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## EUROPEAN UNION ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS: STRONGER PROTECTION OF FUNDAMENTAL RIGHTS IN EUROPE?

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**Abstract.** *The treaty of Lisbon makes European Union (EU) accession to the European Convention on Human Rights (ECHR) an obligation of result. The issue has been intensely discussed for more than thirty years, arguing that such accession is necessary in view of the need to ensure the ECHR standard of fundamental rights protection in Europe. This question again gains prominence as the EU member states and the institutions seek to agree on the negotiation directives of EU accession to the ECHR. The process brings up the difficulties involved in creating a mechanism which would both facilitate the autonomy of the EU legal order and enable individuals to bring claims against the EU to the European Court of Human Rights (ECtHR). This involves the questions how it would be possible to ensure quick access to justice, and whether the ECtHR would continue to apply the doctrine of equivalent protection in relation to EU even after the latter becomes bound by the ECHR. The article argues that EU accession to the Convention is a prominent political step ensuring coherence of human rights protection mechanism in Europe. However, the need to ensure prompt access to justice mandates that the doctrine of equivalent protection, pursuant to which the ECtHR presumes that EU ensures equivalent protection to human rights to that of the ECHR system and finds claims concerning EU acts inadmissible, is maintained and developed further.*

**Keywords:** *EU accession to the ECHR, division of competences, fundamental rights, EU legal order, doctrine of equivalent protection, Lisbon treaty.*

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## Introduction

The Treaty of Lisbon not only provides for a legal basis for the EU to accede to the ECHR, but also makes the accession an obligation of result: “The Union *shall accede* to the European Convention for the Protection of Human Rights and Fundamental Freedoms”.<sup>1</sup> (emphasis added) After the entry into force of the Protocol 14 of the ECHR on the 1<sup>st</sup> June 2010, the doors are finally open to start negotiations on the terms of EU accession to the Convention.

This development comes after more than thirty years of intense discussions on the issue. During the Convention for the Future of Europe, which drafted the Constitution for Europe and envisaged competence for the EU to accede to this instrument, three arguments in favour of EU accession to the ECHR were identified, claiming that it would 1) give a strong political signal of coherence between the Union and the “greater Europe”, 2) give citizens an analogous protection vis-à-vis acts of the Union as they presently enjoy vis-à-vis the Member States; 3) ensure harmonious development of the case law of the two courts, especially in view of the incorporation of the EU Charter of fundamental rights into the Treaties.<sup>2</sup>

The very idea of accession to the ECHR implies that EU acts would become subject to review by the ECtHR for their compliance with the Convention after the local remedies have been exhausted. The fact that EU was not a party to the ECHR meant that it was not legally bound by it, and that it could not participate in the proceedings before the ECtHR against its member states, even those involving its own legal acts. Nonetheless, the fact that an alleged violation was a result of an EU legislation could not excuse the member states from responsibility: they could not, by transferring powers to an international institution, evade their own responsibility under the ECHR and their answerability towards the ECtHR.<sup>3</sup>

However, in the beginning of the 1990s the European Court of Human Rights developed a doctrine pursuant to which it started to consistently find claims against the EC member states involving EC law inadmissible. The doctrine, known as a doctrine of equivalent protection, presumes that the EU legal order provides protection which is equivalent to that of the ECHR, and considers claims against EU inadmissible.<sup>4</sup> At the same time, the ECtHR maintains the principle that the member states remain responsible for the activities of the international organisation, disregarding whether it holds a

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1 Art. 6 (2) TEU.

2 Final report of Working Group II, CONV 354/02, 22 October 2002, p. 11–12.

3 *Waite and Kennedy v. Germany* (GC), Appl. No. 26083/94, ECtHR decision of 18 February 1999, para 67. See also *Matthews v. United Kingdom*, ECtHR(GC) decision of 18 February 1999, para 32. “Member States’ responsibility therefore continues even after such a transfer”.

4 *Bosphorus Hava Yollari Turizm v. Ireland*, App. No. 45036/98, ECHR, 30 June 2005.

separate legal personality, i.e. whether it is capable of being responsible for violations.<sup>5</sup> Though the presumption of equivalence can be refuted, so far it has happened only once, and before the key ECtHR judgment on the issue was made.<sup>6</sup>

This leads to a question what implications, if any, EU accession to the ECHR would have on human rights protection in Europe. Accession necessarily implies the extension of human rights remedies with a possibility to refer cases also against the EU to the ECtHR. However, legal proceedings take time, and the heavy caseload of the ECtHR has meant so far that the Court has only “endeavoured to deal with cases *within three years* after they are brought.”<sup>7</sup> A related question is whether the Court would abandon the doctrine of equivalent protection with respect to the European Union after it becomes a party or would it extend its application further, perhaps also including certain member states. In order to answer these questions, the article first analyses the background of EU fundamental rights protection and the circumstances which prompted EU accession to the ECHR, then considers the development of the doctrine of equivalent protection, and the likelihood of maintaining it after EU becomes bound by the ECHR, especially in view of the entry into force of the Lisbon Treaty.

## 1. Background – the Need for the EU to Accede to the ECHR

The EU law has come a long way since 1957, when due to the absence of a single provision concerning fundamental rights protection in the EC treaty the ECJ used to refuse to adjudicate on the claims for annulment of institutions’ acts for their violation of constitutional provisions of the member states<sup>8</sup> to the current position when in addition to the classical doctrine of fundamental rights as general principles of EU law, the EU has both its own Charter of fundamental rights, and, in addition, legal capacity to accede to the ECHR.

The development of the doctrine of fundamental rights protection as general principles of law was initiated already in 1969,<sup>9</sup> though a number of writers view the *Handelsgesellschaft* case as its starting point.<sup>10</sup> Since no catalogue of protected fundamental rights was provided by the positive primary EU law, the Court imported those rights from national constitutional traditions common to the Member States as well as international agreements to which the member states were parties.<sup>11</sup> In 1992 this formula was

5 A similar approach was followed by the House of Lords in the *Australia & New Zealand Banking Group Ltd., et al. v. Australia, et al. (International Tin Council case)*, HL judgment of October 26, 1990, I.L.M. 29: 670–715.

6 *Matthews v. United Kingdom*, Appl. No. 24833/94, ECHR (GC), decision of 18 February 1999.

7 *European Court of Human Rights: ECHR in 50 questions*. Council of Europe, 2009, p. 8.

8 Case 1/58, *Stork v. High Authority* [1960] ECR 43; Joined cases 26-28, 40 /59, *Ruhrkohlenverkaufsgesellschaften v. High Authority* [1960] ECR 857.

9 Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419; Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.

10 *Ibid.*; Douglas-Scott, S. *Constitutional Law of the European Union*. Longman, 2002, p. 431–478.

11 Case 4/73, *Nold v. Commission* [1974] ECR 491.

inserted in the EU treaty as Article F(2) (after the Amsterdam treaty – Art. 6.2). The European Convention on Human Rights was recognised as a source of inspiration of these general principles already in the *Nold* case of 1974, and subsequently confirmed it in the *Rutili* case of 1975.<sup>12</sup> Some have interpreted this practice as a *de facto* accession of the EU to the Convention.<sup>13</sup> This was taken as a sufficient step for human rights protection also by the Commission, which initially considered that “the Human Rights Convention set out [...] a catalogue of principles of law recognized as binding in all the Member States [which] therefore also ha[d] binding effect on the activities of the Community institutions.” Hence, it did not consider it necessary for the Community as such to become a party to the Convention, since the fundamental rights laid down as norms in the Convention were recognized as generally binding in the context of Community law without a further constitutive act.<sup>14</sup> Nevertheless, the Commission changed its approach three years later:

“The Commission believes that the best way of replying to the need to reinforce the protection of fundamental rights at Community level, at the present stage, consists in the Community formally adhering to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.”<sup>15</sup>

This intention was not meant to materialize at that time for lack of political momentum, which developed only recently. After the European Court of Justice failed to read the EC treaty as providing competence for the EC to become a party to the ECHR in 1996,<sup>16</sup> the relevant provision was first included into primary law only in 2004, in the draft Constitutional Treaty,<sup>17</sup> and later found its way in the Treaty of Lisbon of 2007, which entered into force on 1 December 2009.

## 2. Arguments in Favour of Accession

The general idea in favour of EU accession to the Convention was that it would ensure greater protection of individuals’ rights<sup>18</sup> and close the gap of judicial protection

12 Case 36/75, *Rutili v. Minister for the Interior* [1975] ECR 1219.

13 Verstichel, A. *European Union Accession to the European Convention on Human Rights*. In *Protocol No. 14 and the Reform of the European Court of Human rights*. Lemmens, P.; Vandenhole, W. (eds.). Intersentia, 2005, p. 125.

14 Report of the Commission of 4 February 1976, submitted to the European Parliament and the Council. The protection of fundamental rights in the European Community COM (76) 37. Bulletin of the European Communities, Supp. 5/76 [interactive]. [accessed 08-06-2010]. <[http://aei.pitt.edu/5377/01/001858\\_1.pdf](http://aei.pitt.edu/5377/01/001858_1.pdf)>.

15 Report of the Commission on the Accession of the Communities to the European Convention on Human Rights, 2 May 1979 COM (79) 210, p. 4–5.

16 Opinion 2/94 on the Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 28 March 1996 [1996] ECR 1759.

17 Article I-9(2) of the Treaty establishing the Constitution for Europe.

18 European Commission Memorandum on Accession of the Communities to the European Convention on Human Rights. Bulletin of the European Communities. Supplement 2/79, p. 15 [interactive]. [accessed 06-06-2010]. <[http://aei.pitt.edu/6356/01/4810\\_1.pdf](http://aei.pitt.edu/6356/01/4810_1.pdf)>.

in the EU,<sup>19</sup> extend the guarantee of a coherent Europe-wide system of human-rights protection, and reinforce legal certainty.<sup>20</sup> It was also argued that it would improve the image of Europe as an area of freedom and democracy, enable direct challenges to Community acts in Strasbourg and the enhancement of the Communities' international personality,<sup>21</sup> allow to avoid conflicting and inconsistent law-making that could result if the EC were not a party to the Convention.<sup>22</sup>

More recently, the argument that EU accession would allow avoidance of inconsistent interpretation of the ECHR subsided, with most authors agreeing that inconsistent interpretation itself was not likely.<sup>23</sup> Rather, it was pointed out that accession was in the interests of the EU/EC, since it would facilitate EU to be represented as such in the ECtHR and on the Committee of Ministers of the Council of Europe, which oversees the enforcement of the Court's judgments,<sup>24</sup> thus making the EU voice hearable during the proceedings involving EU law. So far, although the ECtHR has found inadmissible claims filed against the EU for lack of jurisdiction *ratione persone*, it in principle still allowed claims against the member states when EU law was involved: the Court considered that having transferred certain competencies to an international organization member states could not avoid responsibility under the Convention. In such cases where EU law was at issue the European Commission is allowed standing to present its position as a third interested party, yet even the claims against the contracting member states are dismissed on the basis of the doctrine of equivalent protection. In cases like *Mathews* where the Court does not accept that EU protection under the circumstances is equivalent to that of the Convention, there is a legal problem concerning enforcement of the judgment, as the EU member state does not have full control enabling it to remedy

19 Verstichel, A., *supra* note 13, p. 131.

20 Bemelmans–Videc, M. L. Report of the Committee on Legal Affairs and Human Rights on the accession of the European Union/European Community to the European Convention on Human Rights. Council of Europe, Parliamentary Assembly Doc. 11533 of 18 March 2008 [interactive]. [accessed 07-06-2010]. <<http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11533.htm>>.

21 Duvigneau, J. L. From Advisory Opinion 2/94 to the Amsterdam Treaty: Human Rights Protection in the European Union. *Legal Issues of Eur. Integration*. 1998, 25: 61–91, p. 84, cf. Economides, K.; Weiler, J. Report of Committees, Accession of the Communities to the European Convention on Human Rights: Commission Memorandum. *The Modern Law Review*. 1979, 42(6): 683–695.

22 Coppell, J.; O'Neill, A. The European Court of Justice: Taking Rights Seriously? *Common Market Law Review*. 1992, 29: 669–692; Sera, J. The Case for Accession by the European Union to the European Convention for the Protection of Human Rights. *Boston University International Law Journal*. 1996, 14: 151–186, p. 151.

23 Jacobs, F. Accession of the European Union to the European Convention on Human Rights. Note for the hearing organised by the Committee on Legal Affairs and Human Rights in Paris on 11 September 2007; de Schutter, O. Expert contribution to the Report of the Committee on Legal Affairs and Human Rights on the accession of the European Union/European Community to the European Convention on Human Rights. Council of Europe, Parliamentary Assembly Doc. 11533 of 18 March 2008, p. 26; Douglas-Scott, S. A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis. *Common Market Law Review*. 2006, 43: 629–665, p. 630, Dutheil de la Rochere, J. The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty. *Common Market Law Review*. 2004, 345–354, p. 353.

24 See contributions of Jacobs, deSchutter, van Dijk to the Report of the Committee on Legal Affairs and Human Rights on the accession of the European Union/European Community to the European Convention on Human Rights, Council of Europe, Parliamentary Assembly Doc. 11533 of 18 March 2008.

the violation. In view of this, EU accession to ECHR would clearly make the system of human rights protection more coherent: it would entitle persons to complain against the EU directly, and EU would be directly responsible for violations of the Convention. So far this problem has only been theoretical: in the only claim of such nature, *Matthews*, where violation of the right to participate in elections to the European Parliament was involved, an *ad hoc* solution was found on the EU level.<sup>25</sup> Hence, though it is formally correct to state that EU remains “the only ‘legal space’ left in Europe which is not subject to external scrutiny by the Strasbourg court”,<sup>26</sup> in view of the practice of the ECJ on fundamental rights protection and the review exercised by the ECtHR, *de facto* EU is already bound by the Convention.

### 3. Stronger Judicial Protection of Human Rights under the EU Legal System

The argument that EU accession to the ECHR would strengthen human rights protection in the EU has been one of the most frequently invoked. However, some notable authors remain reserved in its regard: the former Advocate General Francis Jacobs has claimed that “EU accession, while widely regarded as valuable for political and symbolic reasons, will have rather limited concrete effects on the observance of human rights standards.”<sup>27</sup> Similarly, de Schutter has recommended to treat with caution the argument that the accession of the EU to the ECHR would ensure that any individual aggrieved by an act adopted by the EC or the EU will have access to a court, which will be competent to determine whether or not that act infringes fundamental rights.

The argument is based on three factors characterising EU legal system: a) a limited competence of the ECJ to hear claims for annulment of EU legal acts b) a limited *locus standi* of private parties to appear before the ECJ c) the impossibility for private parties to bring complaints against EU institutions directly before the ECtHR. The Treaty of Lisbon introduces certain changes into these areas, which have eroded the significance of this argument even further.

The need for the EU to become a party to the Convention was argued extensively especially after the entry into force of the Maastricht and Amsterdam treaties, which expanded EU powers substantially to extend over areas of relevance to human rights, such as asylum, immigration policy, and political and judicial cooperation in criminal matters.<sup>28</sup> At the same time, the ECJ jurisdiction was excluded in the area of common

25 Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom, OJ L 283 of 21/10/2002, p. 1; Case C-145/04, *Spain v. United Kingdom* [2006] ECR 7917.

26 *Ibid.*

27 Jacobs, F. Expert contribution to the Report of the Committee on Legal Affairs and Human Rights on the accession of the European Union/European Community to the European Convention on Human Rights, Council of Europe, Parliamentary Assembly Doc. 11533 of 18 March 2008.

28 Kruger, H. C.; Polakiewicz, J. Proposals for a coherent human rights protection system in Europe. The Eu-

foreign and security policy, and significantly restricted in the area of judicial and police cooperation in criminal matters.<sup>29</sup> However, since the Lisbon treaty abandons the pillar system, the area of judicial and police cooperation in criminal matters becomes subject to ECJ jurisdiction, except for the jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a member state or the exercise of the responsibilities incumbent upon member states with regard to the maintenance of law and order and the safeguarding of internal security.<sup>30</sup> This change significantly weakens the need for the EU to accede to the ECHR, though due to the latter exception from the Court's jurisdiction the ECtHR would be unlikely to apply the doctrine of equivalent protection.

A similar exception from the ECJ jurisdiction is maintained in the area of common foreign and security policy.<sup>31</sup> However, the Lisbon treaty provides explicitly that this exception does not affect the right of the Court to review the legality of CFSP decisions providing for restrictive measures against natural or legal persons,<sup>32</sup> which reduces the likelihood of absence of a judicial remedy in this area, and thus a possible violation of the ECHR to a minimum.

Another area subject to extensive commentaries for its inadequacy from the human rights perspective is the restricted access of private persons to the ECJ for the purpose of challenging the legality of EU measures. The Treaty allows private persons to challenge only those acts with a general scope of application in which they have a direct and an individual interest. The Court has understood the notion of individual interest narrowly, which has left it widely exposed to criticism. It was argued that certain regulatory acts could directly affect individuals without individualizing them sufficiently for the criterion of individual interest to be satisfied. Although the Treaty provides for an alternative that a national court refers such a case for a preliminary ruling, this might be unsatisfactory since this would oblige an individual to run the risk of being subjected to penalties for having violated the law.<sup>33</sup> Disregarding this, the Court remains reluctant to change its approach with regard to standing of private persons. Instead, it focuses towards improving the system of preliminary references, reading in the Treaty an obligation of the member states to adapt their national procedures ensuring the right to effective judicial protection:

“while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection (...) It

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ropean Convention on Human Rights and the European Charter of Fundamental Rights. *Human Rights Law Journal*. 2001, 22(1): 1–13, p. 6.

29 See Article 46 of the Treaty establishing the European Union.

30 TFEU Article 240(b).

31 TFEU Article 275.

32 Šaltinytė, L. Jurisdiction of the European Court of Justice over issues relating to the Common Foreign and Security Policy under the Lisbon Treaty. *Jurisprudencija*. 2010, 1(119): 261–281.

33 Case C-50/00 P, *Union de Pequeños Agricultores v. Council* [2002] ECR- 06677, Opinion of AG Jacobs, para 102.

is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right (...)"<sup>34</sup>

This case shows that the principle of effective judicial protection does not require the Member State to set up a free-standing action for an examination of whether national provisions are compatible with EC law. An indirect route to challenge them is adequate provided it is effective and no less favorable than similar domestic actions such that the issue of compatibility with EC law can be determined as a preliminary issue. Nevertheless, the Court is clearly determined to leave the key burden of ensuring effective judicial protection to be elaborated for the national law.

However, the trend to shift the burden of ensuring effective judicial protection to the national courts does not really seem to persuade some experts who believe that the possibility that the national courts would not refer a case to the Court of Justice for a preliminary ruling and thus possibly fail to ensure effective judicial protection to the Convention rights would pose a risk to the autonomy of the EU legal order.<sup>35</sup> Protocol No. 8 to the Treaty of Lisbon prescribes that the accession shall not affect the competences of the Union or the powers of its institutions. In order to ensure its observance, the member state delegations have so far come up with two options.<sup>36</sup> The first considers that no change is needed for the implementation of this principle, whereas the second, proposed by the judge of the Court of Justice Christian Timmermans, argues that a separate mechanism is needed, allowing the Commission to request the ECJ to rule on the compatibility of an EU act with the fundamental rights, when the claim lodged by an individual before the ECtHR has been declared admissible. In such cases the Strasbourg court would need to suspend proceedings till the Luxembourg court issues its judgment.<sup>37</sup> Disregarding whether the mechanism would be adopted, its suggestion indicates to the lack of certainty in the relationship between the national courts and the ECJ. This also indicates to the possible future problems in the working of mechanism of referring cases against EU and the member states. Introduction of a new mechanism would certainly extend the proceedings before the ECtHR, and, since justice delayed is justice denied, this apparent enhancement of a referral mechanism can hardly be accepted as an improvement to the system of judicial remedies.

A related issue concerns the confusion surrounding the division of competencies between the EU and the member states with regard to fundamental rights protection. The question is in what areas and to what extent the member states need to comply with the doctrine of general principles of law, developed by the ECJ, and, after the entry into force of the Lisbon treaty, the EU Charter of Fundamental Rights. The origin of this confusion lies in the difference of wording of the ECJ's terminology in the *Wachauf/ERT/Familiapress* line of caselaw where the ECJ defined that the member states were bound

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34 Case C-432/05, *Unibet v. Justitiekanslern*, [2007] ECR -2271, paras. 40–42.

35 Council of the European Union, Presidency note to the delegations of 2 June 2010, No. 10568/10 Accession of the EU to the ECHR and the preservation of the ECJ's monopoly on the interpretation of EU law: options under discussion.

36 *Ibid.*

37 *Ibid.*



by this doctrine even when they were *derogating* from the regulation of the EU law and the EU Charter of fundamental rights, which provides for an apparently narrower framework, specifying that this obligation extends only to the cases when the Member states were *implementing* EU law. However, though this is clearly a legal problem of ensuring fundamental rights protection on an internal EU level, it is hardly relevant in determining whether EU accession to the ECHR would have a positive impact on the level of protection of fundamental rights in the EU. Paraphrasing de Schutter, the undertaking to ensure protection of rights under an international instrument would only encourage pursue of fundamental rights protection on the internal order.

One more significant amendment in the area of judicial protection under EU law that the Lisbon treaty liberalizes the standing rules for the action of annulment for private persons. Article 263 allows private persons to institute proceedings against an act which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures.<sup>38</sup> The addition of words ‘without entailing implementing measures’ is likely to solve the problem of ‘self-executing’ legal acts which could not be contested under the pre-Lisbon regulation.<sup>39</sup> A private person would then be able to contest a regulatory act containing a prohibition, but requiring no implementing measure, if he can demonstrate that the act is of direct concern to him.<sup>40</sup> This amendment clearly enhances the possibility of a judicial scrutiny before the ECJ, though it was hardly necessary from the point of view of the ECHR.

#### 4. The ECtHR and EU: Doctrine of Equivalent Protection

The position that subsequent international agreements of the member states do not relieve them from responsibility under the European Convention on Human Rights was expressed by the European Commission of Human Rights as early as in 1958 in *X v. Germany*:

“when a Member State, having submitted itself to contractual obligations, concludes a later international agreement which disables it from performing its obligations under the first treaty it will be answerable for any resulting breach of its obligations under the earlier treaty”.<sup>41</sup>

The first case where the Commission of Human Rights declared a request against the EC inadmissible *ratione personae* was the *C.F.D.T. v. European Communities*.<sup>42</sup>

38 TFEU, Art. 263.

39 Biernat, E. The Locus Standi of Private Applicants under Article 230(4) EC and the Principle of Judicial Protection in the European Community. *Jean Monnet Working Paper*. 12/03, p. 51.

40 *Ibid.*

41 *X v. Germany*, Appl. No. 235/56 [1958] *ECHR* (Ser. A), p. 256.

42 *C.F.D.T. v. The European Communities* [1978], Appl. No. 8030/77, *ECHR* (Ser. A), p. 231; This was again repeated in *Tete v. France* 1987 *EHRR* (Ser. IV) p. 67: “If a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under earlier treaty. This is particularly so when [...] the obligations in question have been assumed in a treaty, the Convention, whose guarantees affect the public order of Europe”.

The case concerned appointment of a consultative committee under the European Coal and Steel Community rules, which was to include producers, workers and consumers and dealers in equal numbers. The applicant was a workers' organisation which had been excluded from designation as a representative organisation with a right to nominate the candidates to the seats to be filled for five times despite being the second largest organisation of this nature in France. After its attempt to nominate two candidates for one post of worker's organisations in the absence of its designation, it was subsequently informed that its nomination could not be taken into consideration because it was not one of the organisations which had the right to nominate. The Court of Justice found this claim inadmissible, since the Treaty allowed challenge to the Council decisions only to the Member States and the Commission. The claimant then unsuccessfully attempted the French Conseil d'Etat, challenging the decision of the French government nominating the French candidates. The case, directed against the European Community and the member states jointly or severally was then referred to the ECtHR, claiming a breach of Articles 11, 13 and 14 of the ECHR. It was dismissed on the ground of lack of jurisdiction *ratione personae*, including against France, because it had not consented to the exercise of individual petitions against it.<sup>43</sup>

The first landmark case decided by the ECtHR against a member state involving the Community law was *M. & Co. v. Germany*.<sup>44</sup> The case concerned a classical situation of enforcement of the Commission's decision to impose a fine against the company, which was to be implemented by national authorities. The enforcement proceedings were initiated after the company's claim before the ECJ for annulment of the Commission's decision was only partially successful. The company proceeded with a claim before the European Commission of Human Rights for breach of the presumption of innocence under Art. 6 ECHR. Although the Commission agreed that it was not competent *ratione personae* to examine decisions of EC institutions, it did not mean that by executing the judgment of the ECJ the German authorities acted as quasi Community organs and were to that extent beyond the scope of control of the Convention organs.<sup>45</sup> Having reiterated its earlier position expressed in *X. v. Germany*, the Commission considered that a transfer of powers did not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers. The object and purpose of the Convention required that its provisions be interpreted and applied so as to make its safeguards practical and effective, therefore:

“the transfer of powers to an international organisation was not incompatible with the Convention provided that within that organisation fundamental rights would receive an equivalent protection.”<sup>46</sup>

43 *C.F.D.T. v. The European Communities* [1978], Appl. No. 8030/77, ECHR (Ser. A), p. 231; This was again repeated in *Tete v. France* 1987 EHRR (Ser. IV) p. 67: “If a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under earlier treaty. This is particularly so when [...] the obligations in question have been assumed in a treaty, the Convention, whose guarantees affect the public order of Europe”.

44 *M. & Co. v. Germany*, Appl. No. 13258/87 [1990] ECHR (Ser. A), p. 138.

45 *Ibid.*

46 *Ibid.*

In the Commission's view, the EC system both secured fundamental rights protection and provided for control of their observance. Although the constituent EC treaties did not contain a catalogue of such rights, in view of the joint declaration of the EC institutions of 1977 where they pledged respect to the European Convention on Human Rights and the case law of the ECJ on fundamental rights protection, it was certain that "Community law contained all criteria which were prerequisites not only to examine, but, if necessary, to remedy the applicant company's complaint [...]. Finally, the Commission took into consideration that "it would be contrary to the very idea of transferring powers to an international organisation to hold the member states responsible for examining, in each individual case before issuing a writ of execution for a judgment of the European Court of Justice, whether Article 6 of the Convention was respected in the underlying proceedings." This led to a finding of inadmissibility *ratione materiae*.

The reasoning of the Commission implies that a transfer of powers to an international organization could exclude state's responsibility under the Convention with regard to the exercise of the transferred powers, provided that within that organisation fundamental rights would receive an equivalent protection. It follows that this decision gave a seemingly unconditional excuse to the transfer of competencies to the Communities. For the Commission, in order to find the EC system of protection of fundamental rights equivalent to that of the ECHR, a political declaration of the institutions, combined with the practice of the ECJ concerning protection of fundamental rights, was sufficient.

A certain change in this approach could be observed in the practice of the ECHR bodies after the Maastricht treaty, which established the European Union, expanding the scope of cooperation of the member states to areas of common foreign and security policy and justice and home affairs, yet providing for restrictions of judicial supervision with regard to these areas.

The first widely referred to case from the period is the *Cantoni v. France*. The case concerned an alleged violation of Article 7 of the ECHR, which provides that there shall be no punishment without law. The complainant, the manager of a supermarket, alleged that the provisions of the French Public Health Code defining the notion of "medicinal products" (which could be sold only in pharmacies) did not meet the standards of foreseeability and accessibility required under Article 7 of the ECHR. For the Commission, the fact that it was based almost word for word on Community Directive 65/65 did not remove it from the ambit of Article 7 of the Convention.<sup>47</sup> This has been interpreted in scholarly writings as a derogation of the ECtHR from its earlier approach.<sup>48</sup> However, the case seems to fall out of context of the doctrine of equivalent protection on the facts because the relevant provision had inspired the text of the Directive, not vice versa.<sup>49</sup> Hence, *Cantoni* can hardly be considered as a derogation from the doctrine of equivalence, as some have presented it.

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47 *Cantoni v. France*, Appl. No. 45/1995/551/637 [1996] ECHR (Ser. V) 1996, p. 1614; para 30.

48 Douglas-Scott, S., *supra* note 23, p. 637.

49 *Cantoni v. France*, *op. cit.*, para 28.

Another related case, *Waite and Kennedy*,<sup>50</sup> reached the Human Rights Court in 1999.

The applicants argued that the German courts breached their rights to a fair trial under the Convention by declaring their complaints against an international organization, European Space Agency, inadmissible on the grounds of immunity. The Court followed a similar line to that in *M. & Co. v. Germany*, yet the language was somewhat more careful. Instead of claiming that transfer of powers to an international organization could exclude state's responsibility under the Convention with regard to the exercise of the transferred powers, provided that within that organisation fundamental rights would receive an equivalent protection, this time the Court opined that attribution of certain competences and according immunities might have implications as to the protection of fundamental rights. In view of the Court, "it would be incompatible with the purpose and object of the Convention, if the Contracting States were thereby absolved from their responsibility under the Convention in the field of activity covered by such attribution." The material factor in determining whether the decision at issue was permissible under the Convention was whether the applicants had reasonable alternative means to protect their rights effectively under the Convention.<sup>51</sup> Since such means were available, there was no breach of the ECHR.<sup>52</sup>

In contrast with the previously discussed cases, the Court treated this claim as admissible, yet dismissed it on the merits, even though it seemed to apply a similar test for its analysis. The difference in approach could be explained by the fact that a different organization was involved.

A further landmark case before the ECtHR relating to EU law was *Mathews v. United Kingdom*.<sup>53</sup> The Court restated its earlier discussed reasoning on the possibility to transfer competences to international organization under the condition that the Convention rights continue to be secured. It then emphasised that the Member States' responsibility continued even after such a transfer.<sup>54</sup> However, since the measure at issue had a status of primary law under Community law, and therefore was not subject to ECJ jurisdiction, the Court could not agree that in this case the right to participate at the elections to the European Parliament was afforded equivalent protection to that of the ECHR.<sup>55</sup>

The post-Matthews period is described as a period of ambiguity concerning the scope of the equivalent protection doctrine, as the Court attempted, where possible, to treat applications as inadmissible on other grounds.<sup>56</sup> An interesting example was *Emesa*

50 *Waite & Kennedy v. Germany and Beer & Regan v. Germany*, Appl. No. 26083/94 [1999] ECHR (Ser. A), p. 13.

51 *Ibid.*, paras 67–68.

52 *Ibid.*, paras 69–73, 74.

53 *Mathews v. United Kingdom*, Appl. No. 24833/94, EHRR 361, judgment of 18 February 1999.

54 *Ibid.*, para 32.

55 *Ibid.*, paras 26–35, particularly para 33.

56 Costello, C. The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe. *Human Rights Law Review*. 2006, 6(1): 87–130, p. 94.

*Sugar v. The Netherlands*.<sup>57</sup> The applicant complained specifically concerning the ECJ order in which it was not allowed to respond to the opinion of the Advocate General. Participating as a third party in the proceedings, the European Commission argued that this claim should have been found inadmissible *ratione personae*, since the ECJ was an institution of the European Communities, which was not a party to the Convention. The Court, however, chose to dismiss this case on other grounds, i.e. the fact that the claim concerned customs duties, and as a tax measure, this did not fall within the scope *ratione materiae* of the Convention.<sup>58</sup>

The *Bankovic* case is another interesting example concerning the military measures that the NATO states took against Yugoslavia.<sup>59</sup> It was argued that the NATO structure did not afford either substantive or procedural protection for the fundamental human rights guaranteed under the Convention.<sup>60</sup> The Court nevertheless dismissed the case on a completely different ground, arguing that the events complained of did not occur within the jurisdiction of the member states.<sup>61</sup>

The *Senator Lines* case was another intriguing case concerning EC responsibility for alleged fundamental rights violations under the Convention. It was expected to clarify the ambiguities concerning the scope of member states responsibility under the Convention with regard to EC actions. The applicant alleged a violation of Article 6 of the Convention, as it was refused to suspend a fine for antitrust violations pending judicial review of Commission's decision. The admissibility hearing before the ECHR was initially cancelled after the CFI heard the case, and it was subsequently found inadmissible, since the applicant was not a victim within the meaning of the Convention – the application concerned proceedings which had not ended when the application was introduced, the fine in question was neither paid nor enforced, and the company's challenge to the fine even ended with the final quashing of the fine.<sup>62</sup>

The proper factual circumstances for elaboration on the doctrine of equivalent protection came with the *Bosphorus* case,<sup>63</sup> which concerned seizure by the Irish government in 1993 of an aircraft owned by Yugoslav airlines, but leased to a Turkish company Bosphorus Airways. The basis of the decision was an EU regulation, giving effect to the UN Security Council Resolutions imposing sanctions against the Federal Republic of Yugoslavia. Under the facts, the aircraft was leased prior to adoption of the sanctions, and the lease payments were made to a closed account so that no benefit was accruing to the Yugoslav authorities. The Irish courts had quashed the decisions to impound the aircraft on two occasions, but were left no choice but to confirm it after the preliminary

57 *Emesa Sugar*, Appl. No. 62023/00 EHRR, decision as to the admissibility of 13 January 2005.

58 *Ibid.*

59 *Bankovic v. Belgium et al.*, Appl. No. 52207/99, Decision on admissibility of 12 December 2001 (GC).

60 *Ibid.*, para 74.

61 *Ibid.*, para 82.

62 *Senator Lines GmbH v. Austria et al.*, Appl.No. 56672/00, Decision on admissibility of 10 March 2004 (GC).

63 *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, Appl. No. 45036/98 Decision as to admissibility of 30 June 2005 (GC), 42 EHRR 1.

ruling of the ECJ concerning interpretation of the relevant regulation.<sup>64</sup> The case is thus a classic example of a case reaching ECtHR after exhaustion of both EU and national legal remedies. This might also serve as a useful indication of the possible duration of the proceedings involving EU legal remedies: the dispute started in the end of May 1993; the ECtHR issued its decision on admissibility on 30 June 2005, thus taking fifteen years to be resolved.

This time ECtHR invoked the doctrine of equivalent protection and clarified its scope of application. The Court reiterated its classic statements that the Contracting Parties could transfer sovereign powers to international organizations, and that such an organization could not itself be responsible for breaches of the Convention as long as it was not a party to it.<sup>65</sup> It is the Contracting Party which remains responsible for acts and omissions of its organs regardless of whether it was a consequence of domestic law or of the necessity to comply with international legal obligations,<sup>66</sup> since absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention – this would limit or exclude the guarantees of the Convention and undermine the practical and effective nature of its safeguards.<sup>67</sup> Therefore, the state retains Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention, and its action taken in compliance with such legal obligations would be justified as long as the organization is considered to protect fundamental rights in a manner *which can be considered at least equivalent* to that for which the Convention provides.<sup>68</sup> In addition to its earlier statements regarding the doctrine of equivalent protection, the Court has here specified that by ‘equivalent protection’ it means ‘comparable’, not ‘identical’ protection, and for the purposes of evaluation it would take into consideration both the substantive guarantees offered and the mechanisms controlling their observance.<sup>69</sup> Though such finding would remain susceptible to review in the light of any relevant change in fundamental rights protection, if it is found to be provided, it will be presumed that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.<sup>70</sup> Any such presumption could be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.<sup>71</sup>

Having briefly discussed the protection offered by the EU legal system, including the problematic issues of standing in actions for annulment by private parties and the relationship between the ECJ and the national courts, the Court again confirmed its earlier approach that the EU legal system provided protection to fundamental rights which was

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64 Case C-84/95, *Bosphorus v. Minister for Transport, Communications et al.*, [1996] ECR I-3953.

65 *Bosphorus* (ECHR), para 152.

66 *Ibid.*, para 153.

67 *Ibid.*, para. 154.

68 *Ibid.*, para 155.

69 *Ibid.*

70 *Ibid.*, para 156.

71 *Ibid.*

equivalent to that under the ECHR.<sup>72</sup> Having taken into consideration the nature of the interference and the general interest pursued by the measure at issue, the Court equally did not find circumstances demonstrating manifest deficiencies to the protection of the applicants' rights.<sup>73</sup> Hence, the application was found inadmissible.

The case has received a wide coverage and was subject to extensive criticism. Peers has blankly denounced it as a “missed opportunity to establish a clear, coherent and uncompromising approach to the protection of human rights within the Community legal order.”<sup>74</sup> Other comments have been more reserved, describing the case as “an illustration of the singular nature of a multidimensional European legal space, which is pluralistic and hybrid in nature, in which there exists no straightforward hierarchical relationship in human rights cases”.<sup>75</sup> Some have greeted the doctrine as potentially facilitating a deep and specific enquiry into the level of fundamental rights protection afforded by the EU and the ECJ in individual cases, whilst still accommodating the autonomy of the EU legal order.<sup>76</sup>

In his concurring opinion on *Bosphorus*, Judge Ress considered that the case revealed the importance of European Union's accession to the ECHR in order to make its control mechanism complete within the Community legal order.<sup>77</sup> Arguably, he assumed that the ECtHR would abandon the doctrine once EU accedes to the Convention. However, it is far from certain whether EU accession to the Convention will make this doctrine oblivious. Four arguments against the doctrine could be distinguished. First, it lays ground for double standards, since EU is subjected to less extensive review of its measures than others.<sup>78</sup> Second, it is argued that the doctrine of equivalent protection was established in a too general and abstract manner for it to be accepted, furthermore, there was no substantive test of proportionality to legitimize its application.<sup>79</sup> The third argument points out that the ground for the doctrine of equivalence disappears after EU accession – the relationship between the courts will no longer be based on the principle of cooperation and comity, thus the judgments of the EU courts would become subject to control by the ECtHR.<sup>80</sup> Finally, it is argued that the doctrine should be abandoned for

72 *Bosphorus*, para 165.

73 *Ibid.*, para 166.

74 Peers, S. 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. *European Constitutional Law Review*. 2006, 2: 443–455.

75 Douglas-Scott, S. Case comment on *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, application No. 45036/98, judgment of the European Court of Human Rights (Grand Chamber) of 30 June 2005, (2006) 42 E.H.R.R. 1. *Common Market Law Review*. 2006, 43: 243–254.

76 Costello, *supra* note 56, p. 129.

77 *Bosphorus Hava Yollari Turizm v. Ireland*, Judgment of 30 June 2005, Application No. 45036/98, Concurring opinion of Judge Ress, para 2.

78 See Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki, de Schutter, van Dijk.

79 Besson, p. 238.

80 Besselink, L. The EU and the European Convention of Human Rights after Lisbon: From ‘Bosphorus’ Sovereign Immunity to Full Scrutiny? [interactive]. [accessed 10-2010]. <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1132788](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1132788)>.

its lack of clarity – it is not clear under what circumstances the acts of the EU Member states are exempted from full judicial review of the ECtHR.<sup>81</sup>

Although it is possible to agree that the rationale behind the doctrine of equivalent protection is not sufficiently legally well grounded, it is difficult to view it as a compelling argument to abandon its further development, particularly in view of the novelty of the topic of responsibility of member states for the actions of international organizations in international law.<sup>82</sup> The same comment applies with respect to the argument of lack of clarity of the scope of its application. The cooperation between the two courts already is a useful practical example of a possible solution to the problems that the fragmentation of international law poses. So far this collaboration has demonstrated positive outcome. Though EU accession to the ECHR constitutes a significant formal solution to those problems, *de facto* enhancement of human rights protection in Europe has actually occurred much earlier, and the impact of the doctrine of equivalence on it should not be disregarded.

Also, in order to assess the likelihood that the doctrine of equivalence would be abandoned after EU accession to the ECHR it is necessary to take into consideration that the reasoning in *Bosphorus* was largely based on the specific nature of EU law, the transfer of powers/sovereign rights from the member states to the international organization. The specific nature of the EU legal order is only further reinforced after the entry into force of the Lisbon Treaty, as it makes an EU catalogue of fundamental rights a part of primary law and introduces specific improvements to the mechanism of judicial remedies under the EU legal system. This is a further argument why the ECtHR is unlikely to abandon the doctrine, though the specific approach the Court would take towards the question would be clearly dependent on the terms and conditions of EU accession to the Convention. However, in view of the Court's caseload and the time it would be likely to take a case to reach ECtHR after exhausting both EU and national legal remedies, it would be both a more equitable and practical solution if the ECtHR decided to maintain the doctrine and perhaps even expand it with respect to the states which during the term of their membership have demonstrated a high standard of human rights protection.

## Conclusions

The discussions on EU accession to the ECHR have already improved the level of human rights protection in Europe: EU primary law concerning legal remedies has been amended, enhancing judicial remedies with regard to the area of visas, asylum, police and judicial cooperation. The Lisbon treaty has also improved legal clarity with regard to the possibility of bringing claims in the area of common foreign and security policy.<sup>83</sup>

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81 See Costello, C., *supra* note 56; Peers, S., *supra* note 74.

82 Higgins, R. The legal consequences for member states of the non-fulfilment by international organizations of their obligations toward third parties. *Yearbook of the Institute of International Law*. 1995, 66(1): 251; Higgins, R. The Responsibility of State Members for the Defaults of International Organizations: continuing the dialogue. In *Liber amicorum Ibrahim F. I. Shihata, International finance and development law*. Kluwer, 2001, p. 441–448.

83 See Šaltinytė, L., *supra* note 32.



Arguably, the criticism directed against the dual character of EU human rights policies<sup>84</sup> has played an important role encouraging the formulation of political will to accede to the Convention, which has instigated the review of primary law regulation with regard to judicial remedies. In this respect, the prospect of EU accession to the Convention has already played a role in improving fundamental rights protection in the EU. Formal EU accession to the instrument would certainly introduce more legal coherence and stability to the system of human rights protection in Europe, even though there are no persuasive reasons for the European Court of Human Rights to abandon the doctrine of equivalent protection for admissibility purposes. Indeed, the most compelling rationale for the ‘equivalent protection’ approach remains institutional, since it allows the ECtHR to accommodate the autonomy of the EU legal order, and encourage, if not induce, compliance with ECHR standards by the ECJ.<sup>85</sup>

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## AR EUROPOS SAJUNGOS PRISIJUNGIMAS PRIE EUROPOS ŽMOGAUS TEISIŲ KONVENCIJOS SUSTIPRINS PAGRINDINIŲ TEISIŲ APSAUGĄ EUROPOJE?

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**Santrauka.** *Lisabonos sutartis įtvirtina, kad ES ne tik turi kompetenciją, bet ir pareigą prisijungti prie Žmogaus teisių ir pagrindinių laisvių apsaugos konvencijos. Rusijai pagaliau ratifikavus Konvencijos 14 protokolą tris dešimtmečius aptarinėta galimybė Europos Bendrijai/Europos Sąjungai prisijungti prie Konvencijos tampa reali. Vienas iš pagrindinių argumentų už ES prisijungimą prie Konvencijos – siekis užtikrinti deramą žmogaus teisių apsaugą visoje Europoje, netaikant išimčių tarptautinių organizacijų sprendimams. Nors Europos Sąjungos teisė užtikrina apsaugą pagrindinėms teisėms kaip bendriesiems teisės principams, kurių laikymąsi užtikrina Teisingumo Teismas, iki Lisabonos sutarties ES*

teisėje nebuvo teisiškai privalomo rašytinio tokių teisių katalogo. Be to, ypač po Maastrichto sutartimi įtvirtintos trijų ramsčių sistemos, imta vis aktyviau kritikuoti pagrindinių teisių apsaugą ES, atsižvelgiant į išimtis iš teisinės apsaugos teisingumo ir vidaus reikalų klausimais bei užsienio ir saugumo politikos srityse. Lisabonos sutartis panaikina ramsčių sistemą bei patikslina, kad Teisingumo Teismas turi jurisdikciją nagrinėti ir tas priemones, kuriomis ribojama pagrindinių teisių apsauga bendros užsienio ir saugumo politikos srityje. Tačiau Europos žmogaus teisių teismo netrikdė tariaimi ES teisinės sistemos neatitikimai Konvencijos teisių apsaugos standartui – jis iki šiol nuosekliai laikėsi paties išplėtos ekvivalentiškos teisių apsaugos doktrinos, kuria remdamasis atsisakydavo priimti nagrinėti ieškinius, susijusius su tarptautinėmis organizacijomis, jei tik jos užtikrino ekvivalentišką žmogaus teisių apsaugą. Paskutinis ir pats išsamiausias jo sprendimas šiuo klausimu – Bosphorus prieš Airiją. Kadangi derybos dėl ES prisijungimo prie Konvencijos sąlygų turėtų prasidėti netrukus, vienas aktualiausių šiuo metu klausimų – ar ekvivalentiškos apsaugos doktrina išliktų netgi ES prisijungus prie EŽTK, ir kaip tai būtų suderinama su stojimo tikslu pagerinti pagrindinių teisių apsaugą Europoje.

Straipsnyje analizuojami argumentai, paskatinę ES prisijungimą prie EŽTK, aptariama ekvivalentiškos apsaugos doktrina, jos raida bei argumentai už ir prieš šios doktrinos išsaugojimą tolesnėje Europos Žmogaus Teisių Teismo praktikoje. Nors ES prisijungimas prie Konvencijos neabejotinai prisidėtų prie žmogaus teisių užtikrinimo sistemos nuoseklumo, nėra pagrindo manyti, kad jis ją iš esmės sustiprintų. Ekvivalentiškos teisių apsaugos doktrina jau reikšmingai padėjo sustiprinti pagrindinių teisių apsaugą. Įsigaliojusi Lisabonos sutartis nesuteikia pagrindo Europos Žmogaus Teisių Teismui atsisakyti šios doktrinos. Atvirkščiai, siekis užtikrinti bylų operatyvumą skatintų, kad Teismas šią doktriną praplėstų ir valstybėms.

**Reikšminiai žodžiai:** ES prisijungimas prie EŽTK, kompetencija, pagrindinės teisės, ES teisinė sistema, ekvivalentinės apsaugos doktrina, Lisabonos sutartis.

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