UTRECHT JOURNAL OF
INTERNATIONAL AND EUROPEAN LAW

Post-EU Accession to the ECHR: The Argument for Why the ECtHR Should Abandon the Bosphorus Doctrine

RESEARCH ARTICLE

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ABSTRACT

This article analyses the case law of the ECtHR on the responsibility of the Contracting Parties following from their membership in the EU and the Court's application of the Bosphorus presumption of equivalent protection over the period 2005–2021. It critically evaluates this presumption and the broader consequences it generates in European human rights law. The article then explores the future of the presumption in light of the case law developments and the recently relaunched negotiations on the EU's accession to the ECHR. The summary analysis over a sixteen-year period of the Strasbourg case law demonstrates that there is a lack of methodological clarity when it comes to the parameters and the application of the Bosphorus presumption. It also shows that the mere existence of the presumption was brought into question in the case law relating to the EU principle of mutual trust. This conclusion, coupled with the recently revived aspirations for a speedy accession, suggests that the time has come for the ECtHR to abandon the Bosphorus doctrine.

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KEYWORDS:
Bosphorus presumption; EU's accession to the ECHR; ECHR; EU law; European Court of Human Rights; Court of Justice of the EU

TO CITE THIS ARTICLE:
Imamović Š, 'Post-EU Accession to the ECHR: The Argument for Why the ECtHR Should Abandon the Bosphorus Doctrine' (2024) 39(1) *Utrecht Journal of International and European Law* pp. 17–29. DOI: https://doi.org/10.5334/ujiel.639

1. INTRODUCTION

At the moment the EU is not a party to the European Convention on Human Rights (ECHR) and hence not directly bound by it on the international plane. Complaints cannot be brought against the EU acting as a defendant in Strasbourg, and the EU cannot be held responsible.[1] This does not however mean that the ECHR is of no avail in the EU system of fundamental rights protection. Fundamental rights, as guaranteed by the ECHR, constitute general principles of EU law and the EU shall accede to the ECHR.[2] Moreover, the Charter of Fundamental Rights of the European Union (Charter) draws heavily on the ECHR and provides that Charter rights corresponding to rights guaranteed by the ECHR shall have the same meaning and scope as those laid down by the said Convention, while the EU can offer more extensive protection.[3] In addition, nothing in the Charter can be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by the ECHR.[4] This means that, in practice, these two at first sight independent legal regimes do not operate in complete isolation from each other.[5]

The main issue arises when the European Court of Human Rights (ECtHR) is required to consider whether the action taken by State Parties in matters regulated by EU law is compatible with the State's obligations under the Convention, which has been increasingly the case in Strasbourg.

The starting point is the *Bosphorus* case, in which the ECtHR officially established the presumption of equivalent protection in relation to the EU.[6] The Court took the view that the protection of fundamental rights afforded by the EU is in principle equivalent to that of the Convention system as regards both the substantive guarantees offered and the mechanisms controlling their observance.[7] This view is based on two pillars: the substantive guarantees offered by the international organisation in question (i.e. the EU) and the strong role and powers of the Court of Justice of the EU (CJEU) in supervising the observance of fundamental rights.[8] However, the ECtHR attached two conditions to the application of the presumption: the absence of any margin of discretion on the part of the domestic authorities when complying with an EU law obligation and the deployment of the full potential of the supervisory mechanism provided for by EU law. The Court also explained that even when the two conditions are fulfilled and the presumption is applicable, it can still be rebutted, if there are signs of manifest deficiency in the protection provided by EU law.

The focus of this article is thus on the responsibility of the Contracting Parties for acts originating in EU law. However, it is important to keep in mind that the equivalent protection criterion can also be applied in situations concerning the compatibility of acts of other international organisations with the Convention.[9] This means that the discussion in this contribution may also be relevant beyond the EU-ECHR relationship.

From the Strasbourg perspective, the *Bosphorus* decision is at the heart of the relationship between the ECHR and EU law. It offered a way to remedy the dilemma State Parties may find themselves in whilst allowing the Court to preserve a level of control and oversight. However, the decision also left many questions and concerns on the table. Questions regarding the practical application of the two conditions and the criteria for establishing manifest deficiency remained problematic. More recently, the mere existence of the presumption was brought into question in the case law relating to the EU principle of mutual trust. This principle requires EU member states to trust each other when it comes to compliance with human rights save for exceptional cases.[10] However, this approach does not sit well with the ECHR system because under the Convention Contracting States are required to check the compliance of other states with human rights (e.g. in extra-territorial cases) rather than trusting their compliance. This prima facie conflicting approach is further exacerbated by the paradox that the combination of the principle of mutual trust in EU law and the presumption of equivalent protection in ECHR law creates. The result is essentially that, in a case, national authorities in one of the EU Member States may not examine human rights compliance by another EU state because of mutual trust and, in that same case, the ECtHR may limit its own assessment due to the trust it has shown towards the EU legal system. In other words, many human rights violations in the application of EU law (that are not manifest) may go unnoticed.

The development and the future of the Bosphorus doctrine have been discussed in scholarly literature over the years, but what is still missing is a comprehensive analysis of the relevant case law. This article provides such an analysis in order to illustrate that while the presumption might have been a sensible choice at the time it was introduced, the more recent developments show that its application has become untenable in the long run. To strengthen and develop this argument further the article links this criticism to the EU's accession to the ECHR.[11] In doing so, it goes back to the basic questions of the aim and purpose of both the Bosphorus presumption and the EU's accession to the ECHR and argues why the presumption is no longer tenable after accession. It concludes that the ECtHR should abandon its deferential attitude towards the EU and exercise full scrutiny after accession as it is the only way to ensure the credibility of both institutions when it comes to human rights standards in Europe.

After briefly discussing the origins of the Bosphorus doctrine (section 2), the article provides a comprehensive analysis of the evolution of the presumption, its scope and the conditions for its application in the Strasbourg case law (sections 3 and 4). In section 4, the focus is on the recent cases relating to the European Arrest Warrant Framework Decision (EAW),[12] which has been a point of contention in both Strasbourg and Luxembourg, and has even led to the ECtHR rebutting the presumption and finding a violation for the very first time.[13] In section 5, the question of the future of the presumption is explored in light of the developments concerning the EU's accession to the ECHR.[14] Finally, section 6 provides a brief conclusion.

2. ORIGINS OF THE PRESUMPTION OF EQUIVALENT PROTECTION

The concept of equivalent protection finds its roots already in the early decisions of the former European Commission of Human Rights. In 1990, the Commission noted that Germany's responsibility could be engaged by virtue of the action it had taken to give effect to (then) Community law in respect of which it had no margin of appreciation. However, it declared the application inadmissible on the ground that the legal system of the European Communities guaranteed protection of fundamental rights at a level equivalent to that provided by the ECHR.[15] In *Bosphorus*,[16] the ECtHR accepted the equivalent protection criterion but, contrary to the European Commission of Human Rights, it clearly acknowledged its jurisdiction to review the compatibility of a domestic measure adopted on the basis of Community law with the Convention.

The case concerned an aircraft seizure owned by a Yugoslav airline company but that was leased to Bosphorus, an airline charter company registered in Turkey, by the Irish authorities. Ireland took this action in order to comply with EC Regulation 990/93,[17] which was directly applicable in the Irish legal order. The Regulation implemented sanctions by the UN Security Council at the EU level against the former Yugoslavia (Serbia and Montenegro) on the basis of Chapter VII of the Charter of the United Nations. Bosphorus contested the seizure, arguing that the Regulation either did not apply in the circumstances, or was contrary to Bosphorus' fundamental right to property. The case thus involved the question of the responsibility of a Member State under the Convention for legal actions induced by the EU. The case was dealt with first in Luxembourg and later on in Strasbourg.

The CJEU ruled that the right to property is not absolute and can be restricted if objectively justified. Since the Regulation pursued a general interest of the Union, the interference was not disproportionate and thus the validity of the Regulation under EU law was not affected.[18] Subsequently, the applicant brought the case to the European Commission of Human Rights and, finally, the ECtHR.

The ECtHR recognised that the Convention system does not prohibit Contracting Parties from transferring sovereign power to an international organisation such as the European Union. Following the Commission's approach, the Court considered that State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which may be considered at least equivalent to that for which the Convention provides.

In clarifying the meaning of 'equivalent' protection the ECtHR explained that it means 'comparable'; any requirement that the organisation's protection be 'identical' could run counter to the interest of international cooperation pursued, according to the Court.[19] As regards the protection of fundamental rights afforded by the EU, the Court recognised that it is in principle equivalent to that of the Convention system.[20] It justified this position inter alia by highlighting the consistent references to the ECHR and the Strasbourg case law in the case law of the CJEU and the reflection of both in the EU Charter of Fundamental Rights.

The presumption is thus that an EU Member State does not depart from the requirements of the Convention when it implements obligations flowing from its EU membership. However, as mentioned before, the application of the presumption is subject to two conditions. The first is that the impugned interference must have been a matter of strict legal obligation for the Respondent State, to the exclusion of any margin of discretion on the part of the domestic authorities. The second condition is the deployment of the full potential of the supervisory mechanism provided for by EU law. If the two conditions are fulfilled, the presumption is applicable. Nevertheless, the presumption can still be rebutted, if there is a manifest deficiency in the protection of rights by the Respondent State. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights.[21]

Applying these conditions to the case, the Court held that the presumption is applicable since both conditions were satisfied: Ireland had no discretion in implementing the Regulation in question and the supervisory mechanism provided by EU law was employed since the CJEU had ruled in the case. Moreover, the presumption was not rebutted since the Court did not find any signs of manifest deficiency in the protection provided. In considering a

potential deficiency, the Court simply stated that having had regard to the nature of the interference, the general interest pursued by the restriction and the ruling of the CJEU, a ruling which the Supreme Court complied with, there was no dysfunction of the mechanisms of control of the observance of Convention rights.

The judgment was the Court's attempt to reconcile the Member States' obligations arising from EU law and the ECHR and avoid conflicting treaty obligations. It was also arguably a way for the ECtHR to avoid a direct conflict with EU law and the CJEU. Nevertheless, the decision received quite some criticism.[22] The criticism came from different corners, including from the judges on the bench who disagreed with the approach taken by the Court even though concurring in the final decision. The main criticism voiced both inside and outside of the Court concerned the danger of double standards in human rights protection in Strasbourg.[23] Indeed, the standard of review appears less strict for the EU Member States vis-à-vis non-EU Member States and, conversely, for the EU vis-à-vis other international organisations in certain cases (since the Court, at that time, did not give such leeway to the Contracting States when acting under other international law obligations). Another criticism relates to the criterion for 'manifest deficiency'. It was not clear from the judgment under which conditions a deficiency would be considered 'manifest' and – more importantly – why a deficiency should be 'manifest' in order to rebut the presumption. The Court simply concluded in one paragraph, with no prior elaboration or assessment, that having had regard to the nature of the interference, the general interest pursued and the ruling of the CJEU, it was clear to it that there was no (manifest) deficiency.[24] The lack of any explanation for this conclusion is regrettable since it could have been perceived as a sign that in future cases where State authorities apply EU law they can pass without any proper scrutiny. Instead, a more detailed explanation would have been useful to avoid the impression that EU Member States operate under a different and more lenient system when it comes to the protection of Convention rights and freedoms.

3. UNDERSTANDING THE APPLICATION OF THE BOSPHORUS DOCTRINE

The presumption of equivalent protection, albeit not applied very often, has undergone a significant development over the years. This section analyses some of the most important decisions in the period 2005–2021 and considers different aspects of the evolution of the application of the presumption.

3.1. CLARIFYING THE CONDITIONS

The ECtHR's decision in *Michaud v France*[25] further clarified the conditions under which the Bosphorus presumption of equivalent protection can be applied. In this case, the applicant claimed that an internal regulation, adopted on the basis of the French Monetary and Financial Code, which was an implementing act of EU Directive 2005/60/CE,[26] was in violation of Articles 6, 7 and 8 ECHR. The main argument of the French Government was that the Bosphorus presumption of equivalent protection was applicable in this case, and that the ECtHR should not check the proportionality of the interference.[27] The Court disagreed, however, and explained that there were some crucial differences between the two cases: first, the *Bosphorus* case dealt with an EU Regulation that, by its nature, did not provide discretion for the Member States concerning its application, whereas the present case concerned the implementation of a Directive that, by its nature, did give Member States discretion as to its implementation; and, second, in the *Bosphorus* case the CJEU had already checked whether the Regulation in question was in compliance with the EU fundamental rights standards, while this was not the case in *Michaud* (the *Conseil d'Etat* had dismissed all claims and declared that the internal regulation was in accordance with European human rights standards, without referring the case to the CJEU).[28] Accordingly, the presumption of equivalent protection could not be applied in *Michaud*, and the Court tested the proportionality of the interference.

The first condition for the application of the presumption of equivalent protection, namely the absence of discretion on the part of the State, was further elaborated in *MSS v Belgium and Greece*.[29] The case raised the question of compliance of the Dublin II Regulation[30] with the Convention rights. The applicant was an Afghan national, who entered the EU through Greece but applied for asylum in Belgium. The Belgian authorities decided to transfer him back to Greece, in accordance with the Dublin rules. The applicant then alleged before the ECtHR that, by sending him to Greece, the Belgian authorities exposed him to a risk of inhuman and degrading treatment, and that he was indeed subjected to such treatment. Even though the act at issue in this case was a Regulation, which is directly applicable in the Member States and does not normally allow discretion to the Member States, the ECtHR still examined whether the Belgian authorities had any discretion when applying the Regulation. Noticing the margin of discretion allowed under Article 3(2) of the Dublin II Regulation,[31] the ECtHR concluded that the presumption of equivalent protection was not applicable to the case at hand. In other words, a Contracting Party can only benefit from the presumption when it truly has no discretion in implementing its EU legal obligations. This is not determined solely based on the type of document – although it is helpful to make a distinction between regulations and directives – but on the particular circumstances of each case and the precise content of the EU act on which the action of the Member State is based.

Thus, in those initial cases, the Court applied the conditions for the presumption strictly. In *Povse v Austria*,[32] concerning enforcement of an order for the return of a child made pursuant to Brussels IIa Regulation,[33] the Court declared the application manifestly ill-founded after having established that the presumption of equivalent protection was applicable and that there was no manifest deficiency. It held in particular that, under the Brussels IIa Regulation, the Austrian courts had been under an EU law obligation to respect the terms of the judgment issued by the Italian court ordering the return of the child (in contrast to the situation in *MSS v Belgium and Greece*). Furthermore, the Austrian Supreme Court had duly made use of the control mechanism provided for in EU law by asking the CJEU for a preliminary ruling (in contrast to the situation in *Michaud v France*).[34] Hence, it was clear that both conditions for the applicability of the presumption had been fulfilled in this case. The Court concluded that any alleged change in the circumstances of the applicant's situation since the issuing of the return order had to be brought before the Italian courts, which were competent to rule on a possible request for a stay of enforcement of the order. Should any action before the Italian courts fail, the applicants would ultimately be in a position to lodge an application against Italy in Strasbourg. In other words, even though the alleged violation of the applicant's right to private and family life was not assessed by the Austrian courts, the Court was satisfied with the CJEU ruling that this would be a task for the Italian courts. For this reason, the Court concluded that the presumption applied and that there was no manifest deficiency in the protection provided by the Austrian authorities. It is clear that in this case, the ECtHR put its trust in the CJEU's assessment when it comes to a potential manifest deficiency, without considering the other (more substantive) factors mentioned in the *Bosphorus* judgment, such as the nature of the interference and the general interest pursued, and thus without conducting an assessment on its own.

3.2. LESS FORMALISTIC APPROACH AND THE LIMITS OF THE PRESUMPTION

One of the much-awaited decisions in the context of the relationship between two European Courts was *Avotiņš v Latvia*.[35] The judgment was not only issued in the aftermath of the CJEU's *Opinion 2/13*,[36] in which the Court of Justice categorically rejected the draft Accession Agreement on the EU's accession to the ECHR, but it is also the first case in which the ECtHR considered the principle of mutual trust in EU law.[37] According to the latter principle, the Member States are presumed to respect fundamental rights as protected in EU law.[38] This approach does not sit well with the ECHR system, however, since Contracting Parties are generally required to check human rights compliance when substantial grounds have been shown for believing that the individual concerned would be at risk of treatment contrary to the Convention. It is thus not surprising that the judgment in *Avotiņš* was highly anticipated by the EU and its Member States.

The case concerned an alleged violation of Article 6 ECHR by the Latvian courts for the recognition and enforcement of a Cypriot judicial decision, which was the result of court proceedings that had allegedly disregarded Avotiņš's defence rights. The ECtHR first examined whether the two conditions for the application of the Bosphorus presumption were fulfilled, namely, the absence of a margin of discretion on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided for in EU law. The Court found that under the Brussels I Regulation,[39] the courts of the Member States could not exercise any discretion in ordering the enforcement of a judgment given in another Member State other than the specific grounds provided therein (which did not apply in this case). Accordingly, the Latvian courts were required to order the enforcement of the Cypriot judgment in Latvia. With respect to the second condition, the ECtHR noted that the Latvian Supreme Court did not request a preliminary ruling from the CJEU regarding the interpretation and application of the relevant provisions of the Brussels I Regulation, which meant that the supervisory mechanism in EU law had not been exhausted. However, the Court considered that this condition should be applied without "excessive formalism and taking into account the specific features of the supervisory mechanism in question".[40] In the ECtHR's view, sending requests for a preliminary ruling to the CJEU always and without exception would be disproportionate. The Court also explained that the applicant did not advance any specific argument concerning the interpretation of the relevant provisions of the Regulation and its compatibility with fundamental rights, such as to warrant a finding that a preliminary ruling should have been requested from the CJEU. Consequently, it concluded that the second condition was fulfilled and the Bosphorus presumption was applicable in this case.[41] Unsurprisingly, the Court was careful to distinguish this case from *Michaud*, in which it had concluded that the second condition was not fulfilled because there was no preliminary ruling, by pointing out that in that case, the French *Conseil d'Etat* had refused to make a preliminary reference following the request made by the applicant.[42] Avotiņš, on the other hand, never made such a request.

As for the assessment of 'manifest deficiency', the Court conducted a more thorough assessment when compared to *Bosphorus* and *Povse*. It examined different aspects of Article 6 and found that there was in fact a procedural defect, which, a priori, was contrary to Article 6 of the Convention and precluded the enforcement of the Cypriot judgment in Latvia. While the Court found this shortcoming "regrettable", it decided that the level of

protection could not be considered *manifestly* deficient.[43] This is because Cypriot law afforded the applicant a realistic opportunity to appeal (which the applicant did not make use of for unknown reasons). Taking all this together, the Court concluded that the presumption of equivalent protection had not been rebutted.

The Court thus adopted a less formalistic approach when it comes to the second condition in *Avotiņš*. The deployment of the full potential of the supervisory mechanism in EU law does not in fact have to include a decision by the CJEU as long as there are no good reasons to consider that a preliminary reference was needed, and the applicant had not requested it. Although the decision may seem EU- and CJEU-friendly at first sight, given that the Court found the Bosphorus presumption to be applicable and found no manifest deficiency in the protection provided, a careful reading of the judgment reveals a somewhat stricter application of the presumption.[44] In particular, the ECtHR's critical assessment of the principle of mutual trust and recognition is worth noting.[45]

The ECtHR commenced by stating that it is mindful of the importance of the mutual recognition mechanism for the construction of the AFSJ and of the mutual trust it requires. The Court thus considers, in principle, the means necessary for the creation of the AFSJ to be legitimate.[46] It is apparent to the Court, however, that effectiveness pursued by some of those means results in a "tightly regulated or even limited" review of the observance of fundamental rights.[47] Here the Court referred to *Opinion 2/13*, noting that such an interpretation of mutual trust could, in practice,

> run counter to the requirement posed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient.[48]

The ECtHR warned that the application of the Bosphorus presumption in the case of *Avotiņš*, and in similar cases, leads to a paradoxical situation in which national courts are precluded from a fundamental rights review due to the principle of mutual trust (as interpreted by the CJEU in *Opinion 2/13*) and the ECtHR is precluded from conducting a thorough assessment due to the (self-imposed) presumption of equivalent protection.[49]

The Court ended its appraisal by referring to national courts and their duty under the Convention. It developed a test to be applied in the context of the mutual recognition instruments: if a serious and substantiated complaint is raised before national courts to the effect that the protection of a Convention right has been manifestly deficient, and this situation cannot be remedied by EU law, national courts cannot refrain from examining that complaint on the sole ground that they are applying EU law.[50]

Yet the judgment remains unsatisfactory, not necessarily because of the final outcome but because of the ECtHR's approach and the broader issues it raises. What is particularly striking from a human rights perspective is the paradox that the combination of the principle of mutual trust in EU law and the presumption of equivalent protection in ECHR law creates. The result is essentially that, in a case, national authorities in one of the EU Member States may not examine (or may examine only superficially) fundamental rights compliance because of mutual trust and, in that same case, the ECtHR may limit its own assessment due to the trust it has shown towards the EU legal system. In other words, many human rights violations (that are not manifest) may go unnoticed. This only reinforces the claim of double standards in the ECHR system since different standards are effectively being applied for an EU and non-EU state in fields covered by the EU principle of mutual trust.[51] At the same time, the ECtHR has repeatedly found those same EU Member States to be in violation of the ECHR in different contexts.[52] It is regrettable that the concessions on the part of the ECtHR towards the EU legal system, and in particular the CJEU, may leave (vulnerable) groups of individuals without protection unless they can show manifest deficiency. The latter is very difficult to prove in practice, however, as also illustrated in *Avotiņš*. Indeed, the Court established that there was a deficiency in the protection, but it considered it not to be manifest. Accordingly, one cannot but conclude that the application of the presumption of equivalent protection has already become highly problematic, notwithstanding the EU's accession to the ECHR.

4. REBUTTING THE PRESUMPTION

It will not come as a surprise that it took the ECtHR over 15 years to rebut the presumption and find a violation in a case involving the application of EU law. The case in point is *Bivolaru and Moldovan v France*,[53] concerning the applicants' surrender by France to the Romanian authorities under European Arrest Warrants (EAWs). It prompted the Court to clarify the conditions of the application of the presumption of equivalent protection in such circumstances.

The case concerned two arrest warrants issued by Romania for the purpose of enforcing prison sentences. Relying on Article 3 ECHR the applicants argued that their surrender to the Romanian authorities under the EAWs would place them at risk of ill-treatment in breach

of Article 3 ECHR due to deplorable prison conditions in Romania.

The first condition for the application of the presumption, namely the absence of any margin of manoeuvre on the part of the national authorities, was only considered with respect to Moldovan's application. The ECtHR noted that the legal obligation to execute the warrant stemmed from the relevant provisions of the Framework Decision, as interpreted by the CJEU since *Aranyosi and Căldăraru*.[54] The Court recalled that the CJEU established a two-step test, which national executing authorities must perform before refusing to execute an EAW. First, the authority must make a finding of general or systemic deficiencies in the protection provided in the issuing state and, second, it must conduct further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to inhuman and degrading treatment as protected by Article 4 of the Charter of Fundamental Rights of the EU, which has the same wording as Article 3 of the Convention. If the judicial authority considers that there is a real risk of inhuman or degrading treatment at the systemic or general level, it moves to the second step, which is the individual test. In line with the requirements of the second step, the authority responsible for the execution of the warrant must ask the issuing authority to provide, as a matter of urgency, all the necessary information concerning the conditions of detention, which the issuing judicial authority is obliged to provide. If, in light of the information provided or any other information available to it, the authority in the executing state finds that there is, for the individual who is the subject of the warrant, a real risk of inhuman or degrading treatment, the execution of the warrant must be deferred until additional information is obtained on the basis of which that risk can be discounted.

In light of this analysis, the ECtHR pointed to the absence of discretion on the part of the executing authorities. It explained that this is because the executing authorities had to follow the two-step examination strictly delineated by the CJEU's case law, in order to ensure that the executions are in full compliance with EU law. In other words, the national authorities did not enjoy an autonomous margin of manoeuvre in deciding whether to execute the warrants. Accordingly, the first condition had been fulfilled.[55]

As for the second condition, namely the employment of the full potential of the machinery for fundamental rights protection in EU law, the Court briefly considered that no serious difficulty arose with regard to the interpretation of the Framework Directive or CJEU case law that would require a preliminary reference. This meant that although the national courts did not make a preliminary reference to the CJEU the second condition was also fulfilled since nothing in the case pointed to the need to refer. Accordingly, the Court held that the presumption of equivalent protection was applicable in this case.[56] The next step was to ascertain whether the protection provided by the French authorities was manifestly deficient. This required the Court to determine whether there had been sufficient factual basis requiring executing judicial authority to find that execution of the EAW would entail a real and individual risk that the applicant will be subjected to treatment contrary to Art 3 ECHR on account of his detention conditions in Romania. After an extensive and detailed assessment of the information provided by the issuing State as well as of its case law on prison conditions in Romania, the Court concluded that the French courts had erred in not establishing the existence of a real risk to the applicant. This led the Court to conclude that in the specific circumstances of this case, the protection of fundamental rights had been manifestly deficient and hence the presumption of equivalent protection rebutted.[57]

With respect to Bivolaru's application, the Court did not consider it necessary to assess whether the first condition for the application of the Bosphorus presumption was satisfied and it limited its assessment to the second condition, namely deployment of the full potential of the supervisory mechanism provided by EU law. In that context, the Court noted that, as with Moldovan, the Court of Cassation had rejected Bivolaru's request to seek a preliminary ruling from the CJEU concerning the implications of the execution of the warrant for the applicant's refugee status. However, the ECtHR considered this to be a novel issue that the CJEU had never examined before, which meant that the French court had ruled without exhausting the full potential of the machinery for fundamental rights protection in EU law and hence the presumption of equivalent protection did not apply in his case.[58] The Court proceeded to assess the case without taking into account the presumption, but ultimately found no violation of Article 3 ECHR, mainly because the applicant failed to substantiate his claim sufficiently.

The ECtHR's assessment in this judgment is in stark contrast to its earlier EAW cases, where the consideration of the conditions was significantly less elaborate and detailed. While the Court is to be commended for the clearly reasoned and comprehensive assessment in the case of Bivolaru and Moldovan, this does not change the fact that the line of case law has been inconsistent, and it also does not address all problematic aspects of earlier judgments.

With respect to the first condition, the Court seems to preserve its strict approach as established in the *Bosphorus* case: it is necessary to determine that the national authorities do not have any discretion in a case in order for this condition to be satisfied. In the context

of the EAW decisions, the Court maintained the view that national authorities do not have any discretion when executing warrants issued by other EU Member States. This is not very convincing, however. One could argue that national courts do in fact have a margin of maneuver in the cases under consideration, as also inferred by the ECtHR itself when it concluded that the French courts did not correctly assess the existence of a real risk to the applicant of being exposed to inhuman and degrading treatment. Presumably, the Court meant to say that the French courts failed to conduct a proper assessment because they did not follow the strict guidelines in the CJEU case law, which would indeed confirm the a priori lack of discretion. However, it should not be forgotten that national courts conduct both quantitative and qualitative assessments of the information provided by the authorities of the issuing state, which necessarily implicates some margin of discretion.[59] That is to say: national courts do have discretion when they are required to seek and evaluate evidence before deciding if a warrant can be executed. Moreover, it is known that some national courts are more inclined to refuse to execute EAWs (for example, in Germany and the Netherlands) than others are (for warrants issued by the same Member States), which again confirms that there is at least some margin of manoeuvre for the national courts. A recent analysis of the practice of the Court of Amsterdam in EAW proceedings concluded that this court used the discretion that the CJEU's case law left to the executing authorities to shift emphasis from mutual trust to the fundamental rights of requested persons.[60] The ECtHR does not find this to be the decisive element; instead, it considers that since national courts have to follow the CJEU's case law closely when it comes to how the assessment is to be done (the two-step test) they ultimately do not enjoy any discretion. In practice, however, judicial discretion is usually a matter of degree that may be perceived and exercised differently by different judges and national courts, as also illustrated in the case law. This implies that a case-by-case assessment may be more appropriate as opposed to generally accepting that the first condition would be fulfilled in all EAW cases.

Looking at the second condition, the Court now applies a looser approach in comparison to the early case law: full employment of EU supervisory machinery may require a judgment by the CJEU, but not necessarily. This will depend on the clarity and consistency of the existing case law of the CJEU and it may also depend on whether or not the applicant had requested the national court to send a preliminary reference to Luxembourg. The main criterion, though, seems to be the existence of CJEU case law on the matter at hand, which allows for a ruling by the national court that is compliant with EU law (and, thus, presumably with the ECHR). This means that the request made by the applicant is not decisive; the national courts' refusal to refer when the CJEU has ruled on the matter (and when that case law is clear and consistent) will not lead to a failure to fulfil this condition. The looser approach when it comes to the second condition is in principle not problematic because it serves the principle of judicial economy and may be beneficial for the individual in that sense as it is likely to shorten the length of the procedure. However, if the applicant does not request a referral to the CJEU at the domestic level, the Respondent State may use it to argue that this is because such a referral had no merit in the first place, and the ECtHR may use it to strengthen the conclusion that the second condition was fulfilled.[61]

There is thus a continuous lack of methodological clarity when it comes to the application of the presumption because the Court does not systematically apply the conditions in its case law.[62] There are also problematic aspects within the assessment of each of the conditions since the Court loosened the strict application of both conditions. It would appear indeed that the requirement of no discretion may be satisfied even when a national authority has at least some discretion and that the full employment of the EU supervisory mechanism may be satisfied without any supervision at the EU level. Similarly, one could argue that the Court's assessment of manifest deficiency in the protection has itself been deficient. This persistent lack of methodological clarity in the application of the presumption, coupled with the underlying paradox in areas in which the principle of mutual trust is applicable, leads to the conclusion that the Bosphorus doctrine (as developed in the case law so far) has become untenable in the long run. While developing clear criteria and drawing red lines might be difficult and even undesirable from the ECtHR's point of view, it is necessary from the perspective of individuals seeking protection and national authorities charged with providing it.[63]

5. EU'S ACCESSION TO THE ECHR AND THE FUTURE OF THE BOSPHORUS DOCTRINE

The EU's accession to the ECHR is long-awaited. Officially proposed by the European Commission and Parliament in 1979,[64] accession was consistently opposed by a number of Member States for many years, as there was a lack of political will in those countries to submit themselves to supplementary obligations under the ECHR with respect to EU law. Following the CJEU's *Opinion 2/94*,[65] in which the Court held that EU accession requires a treaty revision, as it would result in a substantial change to its system for the protection of human rights, the idea was put on hold until it re-emerged at the time of the drafting of the Constitutional Treaty. This time around, the Member States expressed sufficient political will to

achieve accession to the ECHR,[66] and a provision giving the Union the competence to accede was included in the Constitutional Treaty and, later on, in the Treaty of Lisbon. Article 6(2) TEU provides that the Union "shall accede" to the ECHR.

Soon after the entry of the Lisbon Treaty the negotiations officially started, and the Accession Agreement was finalised in June 2013. The agreement was rejected by the CJEU in its *Opinion 2/13*, however, and any discussion on accession came to a stall. In 2019, the negotiations resumed with the aim to revise the Accession Agreement in line with the objections raised in the CJEU's Opinion. On 4 April 2023, the Steering Committee for Human Rights of the Council of Europe adopted its report containing the new package of draft accession instruments to the Committee of Ministers.[67] Following the 18th and final meeting of the negotiations group consisting of 46 Member States of the Council of Europe and a representative of the EU a new accession agreement was reached.[68] It remains to be seen, however, if this new draft agreement will be accepted by the CJEU and ultimately signed and ratified by all EU and Council of Europe Member States.

As discussed earlier in the paper, the Bosphorus presumption was designed in order to regulate the overlap between the EU and ECHR legal orders and ensure that State Parties are not faced with a dilemma when complying with the legal obligations incumbent on them because of their membership in other international obligations.[69] In this way, the ECtHR attempted to reconcile the minimum human rights guarantees secured by the Convention with the requirements of uniformity and harmonisation of norms within EU law. From a practical point of view, the doctrine was a solution to potential conflicting obligations EU Member States could face and a deferential gesture towards the EU and the CJEU.[70] After accession, however, these concessions will no longer be needed since the EU itself, as its Member States, will be a party to the Convention. In other words, the dilemma for the Member States will cease to exist after accession. Accordingly, if the Court is to maintain the presumption, it will have to provide further justification for this choice. One argument in favour of maintaining the presumption could be that the presumption itself will not change after accession, i.e. the protection of fundamental rights in the EU will presumably still be 'equivalent' to that in the Convention system. While that may indeed be the case, it is not a valid argument for maintaining the presumption. If it were, a few other Contracting States with strong systems of fundamental rights protection could feel entitled to the same privilege, which would be unacceptable. Moreover, the case law on mutual trust analysed above has pointed to the paradox that is created when the presumption is applied in the case law relating to this principle bringing into question its mere existence.

Hence the Court should abandon the Bosphorus presumption after the EU's accession and it should become less deferential when it comes to defining the standards of human rights on the implementation and application of EU standards in the Contracting States. The Court has always held that the Convention guarantees not rights that are theoretical or illusory but rights that are practical and effective.[71] When looking at the case law under consideration here, one cannot but wonder to what extent the Court manages to live up to this ambition in the cases in which it applies the presumption.

More generally, maintaining the presumption can hardly be reconciled with the idea of comprehensive and effective external supervision by the ECtHR as well as the principle that the EU should accede to the ECHR on an equal footing with the other High Contracting Parties. Indeed, this is precisely one of the concerns that has been raised in the ongoing negotiations on accession in relation to the mutual trust principle.[72] It could even be said that maintaining the presumption would undermine the whole purpose of accession from the perspective of both the ECHR system and the EU itself. For the ECHR, it would seem crucial to preserve the equal rights of all individuals under the Convention, the rights of applicants in the Convention procedures, and the equality of all High Contracting Parties. While certain adaptations may be necessary because of the special characteristics of the EU (such as the addition of the co-respondent and the prior involvement procedure),[73] the adaptations should be limited to what is strictly necessary and should not affect the core of the Convention system. Giving preferential treatment to the EU because it is not a state does not seem strictly necessary to allow its participation in the Convention system. The same goes for the existing rights and obligations of the States Parties to the Convention, whether or not members of the EU, which should be unaffected by accession. In another context, that of reservations to the Convention, the Court had expressed concern in the past about the possibility of inequality between Contracting States which would 'run counter to the aim, as expressed in the Preamble to the Convention, to achieve greater unity in the maintenance and further realisation of human rights'.[74] It is indeed hard to imagine that the ECtHR would accept a situation when there is one standard for the EU and its Member States and another for non-EU Member States within its jurisdiction. After all, the objective of the accession is to enhance coherence in human rights protection in Europe by strengthening accountability in the Convention system, not weakening it. Conversely, for the EU, acceding to the ECHR on an equal footing as other Contracting States is an opportunity to show genuine commitment to human rights protection both internally and on the international plane.

Some commentators have suggested the margin of appreciation as an alternative to maintaining the

Bosphorus presumption.[75] The argument is that the ECtHR could afford wide margin of appreciation to the EU when a margin can be afforded (i.e. for qualified rights), to account for the special characteristics of EU law in certain situations. Examples made in this regard are economic law, the AFSJ and horizontal relations between private persons.[76]

This article suggests, however, that any form of privileged treatment is unwarranted. Yes, the margin of appreciation can and should be afforded in the cases against the EU where appropriate, but the assessment of the margin should be the same as in the cases against other Contracting Parties, namely by considering inter alia the nature of the right protected by the Convention and the nature of the restrictions imposed upon that right. This should not lead to different criteria for the margin being applied against different Contracting Parties, as it would yet again lead to double standards and preferential treatments. The presumption was introduced to prevent the situation in which EU Member States would be faced with conflicting obligations under EU and ECHR law and because the EU could not defend itself in Strasbourg. After accession, however, both these reasons will no longer be valid. Accordingly, the width of the margin of appreciation should be assessed in light of the circumstances of every case and not depending on whether the respondent is the EU, an EU member state or other Contracting Parties.

6. CONCLUSION

Presently, the EU cannot be held responsible under the ECHR for the acts of its institutions, and applications brought against it are incompatible *ratione personae* with the Convention. The EU Member States, however, remain responsible under the ECHR for human rights violations originating in the EU. In that sense, the ECtHR has jurisdiction to review EU law indirectly, as well as a large number of cases decided by the CJEU.[77]

Over the years, the ECtHR has shown that it trusts the level of protection provided for in the EU and enforced by the CJEU. Therefore, in situations in which the Member States do not have any discretion as to how an EU act is applied, the Court will decline full scrutiny and apply the Bosphorus presumption of equivalent protection. This is a compromise offered by the ECtHR: it may accept the jurisdiction, but it will not conduct a full review.

The Court has struggled along the way in trying to find the right balance in cases involving EU law; sometimes it has been willing to assign responsibility to a Member State, while in other cases it has allowed Member States to escape responsibility. The analysis of the most important cases in which the presumption has been applied over the period of sixteen years shows that the Court's approach has been somewhat uneven. Indeed, the Court has loosened the initially stricter assessment of the conditions for the application of the presumption and the conditions are not always applied as comprehensively and systematically. More recently, the mere existence of the presumption was brought into question in the case law relating to the EU principle of mutual trust. This case law illustrated that the combination of the application of the principle and the presumption may lead to situations in which compliance with human rights is not systematically checked at the national level due to the principle of mutual trust and also not in Strasbourg due to the self-imposed presumption of equivalent protection.

The article also incorporated a discussion on the EU's accession to the ECHR. Given that the revised draft agreement has been finalised, it seems important to reflect on the future of the Bosphorus doctrine also in light of the pending accession. The fundamental question is of course if the presumption should be maintained after accession. This question was examined through the aim and purpose lens of both the Bosphorus doctrine and the EU's accession to the ECHR. The findings of this assessment are clear: the Bosphorus presumption of equivalent protection should not be maintained. Instead, the ECtHR should abandon its deferential attitude towards the EU and exercise full scrutiny after the EU's accession to the ECHR, which is the only way to ensure the credibility of both institutions when it comes to human rights standards in Europe.

Abandoning the presumption of equivalent protection does not mean that the EU no longer provides equivalent protection. It also does not mean that the ECtHR no longer trusts the CJEU to supervise the observance of fundamental rights protection. It simply means that the objectives of the EU's accession to the ECHR would be rendered (largely) meaningless if the presumption would continue to exist. The Bosphorus presumption was not the perfect solution to begin with and it would be unwarranted if the Court would decide to maintain it.

NOTES

1 The European Commission is of course at liberty to ask to intervene, or to respond positively to an invitation by the ECtHR to intervene, as a third party in any case involving EU law that comes before the ECtHR.

2 Art 6 (2) and (3) Treaty on the European Union (TEU).

3 Art 52(3) EU Charter on Fundamental Rights.

4 Art 53 EU Charter of Fundamental Rights.

5 Johan Callewaert, 'Convention Control Over the Application of Union Law by National Judges: The Case for a Wholistic Approach to Fundamental Rights' (2023) 8 *European Papers* 1, 331; Šejla Imamović, *The Architecture of Fundamental Rights in the European Union* (Hart Publishing 2022); Sonia Morano-Foadi and Lucy Vickers (eds), *Fundamental Rights in the EU: A Matter for Two Courts* (Hart Publishing 2015); Tobias Lock, *The European Court of Justice and International Courts* (OUP 2015) Ch 4; Sionaidh Douglas-Scott, 'The Relationship between the EU and the ECHR: Five Years on from the Treaty of Lisbon' in Ulf Bernitz, Sybe de Vries and Stephen Weatherill (eds), *Five Years Legally*

Binding Charter of Fundamental Rights (Hart Publishing 2015) at 153.

6 *Bosphorus v Ireland* App no 45036/98 (ECtHR, 30 June 2005). For an analysis, see Cathryn Costello, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' [2006] 6 *Human Rights Law Review* 1, 87; Cedric Ryngaert, 'Oscillating between embracing and avoiding Bosphorus: the European Court of Human Rights on Member State responsibility for acts of international organisations and the case of the EU' (2015) 29 *European Law Review* 2, 176.

7 For criticism of the principle of equivalence more broadly see Cecilia Rizcallah, 'The Systemic Equivalence Test and the Presumption of Equivalent Protection in European Human Rights Law – A Critical Appraisal' (2023) 24 *German Law Journal* Special Issue 6: The Systemic and the Particular in European Law, 1062.

8 *Bosphorus v Ireland* (n 7) para 159.

9 In fact, the ECtHR already applied the presumption of equivalent protection in the context of NATO. See *Gasparini v Italy and Belgium* App no 10750/03 (ECtHR, 12 May 2009) in which the Court found that the protection afforded to the applicant in the present case by NATO's internal dispute resolution mechanism was not 'manifestly deficient' within the meaning given to that expression by the Bosphorus judgment. See also Tobias Lock, 'Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations Under the European Convention on Human Rights' (2010) 10 *Human Rights Law Review* 3, 529.

10 See, among many, Koen Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust' (2017) *Common Market Law Review* 54, 805.

11 For earlier reflections on this question see Audry Plan, ''Bosphorus' as a broken sword of Democles: On the need to institutionalise the EU-ECHR relationship', (2021) *European Human Rights Law Review* 5, 540; Daniel Engel, 'The Future of the Bosphorus-presumption after the EU's Accession to the European Convention on Human Rights', in Stefan Lorenzmeier and Vasilika Sancin (eds) *Contemporary Issues of Human Rights Protection in International and National Setting* (Nomos and Hart Publishing 2018) 133; Paul De Hert and Fisnik Korenica, 'The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Right' (2012) 13 *German Law Journal* 13, 874.

12 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States 2002/584/JHA.

13 *Bivolaru and Moldovan v France* App nos 40324/16 and 12623/17 (ECtHR, 25 March 2021).

14 Soon after the entry of the Lisbon Treaty, the negotiations officially started and the draft Accession Agreement was finalised in June 2013. The draft Accession Agreement was rejected by the CJEU, however, and any discussion on accession came to a stall. In 2019, the negotiations resumed with the aim to revise the DAA in line with the objections raised by the CJEU in *Opinion 2/13*. Following the 18th and final meeting of the ad hoc negotiations group a new draft agreement was reached, paving the way for another attempt at achieving accession.

15 *M & Co v Germany* App no 13258/87 (ECtHR, 9 January 1990).

16 *Bosphorus v Ireland* (n 7) paras 136–137.

17 Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro).

18 Case C-84/95 *Bosphorus v Minister for Transport, Energy and Communications and Others* ECLI:EU:C:1996:312.

19 *Bosphorus v Ireland* (n 7) paras 152–55.

20 ibid paras 159–65.

21 ibid para 156. On the Convention's role as a constitutional instrument of European public order see eg Kanstantsin Dzehtsiarou, *Can the European Court of Human Rights Shape European Public Order?* (CUP 2021).

22 Steve Peers, 'Bosphorus. European Court of Human Rights. Limited Responsibility of European Union Member States for Actions within the Scope of Community Law. Judgment of 30 June 2005, *Bosphorus Airways v Ireland*, Application No 45036/98' (2006) 2 *European Constitutional Law Review* 3, 443; Costello, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (n 7).

23 Kathrin Kuhnert, 'Bosphorus – Double standards in European human rights protection?' (2006) 2 *Utrecht Law Review* 2, 177.

24 *Bosphorus v Ireland* (n 7) para 166.

25 *Michaud v France* App no 12323/11 (ECtHR, 6 December 2012).

26 Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

27 *Michaud v France* (n 26) paras 72–73.

28 ibid paras 112–116.

29 *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

30 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin Regulation).

31 Article 3(2) of the Dublin II Regulation states as follows: 'By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility …'

32 *Povse v Austria* App no 3890/11 (ECtHR, 18 June 2013).

33 Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

34 *Povse v Austria* (n 33) para 83.

35 *Avotiņš v Latvia* App no 17502/07 (ECtHR, 23 May 2016). For a discussion of the case and the relationship between Strasbourg and Luxembourg more broadly see Lize Glas and Jasper Krommendijk, 'From Opinion 2/13 to Avotiņš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Court' (2017) 17 *Human Rights Law Review* 2 at 567; Xavier Groussot, Nina-Louisa Arold Lorenz and Gunnar Thor Petursson, 'The Paradox of Human Rights Protection in Europe: Two Courts, One Goal?' in Arnardóttir and Buyse, *Shifting Centres of Gravity in Human Rights Protection* (Routledge 2016).

36 Opinion 2/13 Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:48. For comments on *Opinion 2/13* see, among many, Eleanor Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) 22 *Maastricht Journal of European and Comparative Law* 1, 35; Steve Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' (2015) *German Law Journal* 16, 213; Bruno De Witte and Šejla Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' (2015) 40 *European Law Review* 5 at 683; Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky' (2015) 38 *Fordham International Law Journal* 955.

37 The ECtHR President at the time, Dean Spielmann, commented on *Opinion 2/13* in unusually strong language, suggesting that the ECtHR might toughen its review of EU law. See the ECtHR Annual Report for 2014 http://echr.coe.int/Documents/Annual_Report_2014_ENG.pdf accessed 16 August 2023.

38 On the principle of mutual trust and recognition in EU law see, among many, Ermioni Xanthopoulou, 'Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Uncharted Territory Beyond Blind Trust' (2018) 55 *Common Market Law Review* at 489; Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust' (n 11); Auke Willems, 'Mutual Trust as a Term of Art in EU Criminal Law: Revealing its Hybrid Character' (2016) *European Journal of Legal Studies* 9, 211.

39 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation).

40 *Avotiņš v Latvia* supra (n 36) para 109.

41 ibid paras 111–112.

42 ibid.

43 ibid para 121.

44 See eg Paul Gragl, 'An Olive Branch from Strasbourg? Interpreting the European Court of Human Rights' Resurrection of *Bosphorus* and Reaction to *Opinion 2/13* in the *Avotiņš* Case' (2017) 13 *European Constitutional Law Review* 3, 551.

45 For a recent appraisal of *Avotiņš v Latvia* and other relevant cases see eg Władysław Wojciech Jóźwicki, 'Bosphorus Gone but Still on: ECtHR's Jurisprudence in Cases Concerning EU After Opinion 2/13 and Potential Cracks in European Fundamental Rights Protection Equilibrium' (2023) *Państwo i Prawo* 4.

46 *Avotiņš v Latvia* (n 36) para 113.

47 ibid para 114.

48 ibid.

49 ibid para 115.

50 ibid para 116.

51 There are exceptions to this such as case law relating to Art 3 ECHR, which is an absolute right, and Art 6 ECHR in the context of the rule of law crisis in Poland. For an analysis see Eleonora Di Franco and Mateus Correia de Carvalho, 'Mutual Trust and EU Accession to the ECHR: Are We Over the Opinion 2/13 Hurdle?' (2023) 8 *European Papers – A Journal on Law and Integration* 3.

52 Examples include fundamental rights breaches reflected in prison overcrowdings and general detention conditions that do not meet the required standards in several Member States as well as breaches related to judicial independence. See eg *Petrescu v Portugal* App no 23190/17 (ECtHR, 3 December 2019); *Rezmiveș and Others v Romania* App nos 61467/12, 39516/13, 48213/13 and 68191/13 (ECtHR, 25 April 2017); *Bouyid v Belgium* App no 23380/09 (ECtHR, 28 September 2015).

53 *Bivolaru and Moldovan v France* (n 14). For comments on the decision, see Leandro Mancano, Judicial cooperation, detention conditions and equivalent protection. Another chapter in the EU-ECHR relationship' (2022) 56 *Revista General de Derecho Europeo* 207; Jasper Krommendijk, 'Bivolaru t. Frankrijk (EHRM, nr.40324/16) – Bosphorus bijt in Bivolaru: over EHRM-toetsing tenuitvoerlegging EU-arrestatiebevelen' *European Human Rights Cases Updates* (7 June 2021) https://www.ehrc-updates.nl/commentaar/211497 accessed 8 March 2024.

54 Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016.

55 *Bivolaru and Moldovan v France* (n 14) paras 113–115.

56 ibid paras 115–116.

57 ibid paras 117–126.

58 ibid para 131.

59 See eg Pim Albers et al, 'Final Report: Towards a common evaluation framework to assess mutual trust in the field of judicial cooperation in criminal matters' (31 March 2013) https://www.government.nl/documents/reports/2013/09/27/final-report-towards-a-common-evaluation-framework-to-assess-mutual-trust-in-the-field-of-eu-judicial-cooperation-in-criminal-m accessed 16 August 2023.

60 Adriano Martufi and Daila Gigengack, 'Exploring mutual trust through the lens of an executing judicial authority: The practice of the Court of Amsterdam in EAW proceedings' (2020) 11 *New Journal of European Criminal Law* 3, 282, 297.

61 *Avotiņš v Latvia* (n 36) paras 81 and 111. The European Commission acting as a third-party intervener invoked the same argument (para 90).

62 For similar argument, see Jasper Krommendijk and Sybe de Vries, 'Do Luxembourg and Strasbourg Trust Each Other? The Interaction Between the Court of Justice and the European Court of Human Rights in Cases Concerning Mutual Trust' (2020) *European Journal of Human Rights* 4–5, 319.

63 For a recent discussion on inconsistencies and 'back and forths' in the ECtHR's case law on the doctrine of equivalent protection see Demi-Lee Franklin and Vassilis Tzevelekos, 'The ECtHR Bosphorus Doctrine in Cases Calling for Indirect Scrutiny of EU Law: Judicial Smoke Signals?' in Vassilis Pergantis (ed), *EU Responsibility in the International Legal Order* (Sakkoulas Publications 2023). The chapter is also available at SSRN: https://ssrn.com/abstract=4689071 accessed 8 March 2024.

64 Commission Memorandum, Bulletin of the European Communities: Accession of the Communities to the European Convention on Human Rights, Supplement 2/79, COM (79).

65 Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:1996:140.

66 Presumably because the States had accepted the EU's commitment to human rights and then decided to fully realise that commitment both internally (giving the Charter a biding status) and externally (requiring accession to the ECHR).

67 Steering Committee for Human Rights (CDDH), 18th Meeting of the CDDH Ad Hoc Negotiation Group ("46 + 1") on the Accession of the European Union to the European Convention on Human Rights, Council of Europe, March 14 to 17, 2023.

68 For an analysis of the new draft agreement see eg Jasper Krommendijk 'EU Accession to the ECHR: Completing the Complete System of EU Remedies?' (April 14, 2023) https://ssrn.com/abstract=4418811 or http://dx.doi.org/10.2139/ssrn.4418811 accessed 8 March 2024.

69 *Michaud v France* (n 26) para 104; *Avotiņš v Latvia* (n 36) para 101.

70 Graham Butler, 'A Political Decision Disguised as Legal Argument? Opinion 2/13 and European Union Accession to the European Convention on Human Rights' (2015) 31 *Utrecht Journal of International and European Law* 8, 104.

71 This is a long-standing principle used in the jurisprudence of the ECtHR. It offers a strong argument for the Court to examine beyond the surface if an individual has been able to enjoy their rights as protected in the Convention. A reference to this principle (in some form) can be found in many judgments of the Court.

72 The EU initially proposed that the new Accession Agreement should explicitly recognise the special importance of mutual recognition mechanisms established by EU law, which are founded on the principle of mutual trust, in the relationship between the member states of the EU. However, most delegations considered that it would be inappropriate to include this explicit recognition of the principle of mutual trust in the agreement for various reasons including that it would be incompatible with the principle of equality between all High Contracting Parties, as well as between individuals under the Convention. The meeting reports and other documents are available on the Council of Europe website.

73 On these specific aspects of accession see eg Fisnik Korenica and Dren Doli, 'The CJEU likes to blame loudly and to applaud quietly: the co-respondent mechanism in the light of opinion 2/13' (2017) 24 *Maastricht Journal of European and Comparative Law* 1, 86; Roberto Baratta, 'Accession of the EU to the ECHR: The rationale for the ECJ's prior involvement mechanism' (2013) 50 *Common Market Law Review* 5, 1305.

74 See eg *Loizidou v Turkey* App no 15318/89 (ECtHR, 23 March 1995) para 77.

75 Engel 'The Future of the Bosphorus-presumption after the EU's Accession to the European Convention on Human Rights' (n 12) 150.

76 ibid 151.

77 There are also other ways in which the ECtHR arguably reviews EU law indirectly. See eg Umberto Lattanzi, 'The Inapplicability of the Bosphorus Presumption to the European Economic Area Agreement: A Risk for the Coherence of Legal Systems in Europe' (2013) 19 *European Constitutional Law Review* 3.

COMPETING INTERESTS

The author has no competing interests to declare.

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TO CITE THIS ARTICLE:
Imamović Š, 'Post-EU Accession to the ECHR: The Argument for Why the ECtHR Should Abandon the Bosphorus Doctrine' (2024)' 39(1) *Utrecht Journal of International and European Law* pp. 17–29. DOI: https://doi.org/10.5334/ujiel.639

Submitted: 30 April 2024 **Accepted:** 13 May 2024 **Published:** 29 May 2024