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Accession of the EU to the ECHR: Issues of the co-respondent mechanism



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ABSTRACT

On December 2014, the Court of Justice of the European Union adopted one of the most controversial decisions in recent decades—the famous Opinion 2/13 that precluded the European Union from acceding to the European Convention on Human Rights. This article engages in the analysis of the co-respondent mechanism—one of the most significant features of the Draft Agreement for the accession of the European Union to the Convention. The co-respondent mechanism was intentionally designed to preserve the specific characteristics of the European Union law by precluding the European Court of Human Rights from solving the complex questions of the internal competence division of the European Union. However, notwithstanding that the European Commission and most of the Member States had not seen any significant threats caused by the mechanism, the Luxembourg court rejected the mechanism due to the European Union's motives for the protection of autonomy. This article analyzes and assesses the objections presented by the Court.

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1. Introduction

On 18 December 2014 the Court of Justice of the European Union (CJEU or the Court) adopted its famous Opinion 2/13 on Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Opinion 2/13). The CJEU found that the Draft revised agreement on the accession of the European Union to the Convention

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for the Protection of Human Rights and Fundamental Freedoms ([Draft Agreement, 2013](#)) was not compatible with the Treaty on European Union ([the EU Treaty, 2012](#)) and the Treaty on the Functioning of the European Union ([TFEU, 2012](#)) (both the EU Treaty and TFEU are referred to as EU Treaties). The Court pointed out the drawbacks of the systemic nature, meaning that the accession agreement's provisions should be substantially altered. As stated in some authors' publications, the Court sent a clear message – '*< ... >* accession, under the terms of the Draft Agreement, would risk undermining the very essence of the EU's constitutional system.' ([Krenn, 2015](#), p. 147).

Such a conclusion of the CJEU and its argumentation received significant attention in other authors' publications. It should be noted that some authors recognize that they did not expect such a turn in the process of the accession of the European Union (EU) to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR or the Convention) ([European Convention on Human Rights, 1950](#)) and provide a great deal of criticism ([Eeckhout, 2015](#); [Krenn, 2015](#); [Lazowski and Wessel, 2015](#); [Spaventa, 2015](#)). Others, however, having recalled earlier case-law of the Court observe that the EU Court has always been an eminently strict preserver of EU autonomy. Therefore, such a position of the Court should be assessed as a natural sequel of its jurisprudence ([Halberstam, 2015](#)).

It should be noted that after entry into force of the Treaty of Lisbon ([Treaty of Lisbon, 2007](#)) which, as we know, created the required legal ground for the EU's accession to the ECHR, the discussion on the EU's accession to the ECHR, ongoing for more than 40 years, gained new momentum. The Fourteenth Protocol to the ECHR (Protocol No. 14) that entered into force on 1 June 2010 was the last accent that allowed specific steps in the process of EU accession to the Convention to begin. By amending and reforming the system of the Convention, Protocol No. 14 opened up the possibility of accession of the EU from the side of the Convention. Naturally, in the past few years the discussion was oriented not to the question of whether the EU should accede or what the additional value of accession would be, but to the problem of what legal means would be eligible for the EU's accession to the ECHR ([Groussot, Lock, & Pech, 2011](#); [Lock, 2011](#)). Considering that the Convention system itself was created and adapted to the states, it was clear that the EU (not being a state) would not be a typical member of the Convention. What is more, EU law itself not only entrenched legal grounds for the accession but also established the respective accession requirements that were to be followed by the drafters of the accession agreement. Being stipulated in the separate documents of the primary law of the EU these requirements were basically focused on the aspiration to preserve the specific characteristics of the EU and EU law (Opinion 2/13, p. 161). As we now know, it was exactly the exceptionally strict interpretation of these requirements in the EU Court that formed an obstacle for the EU accession to ECHR.

One of the most significant innovations of the Draft Agreement—the co-respondent mechanism—shall be analyzed in this article. Being focused on the particularities of the EU legal system, this instrument and, to be more precise, its procedural aspects have also received a negative assessment from the CJEU. The Court's objection is essentially based on the reasoning of the need to protect the EU legal order's autonomy. By raising the question whether the provisions of the co-respondent mechanism do actually pose a threat to the EU and the autonomy of its legal system, we try to evaluate the soundness of the Court's position. Yet, even if we do not agree with the position and reasoning of the Court we have to bear in mind that in the case that the negotiations are renewed the provisions of the accession agreement should be altered to the extent that they are contrary to the EU Treaties. Therefore, we attempt to discover and suggest a solution concerning the necessary amendments. While seeking these objectives we first of all analyze in detail the purpose of the co-respondent mechanism and the manner in which it is regulated in the Draft Agreement.

2. The purpose of the co-respondent mechanism

Not only legal ground for the EU accession to the ECHR is stipulated by the EU primary law but the respective accession requirements as well. Protocol No. 8 entrenches the requirement of '*< ... >* preserving the specific characteristics of the Union and Union law *< ... >*' ([Protocol No. 8, 2012, Article 1](#)). Pursuant to this requirement, as elaborated in Article 1 Clause b of Protocol No. 8, 'the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate' must be taken into account. This provision of primary law is driven by the specificity of the EU legal system and expresses the requirement that the proper defendant is involved in the proceedings of the European Court of Human Rights (ECtHR) where the potential infringement of the Convention is related to EU law.

It was thus suggested by the drafters of the Draft Agreement to design the co-respondent mechanism which, as the Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (Explanatory report) clarifies, '*< ... >* is a way to avoid gaps in participation, accountability and enforceability in the Convention system.' ([Explanatory report, 2013](#), p. 39). These objectives are worth analyzing in greater detail.

The parallel membership at the Convention's system of the EU and the Member States as well as the specific features of the EU legal system may induce problems in determining who—the EU itself or the respective Member States—is liable for the alleged infringement of the Convention ([Krenn, 2015](#), pp. 150–151). In general, EU legislation is divided into primary and secondary law. The attribution of the legal act to primary or secondary law is mainly determined by the fact of what

law-making body adopted the respective act. Being law created by the states, EU primary law is at the peak of the legal hierarchy of the EU. Its entry into force is associated with the ratification in each of the Member States. On the basis of the primary law, EU institutions adopt EU secondary legislation. An infringement of the ECHR may arise from both, either from primary law, or from secondary legislation. As far as EU primary law is concerned, it should be noted that its validity is presumed in EU law. Therefore, EU courts are not granted with jurisdiction to decide on its legitimacy.³ However, being the creators of this law, Member States without any doubt are responsible for the compatibility of the provisions of primary law with the ECHR requirements. Accordingly, EU primary law under no circumstances falls outside the control of the ECHR (for instance, *Matthews v. United Kingdom, 1999*) and the accession of the EU to the Convention shall not change that. Even so, once the EU is formally under external control of the ECtHR, a question might arise whether the EU should be responsible for the infringements of the Convention stemming from the primary law. Especially since the EU is not the creator of the primary law it could not eliminate the infringement stemming from such type of law without the consent of the Member States (Article 48 of the EU Treaty). This contradictory question has been raised in scientific publications and we should agree with the position that the Union's responsibility under the Convention should not be divided depending on whether the infringement arises from the primary or secondary law (*Lock, 2010*, pp. 28–29). Such a position is also reflected in the Draft Agreement, i.e. Article 3 Clause 3 (*Draft Agreement, 2013*, Article 3 Clause 3). The conditions of becoming a co-respondent in the ECtHR proceedings are stipulated in this provision as well. In cases when the application is submitted against the EU, the Member State can become a co-respondent if the compatibility of the provision of EU primary law with the Convention is in question. Consequently, in this case it would be important for the Member States to become the co-respondents in order to ensure the enforcement of the ECtHR decision. If alteration of the EU primary law is necessary to enforce the ECtHR decision, it could only take place with the consent and participation of all the Member States. The EU alone would not be capable of eliminating such an infringement and, consequently, implementing the decision of the ECtHR.

As far as EU secondary legislation is concerned, it should be noted that for the most part it is implemented in the Member States while the EU only acts occasionally vis-à-vis individuals (*Lock, 2012*, p. 164). Therefore, as a rule, individuals are confronted with EU law only indirectly through national law (*Krenn, 2015*, p. 150). A regulation, as set out in Article 288 Clause 3, is a directly applicable law that must be complied with by the Member States without any room for manoeuvre. For example, if we remember the famous *Bosphorus* case (*Bosphorus v. Ireland, 2005*), it must be noted that an order by the Irish minister concerning the arrest of an aircraft was issued while implementing the provisions of the respective EU regulation. However, the rights and the alleged infringement of the ownership rights of the *Bosphorus* company were directly influenced not by the regulation itself, but by a national legal act. If we project such a situation in the post-accession period, we should agree that the applicant company *Bosphorus* should direct a petition not against the EU, but against Ireland, whereas it was the legal means issued by this state that have potentially infringed human rights.⁴ Should the ECtHR conclude that the arrest of the aircraft infringed the provisions of the Convention, it would not be sufficient to repeal the national legal act only. The regulation on the basis of which the order of the minister was adopted should be altered or repealed as well. Seeking to ensure an effective enforcement of the ECtHR decisions, it is important that such a decision of the ECtHR would also bind the EU since only its institutions are entitled to alter or annul EU secondary law. Therefore, pursuant to the provisions of the Draft Agreement, i.e. Article 3 Clause 2, in a situation like this the Union could become involved in the proceedings as co-respondent and be bound by the decision of the ECtHR.

That being said, it is clear that the requirement of a proper defendant is focused on the goal to ensure the enforcement of ECtHR decisions. In other words, it is important that the decision of the ECtHR indicating the violation of the Convention obliges the entity which would actually be able to repeal or amend the legislative measure which resulted in human rights violations (which from the potential violation was actually rooted from) (*Krenn, 2015*, p. 151). Thus the utmost advantage of the co-respondent mechanism is the joint responsibility of the EU and its Member State(s) allowing the proper elimination of the infringement of the Convention. Furthermore, the possibility for the party responsible for the violation of the Convention to participate in the proceedings and present its defensive position is also an important advantage of the co-respondent mechanism (*Lock, 2012*, p. 165; *Explanatory report, 2013*, p. 45).

Alongside ensuring the effective enforcement of the decisions of the ECtHR, the introduction of the co-respondent mechanism should allow situations to be avoided where the ECtHR would be forced to decide on the division of competences between the EU and the Member States that would require the interpretation of EU law (*Lock, 2010*, p. 15). Given the specificity of the EU law, the uncertainty could occur once in a while whether the breach originated solely from national law or from EU law as well. In particular, an issue of delimitation could arise if, while implementing EU law or taking a decision connected to EU law, a Member State possessed a respective level of discretion. A directive which is not a directly applicable legal act could be taken as an example. As it is established in Article 288 Clause 3 of the TFEU, 'a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods (TFEU, 2015, Article 288 Clause 3).' The margin of discretion possessed by the Member States is

³ Under both Article 267 of the TFEU (preliminary ruling procedure), and under Article 263 of the TFEU (review of legality) the CJEU may only decide on the legality of the EU secondary law.

⁴ Such a conclusion is also affirmed by Article 1 Clause 4 of the Draft Agreement: "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."

essentially dependent on how specific and accurate the provision in question is. The more accurate the provision is, the less discretion is left when incorporating it within the national laws. However, should the provision be formulated in an abstract manner the national government might have a considerably wide range of discretion. It is especially so if it was unclear ‘< ... > whether violation results from the directive itself, or from the way in which the Member State has implemented it.’ (Eeckhout, 2015, p. 979). In order to determine the origins and the responsible party of the alleged violation of human rights, a question of interpretation of EU law provisions (especially concerning EU competence) would have to be dealt with. This would mean that the ECtHR would be forced to get itself entangled in the issues of delimitation of the competences of the EU and the Member States and, therefore, in the interpretation of EU law. Knowing how meticulously the CJEU protects the autonomy of the EU legal order, and that one of its most important elements is directly related to the exclusive jurisdiction of the CJEU to interpret EU law (Opinion 1/91, pp. 70–71; Opinion 1/09, p. 80, 89; Commission v. Ireland [Mox Plant], 2006, p. 123), the drafters of the Draft Agreement sought to eliminate any possibility for another court to intervene in the matters of delimitation of EU and the Member States’ competences. Thus, as the drafters of the Draft Agreement thought, the co-respondent mechanism should have prevented such interference within the internal affairs of EU law since the ECtHR would not have to decide on EU and Member States’ competence division (Opinion 2/13, p. 82). Yet, as we know and as will be further analyzed, the CJEU discovered such a threat anyway.

3. Draft agreement rules regulating the co-respondent mechanism

Provisions concerning the co-respondent mechanism are entrenched in Article 3 of the Draft Agreement. Just like for the other provisions of this agreement, the explanations concerning Article 3 are provided in the Explanatory report of the Draft Agreement (Explanatory report, 2013, pp. 37–64).

Since the current system of the ECHR does not provide for such a procedural participant as the EU, the establishment of the co-respondent mechanism would also result in amendments to the Convention. Therefore, it firstly provides the list of amendments of the Convention that would be needed in order to introduce this mechanism. The necessity to complement Article 36 of the Convention currently designed for the participation of third parties in the proceedings before the ECtHR is stipulated in Article 3 Clause 1 of the Draft Agreement. It was suggested to append a new fourth clause to this article which would provide the EU’s and its Member States’ right to become co-respondents in the ECtHR proceedings under the conditions set out in the Draft Agreement and which would note that the co-respondent is a party to a case (Draft Agreement, 2013, Article 3 Clause 1 Paragraph b).

It should be noted that in accordance with the suggested wording of Clause 4 of Article 36 of the Convention, the Union or a Member State shall have the right, but not the obligation, to become a co-respondent (‘< ... > may become a co-respondent < ... >’). Introduction of the voluntary status of the co-respondent mechanism attracted significant criticism (Grousot et al., 2011, pp. 13–14). In addition, whereas it was obvious that this mechanism was relevant and could be applied only in the context of EU law, it was stipulated that the co-respondent status could only be acquired by the EU or a Member State while the other parties would not have such a right.

Accordingly, the provision of the Convention that should introduce the co-respondent’s mechanism itself makes a reference to the Draft Agreement elaborating the most important aspects of this mechanism.

Occasions when the co-respondent mechanism could be applied are distinguished in Clauses 2 and 3 of Article 3 of the Draft Agreement. The conditions of becoming a co-respondent are entrenched in the same provisions. The first case is when the application is submitted against one or more of the Member States. In this case the EU could join as a co-respondent when it ‘appear[ed]’ that such allegation called into question the compatibility with the Convention of a provision of (primary or secondary) EU law (Draft Agreement, 2013, Article 3 Clause 2). This would be the case, for instance, if an alleged violation could only have been avoided by the Member State by disregarding an obligation under EU law (Draft Agreement, 2013, Article 3 Clause 2). The Bosphorus case (Bosphorus v. Ireland, 2005) could be indicated as an equivalent of such situation. The second case would involve a situation when the application was addressed against the EU and the Member States may become co-respondents if it appeared that the alleged violation as notified by the Court called into question the compatibility of a provision of the primary law of the EU with the Convention rights at issue (Draft Agreement, 2013, Article 3 Clause 2). The Matthews case (Matthews v. United Kingdom, 1999) could be indicated as an equivalent of this situation. In this case the ECtHR assessed the compatibility of the EU primary legislation banning EU citizens living in Gibraltar from participation in the elections of the European Parliament with the provisions of the Convention.

Consequently, either in the first or the second case, an assessment must be performed to evaluate whether the material conditions of becoming the co-respondent are fulfilled. In addition, it must be evaluated whether the connection of the violation with EU law exists and whether such a violation could have been avoided if the Union law was disregarded.

As mentioned already, the decision to become a co-respondent would be voluntary. Both the EU and the Member States may become co-respondents either by means of accepting an invitation from the ECtHR or making a request to join the proceedings as co-respondent (Draft Agreement, 2013, Article 3 Clause 5 first sentence). As provided for in Article 3 Clause 5 of the Draft Agreement, where Union or Member States request to be allowed to enter into the case in the ECtHR under the rights of a co-respondent, they must present arguments allowing the determination of whether they meet the material conditions of participation in the court proceedings. Having verified these conditions the ECtHR would decide whether to involve the party into the case with the rights of the co-respondent.

Unlike a third party, the co-respondent becomes a full party to the case in the ECtHR proceedings. It enjoys the same procedural position as the respondent and will therefore be bound by the judgment (*Draft Agreement, 2013*, Article 3 Clause 7, *Explanatory report, 2013*, p. 45). Hence, if the ECtHR determines the violation, as stipulated in Article 3 Clause 7, the respondent and co-respondent(s) would be jointly responsible. Even so, this provision also establishes the exemption from the rule of joint responsibility of co-respondents. More precisely, the ECtHR is also entitled to decide that only one of them is responsible for the violation. The ECtHR is entitled to adopt such a decision in accordance with the respondent's and co-respondent's arguments presented and after hearing the opinion of the applicant.

4. Objections raised by the CJEU with regard to the co-respondent mechanism

The idea of the joint responsibility and its instrument, the co-respondent mechanism, has been in principle acknowledged by the CJEU. However, the Court considers that the particular procedural elements of that mechanism are incompatible with the EU Treaties whereas they '< ... >' do not ensure that the specific characteristics of the EU and EU law are preserved.' (Opinion, 2/13, p. 235).

The assessment of the co-respondent mechanism is provided in paragraphs 215–235 of the Court's opinion. In fact, the Court objects to three features of that mechanism, two of which shall be discussed in this article.⁵ The first objection concerns the material conditions under which a Member State or the EU respectively may become co-respondents. The Court does not agree with the rule established in Article 3 Clause 5 of the Draft Agreement pursuant to which the ECtHR is empowered to assess whether the material conditions for the application of the co-respondent mechanism are met. By endorsing the voluntary status of the co-respondent mechanism the CJEU expresses the desire that '< ... >' the EU and Member States must remain free to assess whether the material conditions for applying the co-respondent mechanism are met.' (Opinion 2/13, p. 220). The Court's position is highly based on the argumentation of the EU legal order autonomy protection, which is inseparable from the exclusive jurisdiction of the CJEU to interpret EU law, including the right to decide on the competence division between the EU and its Member States. According to the Luxembourg court, in carrying out such an assessment '< ... >' the ECtHR would be required to assess the rules of EU law governing the division of powers '< ... >' as well as the criteria for the attribution of their acts or omissions '< ... >'.' (Opinion 2/13, p. 224). This kind of control performed by the ECtHR could disturb the competence division between the EU and the Member States and would not be compatible with the requirements of EU autonomy.

The second objection of the Luxembourg court was also based on the motive to protect its exclusive jurisdiction. The Court did not agree with the rule established in Article 3 Clause 7 concerning the exception from the joint responsibility of the co-respondents in accordance with which the ECtHR could decide that only one of them was responsible. As in the case of the first objection, by adopting such a decision the ECtHR should assess the EU rules governing the division of competences between the Union and the Member States. The CJEU observes that permitting '< ... >' the ECtHR to adopt such a decision would also risk adversely affecting the division of powers between the EU and its Member States.' (Opinion 2/13, p. 231). The Court also pointed out that the wording of this provision was rather uncertain (Opinion 2/13, p. 233). It should be remembered that Article 3 Clause 7 provided that the ECtHR's decision on liability was to be adopted on the basis of the arguments submitted by the respondent and the co-respondent. To be more precise, it is not clear whether this provision requires that the ECtHR could only attribute responsibility if there were a mutual agreement between the respondent and the co-respondent concerning the allocation of the responsibility. But even if such an assumption was made, according to Court, it is not sufficient to eliminate all the possibilities of infringement of EU autonomy (Opinion 2/13, p. 234).

Consequently, having presented these rather abstract arguments, the CJEU came to the conclusion that the rules on the co-respondent mechanism established in the Draft Agreement did not ensure that the specific characteristics of the EU and EU law would be preserved (Opinion 2/13, p. 235).

5. Opinion 2/13 – a continuation of the well-established trend of autonomy protection

What seems to be at the center of the Court's reasoning is the right to decide on the internal EU competence division. Not surprisingly, the Court took an opportunity to underline its exclusive right to apply and interpret EU law. In this respect, Opinion 2/13 does not seem to be exclusive in any way. On the contrary, it is well in line with the Court's earlier decisions representing protection of the autonomy and separateness of EU legal order.

When it comes to protection of autonomy, the case-law of the CJEU can be summarized in two rules. Firstly, autonomy requires '< ... >' that the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered.' (Opinion 1/91, pp. 33–35; Opinion 1/00, p. 12). Secondly, '< ... >' the procedures for ensuring uniform interpretation of the rules of the '< ... >' [a]greement and for resolving disputes will not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of

⁵ The third objection concerns the position of the Member States that have made use of reservations pursuant to Article 57 ECHR. (See Opinion 2/13, pp. 226–228.)

Community law referred to in that agreement.’ (Opinion 1/91, p. 35; Opinion 1/00, p. 13). In other words, the first element demands that the international agreement does not change the division of the powers and competences between the Member States and the EU and among the EU institutions themselves (Van Rossem, 2011, pp. 61–62). The second criteria means ‘< ... > that procedures for ensuring uniform interpretation of the treaties, specifically procedures that involve an external judicial body < ... >’ (Van Rossem, 2011, pp. 61–62) interpreting EU law do not have the effect of binding the EU and its institutions.

As is apparent, the rules firstly introduced in Opinion 1/91 concerning the European Economic Area Agreement and later reiterated in Opinion 1/09 concerning the draft agreement on the European and Community Patents Court, the Mox Plant (Commission v. Ireland, 2006, p. 123) and Kadi (P Kadi and Al Barakaat International Foundation v. Council and Commission, 2008, p. 282) cases were again invoked to reject the Draft Agreement in Opinion 2/13. Among other things, the consistent protection of the autonomy embodied by the CJEU resulted in the formation of a somewhat pluralistic relationship between the EU and international legal orders (see, for instance: Ulfstein, 2012). Indeed, aiming to protect the internal fundamental characteristics of the EU legal order the CJEU allegedly disregarded the ‘core value system’ (De Wet, 2009, p. 287) of human rights protection common to the national and regional legal structures in Europe. That way, due to internal motives, the CJEU clearly created a conflict between the norms of the EU and ECHR legal regimes (Krenn, 2015, p. 147).

However, the CJEU’s approach in Opinion 2/13, at first glance seeming to be highly pluralistic, is to a large extent determined by formalistic and procedural reasons and could be easily taken into account in order to meet the demands of autonomy protection. Namely, it appears that the elimination of the procedural mechanisms potentially enabling the ECtHR to decide questions of EU competence division would do the trick and make the co-respondent mechanism acceptable. To overcome the first objection concerning the right to decide if the material conditions of becoming a co-respondent are met (Opinion 2/13, p. 220) the Court seems to suggest that the power of the assessment must remain within the express competence of the EU and its Member States. As regards the second objection, i.e. the right of the ECtHR to decide that only one of the co-respondents is to be held responsible for the violation of the ECHR, it appears that the withdrawal of the ECtHR competence to decide who is ultimately responsible could mitigate the CJEU’s concerns. In this case, only a couple of provisions should be needed to be included within the accession agreement to meet the concerns of the CJEU. First of all, it would have to be stipulated that the EU and Member State(s) are jointly responsible for the breaches of the ECHR. Second of all, the competence of internal responsibility attribution would have to be reserved to the CJEU by eliminating any competence of the ECtHR to engage in the matters of EU competence division.

But is there really something worth avoiding there? According to some authors, on the circumstances of the particular case, the ECtHR might never actually face the question of EU competence division (Eeckhout, 2015, p. 983). Indeed, the first question that ECtHR would encounter after receiving the application would be rather formalistic: does the alleged violation of the ECHR originate from EU law or only from domestic measures? (Eeckhout, 2015, p. 983). There is not enough space for deciding matters of competence division here. In turn, at the time an application comes to the ECtHR all the domestic remedies would have to be exhausted. If the subject matter of the dispute is significantly related to the questions of the application and interpretation of EU law, it is likely that the CJEU would have already been involved in the dispute and commented on the subject matter of the case through the preliminary ruling procedure. Should the CJEU not be involved in the domestic proceedings, it would be involved through the *prior involvement procedure* in accordance with Article 3 Clause 6 of the Draft Agreement. Therefore, once an actual application is submitted against the EU and/or its Member States, most of the questions of EU law and internal competence division should already be decided. Therefore, the ECtHR might never get the chance to confront the question of EU competence division at the initial stage.

However, the situation is rather different when deciding which of the co-respondents is ultimately responsible for the breach. From the perspective of international law the question of responsibility is normally decided regardless of the internal laws of the state or an international organization (Vienna Convention, 1969, Article 27). In other words, the state or an international organization may not justify its illegal actions with the arguments stemming from its internal laws. Yet the EU legal system being of *sui generis* nature results in the situation where the question of responsibility can be duly decided only if the internal laws are taken into account.

It is not by accident that in the case of mixed agreements the EU is rather perceived as a single contracting party and not as many (Neframi, 2010, p. 335). If one looks at the EU from the angle of the attribution of international responsibility it seems to be much more pragmatic to consider the EU as a single entity. Meanwhile, the EU itself aspires to be seen first as a single entity in the international arena (Opinion of AG Tesaurò, 1997, p. 21) and later have the question of the responsible party resolved in accordance with internal procedures (Neframi, 2010, p. 335).

Therefore, there is no good reason for an external judicial body to decide which of the co-respondents is ultimately responsible. Indeed, ‘< ... > the rationale behind the principle “joint and several responsibility” is directed at the protection of the interests of the injured party and is thus rather unsatisfactory from the perspective of the responsible parties < ... >’ (Ahlborn, 2011, p. 463). Therefore, from the perspective of human rights protection an individual’s rights may be safeguarded just as effectively by recognizing that the EU and the respective Member State are jointly responsible and by not deciding which one of them was actually liable and risking the performance of a false competence division. Having said that, a rule entrenched in Article 3 Clause 7 of the Draft Agreement entitling the ECtHR to decide that only one of the co-respondents is liable appears to be unnecessary.

As it appears, Article 3 Clause 7 concerning the exception from the joint responsibility of the co-respondents was intended to make the regulation clearer and more effective. However, by choosing to determine that the ECtHR may in

certain cases ultimately decide who is responsible for the infringement of the Convention, drafters of the Draft Agreement caused an opposite reaction from the CJEU than expected. As stated by some authors, the CJEU's concerns were to a large extent caused by the vague wording of Article 3 Clause 7 (Krenn, 2015, p. 152). Indeed, it is not really clear from this provision whether the reasons given by the respondent and co-respondent would have had to be given unanimously by the respective Member State(s) and the EU's representative. And if unanimity was not needed, as Krenn rightly observes, it could be understood that the ECtHR was endowed with the power to decide which of the co-respondents' views should prevail (Krenn, 2015, p. 152). However, should the provision in question have been precise enough, it may have not guaranteed the approval of CJEU anyway because it would still allow for the ECtHR to decide who is ultimately responsible and thus undermine the authority of the CJEU.

Accordingly, the opinion of D. Halberstram, stating that the failure to indicate the ultimate decider may actually lead to mutual adjustments made by the two courts (Halberstram, 2015, p. 116) could be relatively acceptable and serve as a solution to the second objection of the Court. In very truth, by not stating which one of the courts shall have the final say in determining responsibility, the Draft Agreement could have created preconditions for the Strasbourg and Luxembourg courts to resolve the issues by a way of mutual accommodations (Halberstram, 2015, p. 116). As *Bosphorus v. Ireland* (2005) has proved, it is really possible in the case of the relationship between these two particular judicial institutions to agree on a mutually acceptable system of rules for co-existence. Consequently, instead of endorsing the rules suggested, the CJEU was forced to reject it whereas it threatened its ultimate judicial authority within the EU legal order and, naturally, the autonomy of the EU legal order. Therefore, the Draft Agreement empowering the ECtHR to recognize the EU and the Member State(s) as jointly responsible and leaving the right to decide who is actually responsible unregulated could have really been endorsed by the Court.

As regards the voluntary status of the co-respondent mechanism, it was accepted by the CJEU by endorsing the position of the Advocate General E. Kokkot (Opinion of AG Kokkot, 2014, pp. 231–232). Importantly, although the Member States as well as the Commission did not see any obstacles for the preservation of the specific characteristics of EU law (Opinion 2/13, p. 117, p. 82) the Advocate General took into account a 'considerable uncertainty on account of the plausibility assessment' (Opinion of AG Kokkot, 2014, p. 230) that was identified among the participants in the procedure and ruled in favor of the voluntary status of becoming the co-respondent. Indeed, the suggestion of the Advocate General and the CJEU that the EU and Member States should not ' < ... > be precluded from participating in proceedings before the ECtHR, even though they considered it necessary to defend EU law in those proceedings' (Opinion of AG Kokkot, 2014, p. 231) seems to be sufficiently reasonable to uphold such a position. When you think about it, a voluntary status for becoming a co-respondent does make sense. Should the case (when being solved at the domestic level) require the preliminary ruling, it would be obvious that the case involves the questions of EU law and indicate that the EU should become the co-respondent. If the preliminary ruling procedure was not applied when solving the case at the domestic level, but the EU institutions believe that it really does involve the questions of EU law, the EU should be free to enter the proceedings as co-respondent and request to apply the *prior involvement procedure*.

It should, however, be remembered that according to some authors it was one of the major deficiencies of the Draft Agreement that the co-respondent's mechanism was not intended to be made mandatory since it could have made the mechanism inefficient (Groussot et al., 2011, pp. 13–14). As we now know, they were not really correct. In fact, the voluntary status of becoming the co-respondent seems to be the solution to the first objection presented by the Court. By opposing the empowerment of the ECtHR to assess whether the material conditions for the application of the co-respondent mechanism are met, the Court defended the voluntary status of the mechanism. Eliminating the power of the ECtHR to assess whether the EU and/or Member States could join the proceedings would deprive the ECtHR from any possibility to comment on the division of competences within the EU. Therefore, making the procedure purely voluntary would most likely remove the Court's precautions and make the procedure of becoming the co-respondent compatible with the specific characteristics of EU law.

6. Conclusions

1. What the analysis presented suggests is that the ECtHR could actually be enabled to solve the questions of EU competence division if it was entitled to decide who, the EU or the Member State(s), is ultimately responsible for the violation of the ECHR. It must be admitted that the CJEU's precautions with regard to this objection were at least partially justified since in deciding which one of the co-respondents is liable the ECtHR might need to engage in the questions of internal competence division within EU. However, such a threat to the CJEU's exclusive competence, as some authors state, may be eliminated by not regulating which court is ultimately authorized to allocate the responsibility and to indicate the responsible co-respondent.
2. Apart from the question of allocation of responsibility between the co-respondents, it is very unlikely that the ECtHR would actually need to engage in the questions of internal competence division of the EU at any other stage. Indeed, once the application is submitted to the ECtHR it would have to decide the technical question of whether the infringement comes from EU legislation, or purely from national legislation. Should there have been the preliminary ruling procedure in national proceedings the EU should become a co-respondent. And if there is still a suspicion that the case might involve

the questions of EU law the voluntary status of becoming the co-respondent would allow the EU's participation to be ensured if it was necessary.

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