators from the 47 member States of the Council of Europe and the EU. It may be argued that this question may better be left to the ECtHR to decide. This would require an amendment to the Draft Accession Agreement.

²² T. Lock, ‘End of an Epic? The Draft Agreement on the EU's Accession to the ECHR’, *Yearbook of European Law* (2012) Vol. 31(1), pp. 162-197 at p. 190.

²³ *Ibid.*

However, even in the absence of such an amendment, it would seem that the ECtHR would retain some power to apply its own attribution rules, since a determination of whether there is an “act, measure or omission of organs of a member State or the EU or of persons acting on their behalf” in the meaning of Article 1(3) and (4) may depend on a preliminary assessment by the ECtHR of which party exercised control or governmental authority over the conduct (see Box 1). This could then result, if the ECtHR finds that military activity is to be attributed to one entity alone, in the co-respondent mechanism not being applicable.

3. The co-respondent mechanism

The co-respondent mechanism set out in Article 3 of the Draft Accession Agreement is being introduced to allow the EU to become a co-respondent to proceedings instituted against a member State and, similarly, to allow the EU member States to become co-respondents to proceedings instituted against the EU. The mechanism should accommodate the intertwining of the legal orders of the member States and the EU, and allow the ECtHR to refrain from addressing the division of competences between the EU and the member States, thus preserving the autonomy of the EU legal order. While the mechanism may help ensuring accountability and the enforceability of judgments, it raises several issues.

3.1. The test for triggering the co-respondent mechanism

The criterion for the EU to become co-respondent is on the one hand formulated rather broadly (“if the application calls into question the compatibility of a provision of European Union law with the ECHR”), but on the other hand qualified by the phrase “notably where that violation could have been avoided only by disregarding an obligation under European Union law” (Article 3(2) Draft Accession Agreement, see Box 3). Furthermore, it need only be “plausible” that those conditions are met (Article 3(5) Draft

Box 3

Article 3 – Co-respondent mechanism

2. Where an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of European Union law, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union, notably where that violation could have been avoided only by disregarding an obligation

Accession Agreement). This calls into question the type of cases to which the co-respondent mechanism applies. The Draft Explanatory Report suggests that the mechanism will only be applied in a limited number of cases, presumably referring to situations such as in the *Bosphorus* case, when member States are obliged under Union law to undertake the action that is in alleged violation of the ECHR.

However, the word “notably” indicates that the ECtHR is not precluded from bringing wider scenarios within the ambit of the mechanism. The Draft Agreement hence leaves open the possibility that all situations in which a member State acts in the scope of Union law are handled under the co-respondent mechanism. These may include cases such as *M.S.S. v. Belgium and Greece*, concerning discretionary member State activity within the scope of Union law.²⁴ It is suggested that the ECtHR should retain flexibility in deciding on the type of situations that would set the mechanism in motion. Firstly, it may not always be easy for the Court, especially at an early stage in the procedure, to verify what the exact relationship of member State conduct with EU law is. Secondly, it seems that the distinction between discretionary activity and obligatory activity in the scope of Union law is primarily relevant for deciding which party is responsible for a violation. If a violation stems from discretionary activity, it seems appropriate to hold only the member State responsible. If, on the other hand, a violation could only have been avoided by a member State by disregarding an obligation of Union law, a determination of joint responsibility seems most appropriate. As long as the Court is free to decide on single responsibility in case it finds a violation, there is no harm in allowing the (non-violating) co-respondent to be a party to the proceedings.

If the application concerns activity taking place in the scope of Union law, there are good reasons for allowing the EU to be co-respondent. Also if the EU is ultimately not found to be responsible (by the ECtHR or after the judgment is rendered in accordance with the EU internal rules), its future legislative activity may be based on the judgment. For example, the Dublin Regulation amendments of 2013 incorporated the *M.S.S. v. Belgium and Greece* judgment, in effect transforming the discretionary power of the member States to respect fundamental rights into an obligation under Union law.²⁵ The EU being a party to the proceedings may further ensure that such legislative activity falls within the scope of the Committee of Minister’s supervisory powers.

3.2. Omissions

Although Article 1(3) and (4) of the Draft Accession Agreement make clear that it also covers omissions (see Box 1), i.e. failures to discharge a positive duty under the ECHR, some categories of positive obligations may pose challenges under the co-respondent mechanism. Where an applicant alleges that there is a failure to legislate, the correct addressee cannot always be easily determined, as it depends on the division of legislative competences between the EU and the member States. The co-respondent mechanism would seem the correct procedure to address such applications, if one follows the rationale that the Court should refrain from addressing the division of competences. However, the wording of

²⁴ *M.S.S. v. Belgium and Greece*, n. 7.

²⁵ Regulation (EU) No. 604/2013, [2013] OJ L 180/31.

Article 3(3) and (4) of the Draft Accession Agreement may have the effect of excluding such scenarios from its ambit, because it presumes an alleged incompatibility between a “provision of European Union Law” or “a provision of the Treaties” and the ECHR. Some complaints may see precisely to the absence of such a provision. It must be assumed however, that all failures to legislate may trigger the co-respondent mechanism, because the Draft Explanatory Report stipulates that “[t]he fact that the alleged violation may arise from a positive obligation deriving from the Convention would not affect the application of these tests” (para. 47).

3.3. *Voluntary character*

During the negotiations, much thought was given to the question whether participation in the co-respondent mechanism should be voluntary or obligatory.²⁶ The issue becomes relevant when the initial application is not addressed against the potential co-respondent. Although the Draft Accession Agreement sets forth that participation is voluntary, the Draft EU Declaration has the effect of ensuring that the EU will request to become a co-respondent if the conditions are met (see Box 4).

Box 4

Draft declaration by the European Union to be made at the time of signature of the Accession Agreement

Upon its accession to the Convention, the European Union will ensure that:

- a. it will request to become a co-respondent to the proceedings before the European Court of Human Rights or accept an invitation by the Court to that effect, where the conditions set out in Article 3, paragraph 2, of the Accession Agreement are met.

The Draft Declaration is in conformity with Article 1(b) of Protocol 8 to the Lisbon Treaty, which provides that the Accession Agreement shall make provision for ensuring that proceedings by non-member States and individual applications are correctly addressed to member States and/or the Union as appropriate. That provision seems to acknowledge that individual applicants or non-member States cannot always be expected to choose the correct respondent in view of the intricate legal intertwining between the EU and the member States. If an applicant errs in choosing the correct respondent, therefore, it should be possible to remedy such a failure without declaring a complaint inadmissible. If such a remedy depends on a voluntary decision of the High Contracting Parties, it can hardly be considered effective. The justification for the voluntary nature of the mechanism advanced in the Draft Explanatory Report (“This

²⁶ See J. Polakiewicz, ‘EU law and the ECHR: Will the European Union's Accession square the Circle?’, *European Human Rights Law Review* (2013), pp. 592-605 at 598.

reflects the fact that the initial application was not addressed against the potential co-respondent, and that no High Contracting Party can be forced to become a party to a case where it was not named in the original application”, para. 53) appears to insufficiently recognise this rationale.

Although the co-respondent mechanism remains optional for member States, the Draft EU Declaration seems an appropriate compromise from a practical perspective. Although it has no effect on the participation of the member States as co-respondent, it is arguably more likely in practice that scenarios will occur where an applicant fails to recognise the EU as correct respondent than *vice versa*. A primary cause for such confusion will be ignorance about member State activity being inside the scope of Union law.

3.4. *Prior involvement of the CJEU*

The Draft Accession Agreement gives the CJEU a chance to express its opinion on the compatibility of Union law and the ECHR, if it has not yet had the opportunity to do so (Article 3(6), see Box 5). This allows the EU to exhaust internal remedies prior to the proceedings before the ECtHR, in particular when a national court has failed request a preliminary ruling. This “prior involvement procedure” is left undefined in the Draft Accession Agreement because it is an internal EU procedure. However, the Agreement states that the procedure should not result in undue delays and does not affect the powers of the ECtHR.

Box 5

Article 3 – Co-respondent mechanism

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

The prior involvement procedure raises a large number of issues: whether there is a legal basis in Union law for such a procedure; who is able to start the relevant proceedings; who will be entitled to be a party; what is the scope and basis of judicial review; whether the procedure only applies when the EU is a co-respondent or also in other proceedings to which the EU is a party and where the CJEU has not yet been involved; whether the procedure also applies when a preliminary ruling was obtained, but which did not address the question of compatibility with the ECHR; and whether “compatibility with the rights at issue

defined in the Convention” also refers to an examination of rights contained in the EU Charter on Fundamental Rights or principles of Union law.

It is suggested that the procedure should at the least be based on the following considerations. Firstly, for the prior involvement procedure to provide effective internal EU legal remedies, the applicant should have the right to be involved as a party or as intervener. Secondly, it follows from the same principle that the procedure must not merely consist of an assessment of compatibility, but must also allow for redress, such as the revocation of national decisions or the reopening of proceedings before national courts. Thirdly, the procedure should not lead to additional costs and expenses for the applicant. Fourthly, in view of the fact that the current Treaties explicitly provide for the EU to accede to the ECHR, the entry into force of the Accession Agreement should not be made dependent on a further revision of the Treaties. If it is concluded that the prior involvement procedure does require Treaty amendment, one solution is to let the EU accede to the ECHR with suspending the effects of Article 3(6) of the Draft Agreement until the Treaties are revised.

3.5. Complexity and access to justice

It must be prevented that the rather complex co-respondent mechanism jeopardizes the accessibility of the procedure before the ECtHR. On the one hand, the co-respondent mechanism facilitates the individual right of complaint by making it possible for the Court to join the EU as a party, without exhausting domestic remedies in the EU, even when the application was not directed from the outset against the EU. Further, the decision to set the mechanism in motion is left to the Court and the High Contracting Parties. The individual is by virtue of Article 3(4) of the Draft Accession Agreement merely requested to present views on a decision to join a party as co-respondent. All this does not seem to bring substantial burdens for the applicant. Even though an applicant may be confronted by counterarguments of more than one party, the very nature of the co-respondent mechanism brings with it that the applicant only needs to demonstrate that a violation has occurred, leaving further determinations on how to allocate responsibility to the Court, the respondent and co-respondent, or to the internal rules of the EU.

On the other hand, the possibility of prior involvement of the CJEU may well raise additional burdens in the sphere of legal assistance and expertise. Further, it risks lengthening the proceedings, despite the condition of Article 3(6) of the Draft Agreement that it may not lead to undue delays (which further begs the question what “undue” exactly is, see Box 5). Moreover, if the ECtHR finds the EU and a member State to be jointly responsible for a violation, it is not self-evident which party should ensure redress, possibly forcing an applicant to bring further actions to ensure execution of the judgment. It is therefore important that the internal Union rules on the prior involvement of the CJEU, as well as on the division of responsibilities for ensuring redress, are designed to facilitate access to justice as far as possible (see on reparation obligations further section 4.)

3.6. *The position of non-EU associated countries*

The co-respondent mechanism does not apply to States which are associated to parts of the EU legal order through separate international agreements such as the “Schengen” and “Dublin” agreements and the agreement on the European Economic Area. These agreements cover substantial parts of EU law. The Draft Model of Memorandum of Understanding in Appendix IV provides as alternative solution that upon the request of a respondent non-member State, the EU will seek leave to intervene. If a violation is found that involves a provision of EU law, the Draft Memorandum further provides that the EU will examine, together with the respondent State, which measures it should take. This Draft Memorandum of Understanding does not however become part of the ECHR, rendering this solution outside the ambit of the supervisory functions of the ECtHR and the Committee of Ministers of the Council of Europe.

Apart from this solution, it should be noted that the Draft Accession Agreement does not exclude applications from being brought against the EU by nationals of non-EU countries. It merely stipulates that the co-respondent mechanism does not apply to applications directed against an associated country. Applications may therefore be from the outset directed against the EU for providing the legal basis for an alleged violation by an associated country. Such complaints are not governed by the attribution rule of Article 1(4) of the Draft Accession Agreement (see Box 1), since it only refers to implementing activity of a member State of the EU (which according to that provision is to be attributed to the member State). It is thus left to the ECtHR to decide on such applications and the criteria for allocating responsibility.

3.7. *Horizontal cooperation under EU law*

A further category of cases that are left unaddressed in the Draft Accession Agreement are those that concern cooperation between member States under Union law. The co-respondent mechanism applies only to the vertical scenarios of incompatibility with the ECHR resulting from a member State implementing Union law, or a member State having enacted primary Union law.

The EU increasingly facilitates and, in some cases, obliges cooperation between member States in the spheres of *inter alia* criminal matters and immigration, for instance through the recognition of judgments, evidence, alerts of third country nationals and the issuing of visa. Such cooperation may well raise human rights issues as is evident from cases concerning the transfer of asylum seekers and the European Arrest Warrant. Special challenges, especially in the sphere of remedies, arise if the unlawful conduct of a member State originates in an act of another member State, for example when evidence unlawfully procured by another member State is used, or when a third country national is refused entry on the basis of an inaccurate alert of another member State. Such scenarios involve not only the EU and a member State, but also a further member State.

Obviously, an individual may always bring a complaint against all involved member States, but he may not always recognise that a further member State is involved. Moreover, an applicant will need to exhaust domestic remedies in all member States under the current admissibility requirements. Thought may be given therefore to use the co-respondent mechanism under certain conditions also to join another

member State as party to the proceedings, if a case is brought to the acting member State only. This could not only increase justiciability in respect of complaints stemming from cooperation under EU law, but also in respect of other forms of cooperation between parties to the ECHR. Such solutions require further thinking and are probably best addressed outside the context of the current Draft Agreement.

3.8. *Inter-party cases*

The Accession Agreement brings about the possibility for other High Contracting Parties to bring proceedings against the EU. Inter-party cases are rare and – perhaps for that reason – the Draft Accession Agreement pays little attention to them. The Draft Explanatory Report acknowledges that “[a]n issue not governed by the Accession Agreement is whether EU law permits inter-Party applications to the Court involving issues of EU law between EU member States, or between the EU and one of its member States” (para. 72). The Draft Explanatory Report refers to Article 344 of the Treaty on the Functioning of the European Union (TFEU) (to which Article 3 of Protocol No. 8 to the Treaty of Lisbon makes reference), which states that EU member States “undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein” (para. 72). It is clear, at the least, that Article 344 TFEU does not prevent the EU from bringing a complaint against a member State for violating the Convention on whatever basis; that it does not prevent countries such as Switzerland and Norway from bringing a complaint against the EU for forcing it to apply EU legislation that violates the ECHR; nor that it prevents any other non-member State from bringing proceedings against the EU.

Less clear are scenarios where a member State would wish to bring a case against the EU before the ECtHR for having enacted legislation that violates the ECHR, or against another member State for giving effect to EU law contrary to the ECHR. Article 344 TFEU might on the one hand be taken to indicate that member States may not have recourse to the ECtHR if they feel that the Treaties violate the ECHR or that another member State has failed to fulfil its obligations under the Treaties (cf. Article 259 TFEU). But the interpretation that member States may under all circumstances and on whatever grounds lodge an inter-party case against the EU or another member State is also possible, because the Treaties explicitly provide for accession of the EU to the ECHR, and thus indirectly provide for the dispute settlement mechanism of the ECtHR. Such cases would then be subject only to the admissibility criteria laid down in the ECHR. It is remarkable that the Draft Accession Agreement leaves the issue open, as this will result in the ECtHR deciding on the admissibility of such complaints, which is not bothered by internal EU rules such as Article 344 TFEU and moreover is incompetent to interpret such provisions. It appears that the EU position is that such inter-party applications are excluded by EU law, because they would circumvent infringement procedures (Article 258 TFEU) or – as far as member States applications against the EU are concerned – the procedures under Articles 263 (actions for annulment) and 265 TFEU (actions for failure to act).

Since the co-respondent mechanism applies where an “application is directed against one or more member States” or “against the European Union” (Articles 3(2) and (3), see Box 3), the mechanism also

appears to apply to inter-party proceedings brought by a non-member State against the EU or a member State, or where a member State complains against the EU or another member State. As far as non-member States are concerned, that is also in conformity with Article 1(b) of Protocol 8 to the Lisbon Treaty that stipulates that the mechanism for ensuring that the correct respondent is chosen should apply not only to individual applicants but also to proceedings by non-member States.

4. Internal implementation in the EU

A key issue left unaddressed in the Draft Accession Agreement are the consequences of a determination by the ECtHR of joint responsibility of the EU and one or more of the EU member States. What does joint responsibility for violating the ECHR mean in terms of reparation? Which responsible party should execute the judgment? The principle of joint and several liability, which refers to the possibility of a victim to address either the member State or the Union for compensation in full, leaving it to the responsible parties to sort out their respective proportions of liability and payment, may seem the best solution from the perspective of the victim. Article 3(7) of the Draft Accession Agreement is based on that principle (see Box 2). However, although joint and several liability might work if reparation consists of monetary compensation, it may not be possible to apply that principle to situations of normative redress. It seems therefore that a distinction must be made between compensation and normative redress necessary to execute a decision of the Strasbourg Court.

4.1. Compensation and reimbursement of costs and expenses

In situations where the ECtHR awards compensation for pecuniary or non-pecuniary damages under Article 41 ECHR, the best solution for the applicant would be that he is automatically awarded, without having to bring further actions (and possibly being sent from pillar to post), the full sums awarded. This also applies to reimbursements of costs and expenses which the ECtHR may order for costs of legal assistance, court registration fees and suchlike. Any other option will put the applicant in a disadvantageous position compared to applicants in “ordinary” cases. The best solution seems to be to enact internal EU rules, for instance in the Council Decision approving the Accession Agreement, which ensure effective and readily available compensation for the applicant. This might take the form of either a special fund under the administration of the European Commission or an obligation of the respondent party to provide compensation. The division of compensation obligations between the respondent and co-respondent may then be settled in accordance with existing Union law on the division of competences and derivative responsibilities.

4.2. Normative redress and individual measures

The ECtHR may also indicate specific individual measures and, exceptionally, legislative measures required for the execution of a judgment under Article 46 ECHR. Judgments of the ECtHR anyhow entail

the obligation to prevent other similar violations in the future. Here, it is the competent authority and not necessarily the respondent party that should take the necessary measures to implement the decision of the Strasbourg Court. It should be considered to establish on the EU level a procedural mechanism allowing to solve disputes about who is competent and who should do what. Again, the Council Decision approving the Accession Agreement would seem to be the appropriate vehicle. If in an individual case a member State and the Union would not be able to agree, it should be considered to submit the issue to the CJEU.

The available remedy could first of all depend on how the procedural mechanism would be structured. More generally, the member State could consider an action for failure to act against an institution of the Union under Article 265 TFEU. The Commission could have recourse to the infringement procedure. The obligation of the member State, jointly condemned with the Union as the co-respondent, to execute the judgment, is also an obligation of the member State *vis-à-vis* the Union resulting from the Accession Agreement (Article 216 (2) TFEU). The member State could be held accountable for respecting that obligation under the infringement procedure. Such procedures should anyhow not delay the award of monetary compensation as set out in section 4.1.

5. Overall evaluation

The provisions of the Draft Accession Agreement on attribution and responsibility are generally in line with the existing case law of the ECtHR and the work of the ILC on the topic of international responsibility. They also accommodate the wish expressed by the EU not to endanger the autonomy of the EU legal order and the exclusive powers of the CJEU in that respect. Overall, the Draft provides a fruitful basis for allowing the EU to accede to the ECHR.

The Draft Accession Agreement will enhance access to judicial protection for individuals. Firstly, it closes existing responsibility gaps which stem from the fact that the EU is not a party to the ECHR. Secondly, the co-respondent mechanism may correct a situation where an individual fails to identify all respondent parties at the outset. Thirdly, the individual does not need to meet the admissibility requirements in respect of the co-respondent. Fourthly, the rule of joint responsibility for violations stemming from implementing activity and primary Union law ensures that all involved parties incur obligations of reparation.

Not all solutions in the Draft Agreement necessarily foster access to justice however. The voluntary character of the co-respondent mechanism, which is maintained for the member States, may prevent its very functioning in some types of cases. However, it should also be taken into account that victims will always be able to bring an application against either the member State which has acted or the EU. Moreover, the EU's Declaration which will in all probability be complemented by the EU's internal rules may go some way to prevent this risk.

There is further some risk that the prior involvement of the CJEU leads to additional burdens in terms of the duration of the procedure and legal assistance and expertise. Additional rules need to be adopted by the EU to prevent that risk from materializing.

The negotiators of the Draft Accession Agreement took the liberty to stipulate rules which may interfere with existing doctrines in the case law of the European Court of Human Rights. The default rule of joint responsibility expressed in Article 3(7) of the Draft Agreement may prevent the Court from addressing issues relevant for allocating responsibility which do not deal with the division of competences between the EU and the member States (see Box 2). Moreover, a finding of joint responsibility may preclude the Court from indicating which party must execute which parts of the judgment, thus jeopardizing the effectiveness of remedies.

Finally, the Draft Agreement contains a measure of constructive ambiguity on a few issues. These include the test for triggering the co-respondent mechanism; the alternative solution chosen for non-EU members which have concluded an Association Agreement with the EU; instances of horizontal cooperation between member States under EU law; and the competence of the ECtHR to decide on inter-party cases in which EU law is at issue. The ECtHR and, on issues of EU law, the CJEU, will have some liberty to address these issues in their evolving case law, others need to be further elaborated in the EU's internal rules.