Developments

The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights

By Paul De Hert[*] *and Fisnik Korenica*[**]

A. Introduction

The relationship between the Court of Justice of the European Union (henceforth: Luxembourg Court)[1] and the European Court of Human Rights (henceforth: Strasbourg Court)[2]has been one of the prevailing issues in the human rights debate in Europe. The main crater in the relationship between the two courts is the fact that Strasbourg could not call directly into responsibility the Luxembourg Court due to the fact that EU is not a party in the ECHR, whereas the Luxembourg Court is not likely to obey a Strasbourg ruling without having any international legal obligation to do so. This situation has thus far led to many observations that have called for the accession of the EU to the ECHR, a step that would legalize the relationship between the EU and the Council of Europe, offering critics of human rights an assurance that the EU's human rights regime will become externally controlled by a specialized human rights court.

Although the two regimes of human rights in Europe – the one of the EU and that of the Council of Europe – have had a number of cases where they could have clashed, an open

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[1]We use the term Luxemburg Court to connote any instance of the Court of Justice of EC/EU.

[2]We use the term Strasbourg Court to connote any instance of the European Court of Human Rights.

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conflict has occurred only rarely. However, each court's case law illustrates a considerable degree of mandate demarcation. To this extent, both courts have in different decisions shown an aspiration to protect their mission: the Luxembourg Court to protect the autonomy of the EU legal order, whereas the Strasbourg Court has aimed at protecting its position as a guardian of the human rights performance of the ECHR parties, most of which are member states of the EU[3].

In view of these tendencies, the main characteristic of the relationship between the two courts was founded on the fact that neither of the courts wished to face a deadlock of their legitimacy. It would not be in the interest of the Luxembourg Court to try to contravene a court of international law such as the Strasbourg Court, whereas the latter would have no interest to see its rulings being rejected by the Luxembourg Court. As a result, the Strasbourg Court – at its early stage – had refused to deal with cases that would have prompted far reaching judicial review by the court of EU norms, declaring them procedurally inadmissible. This case law of the Strasbourg Court met with increasing critique, and, as a result, it recognized that to openly follow a double standard towards the EU human rights regime would nevertheless amount to a practice in violation of the *bona fide* application of the ECHR. Following a number of incremental adaptations of its case law on its position vis-à-vis the EU human rights regime, the Strasbourg Court in 2005took a decisive turn by adopting an approach very similar to this of the German Federal Constitutional Court This approach, that became known as the *Doctrine of Equivalent Protection,* basically brought the Strasbourg Court to acknowledge that the EU human rights regime is equivalently protective as that of the Council of Europe. This 'finding' allowed the Strasbourg Court not to engage in the review of cases involving the EU. As long as the EU human rights regime is equivalently protective with that of the Council of Europe there is no need for a Strasbourg review

This Doctrine of Equivalent Protection opened a new momentum in the relationship between the two courts.[4] It also challenged those who wished to see Strasbourg provide for a more rigid and fair control mechanism vis-à-vis human rights violations. Some commentators therefore strongly criticized the use of the doctrine. Others, on the contrary considered that Strasbourg had chosen a rational way in order to address a problem, which needed to be solved on a *treaty basis* between the EU, its member states and the Council of Europe (and not by the courts themselves).

[3] *E.g.* Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe* 13 DUKE J. COMP. & INT'L L. 95 (2003)

[4] View how the Luxembourg Court, the EU member states' courts and the Strasbourg Court manage to cooperate, at Charles Sabel & Oliver Gerstenberg, *Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order* 16(5) EUR. L. J. 511–550 (2010); see a more general overview of the relationship between the two European courts, at PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES AND MATERIALS 418-426. (2008).

This article discusses and analyzes the legal significance, scope, nature and prospects of the Doctrine of Equivalent Protection. Our first section explains the roots of the Doctrine and the incremental steps of its development (sub 2). The second section discusses the 2005 *Bosphorus* decision,[5] representing the Strasbourg Court's last and most advanced attempt in shaping the Doctrine. We will see amongst other that the Doctrine of Equivalent Protection does not shield the entire EU law from the control of the Strasbourg Court. Only (some) EU secondary law is presumed to be Strasbourg compatible. We will also discuss in this section the latest *M.S.S. v. Belgium and Greece* as it related to the Doctrine's recent reapplication (sub 3). The third section introduces the 'manifest deficiency' concept, -a key element of the doctrine that has provoked numerous scholarly commentaries. We discuss the burden of responsibility in cases of manifest deficiency (sub 4). A next section discusses the prospects of the Doctrine in light of the accession of the EU to the ECHR. As this section notes, it is logical that the Strasbourg Court will continue to uphold the Doctrine *substantively* even after the accession (sub 5). The article concludes that the Doctrine provides for an innovative space wherefrom the 'communication' of the two European tribunals is materialized, although the mere existence of the Doctrine as such continues to create a risk for coherent human rights protection within Europe (sub 6).

B. The Background of the Doctrine of Equivalent Protection

The early shape of the European Union, and the logical track that it followed as a young organization, dealing solely with economic integration had nothing to do with human rights obligations.[6] As an organization, the EU had no human rights matters to care for.[7] At this point, there was no possible conflict between the EU and the Council of Europe human rights regime. However, with the growing integration efforts advanced by the EU institutions, the EU started to engage itself in internal human rights obligations, and

[5] Bosphorus Hava Yollari Turizm v. Ireland, App. No. 45036/98 (Eur. Ct. H. R. 30 June 2005), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69564 (last accessed: 16 June 2012); *see*, for a commentary, Frank Schorkopf, *The European Court of Human Rights' Judgment in the Case of Bosphorus Hava Yollari Turizm v. Ireland*, 6 GERM. L.J. 1255 (2005), available at: http://www.germanlawjournal.com/pdfs/Vol06No09/PDF_Vol_06_No_09_1255-1264_Developments_Schorkopf.pdf (last accesssed: 16 June 2012).

[6] *See*, for instance Joseph Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103, 1110 (1986).

[7] The term EU – used here, and where applicable – refers to the European Communities of that time.

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accordingly set off to generate occasional human rights law.[8] The continuous transfer of powers from the national governments of member states to EU institutions was accompanied by the gradual expansion of the human rights law of the EU.[9]Many of the human rights obligations that originally belonged to the member states were now being transferred to the EU.[10] On the other hand, since the member states remained internationally liable for their human rights performance as signatories to the ECHR, and the EU was not a party to the ECHR, the human rights law being made at the EU level owed no debts to the ECHR mechanisms. This resulted in a situation where the EU remained free from the control of the Strasbourg Court, while constantly increasing its responsibilities in the human rights area.

Because of this situation, a number of parties that had lost their cases before the Luxembourg Court appealed those rulings to the Strasbourg Court, claiming that the rulings failed to meet the standards required by the ECHR. Faced with this situation, the Strasbourg Court preliminarily refused most of those claimants' appeals as being *rationae personae* inadmissible,[11] holding that the rulings of the Luxembourg Court could not be appealed to the Strasbourg Court as long as the EU is not a party to the ECHR. The Strasbourg Court was forced to abandon this approach as a consequence of a growing

[8]It is worth recalling that the responsibility to deal with human rights from the European Union side – and accordingly to construe human rights law – was first built with the *Van Gend en Loos case* of the Luxembourg Court. The Luxembourg Court, nevertheless, self-managed to further its competence to deal with human rights and to wear the EU with human rights obligations with the *Internationale Handelgesellschaft* case, and later with *Nold KG* case, where it made an explicit reference for the first time to the international human rights treaties ratified by the member states of the EU. This was later advanced with *Hauer v. Land Rheinland-Pfalz*, where the Luxembourg Court for the first time openly referred to the ECHR. The human rights catalogue of the EU was later proclaimed for the first time with the Charter of Fundamental Rights in 2000, as a domestic list of rights and freedoms. The Lisbon Treaty, on the other hand, provided for the first time a treaty ground for the legal effect of the Charter of Fundamental Rights, making the EU regime of human rights have a treaty ground for its human rights law. (*See* Van Gend en Loos v. the Netherlands, case 26/62 [1963] ECR1; Internationale Handelgesellschaftmbh v. Einfuhr und Vorratsstelle für Getreide und Futtermittel (case 11/70), 1970, ECR 1125; Nold KG v. Commission, case 4/73 [1974] ECR 491; Hauer v. Land Rheinland-Pfalz, Judgment of the Court of 13 December 1979**,** case 44/79 [1979] ECR 3727.)

[9] *See* a broader view on this, at ANTOINE JACOBS, THE EUROPEAN CONSTITUTION. HOW IT WAS CREATED. WHAT WILL CHANGE 119 (2005).

[10] This 'merit' rests mainly and mostly with the Luxembourg Court. *See* Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights, in* THE EU AND HUMAN RIGHTS 866 (Philip Alston ed., 1999).

[11]*See* for instance Confederation Francaise Democratique du Travail v. the European Communities, ECtHR, Decision on Inadmissibility, No. 8030/77, D. 10.07.1978.

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pressure on it to find a way to hold the EU – in the human rights sphere – to the requirements of the ECHR. When it became apparent that human rights violations could appear at the European Union level, and once the Strasbourg Court became willing to attach responsibility to such violations, the court (then the European Commission for Human Rights), in 1958, handed down a landmark ruling on the case of *X v. Federal Republic of Germany*, where it held that:

> If a State contracts treaty obligations and subsequently concludes another 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.[12]

This formula of the Strasbourg Court was clearly aimed at assuring that the Strasbourg Court would hold the EU member states responsible for the EU's violations of the ECHR, notwithstanding that the EU was not a party to the convention.[13]If EU law violated the obligations of EU member states arising from the ECHR, the Strasbourg Court would lay the blame for the EU's violations on the EU member states. This first step taken by the Strasbourg Court in its relationship to the Luxembourg Court was essential to assign responsibility for the actions of the EU that violated the ECHR, hinting at the possibility that the Strasbourg Court would review certain EU legal acts with respect to their conformity with the ECHR.

The *X v Federal Republic of Germany* formula showed that the Strasbourg Court was not willing to allow the transfer of powers from member states to the EU remain completely outside of its control. Instead, the Strasbourg Court would create such a control mechanism – although one almost unworkable in practice –by requiring the EU member states to assume responsibility for the EU's violations of the ECHR.

With a number of changes that took place in the EU human rights regime, circumstances started to change by the end of the 1980s. In particular the1986 *Solange II* judgment of the German Federal Constitutional Court needs to be mentioned. It served as the model of what would later constitute the Doctrine of Equivalent Protection created by Strasbourg. In this decision concerning the direct effect of EU law the *Bundesverfassungsgericht* held the following:

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[12]*X v Federal Republic of Germany*, ECHR, No. 235/56, Dec. 10.6.1958, Yearbook 2, 256 (300).

[13]Compare and see this in light of: Article 4 of the Articles on Responsibility of States for Internationally Wrongful Acts, in *Report of the International Law Commission on the Work of Its Fifty-third Session*, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at: www.un.org/law/ilc (last accessed: 16 June 2012).

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> "In view of those developments it must be held that, so long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law; references to the Court under Article 100 (1) for that purpose are therefore inadmissible."[14]

Solange II illustrates the effort of the *Bundesverfassungsgericht* to accept the direct effect and primacy of EU law over German law, while retaining its *sovereign* responsibility to abandon deference if it considers it to diminish its constitutional catalogue of rights. As long as the observance and protection of the fundamental rights by the Luxembourg Court is *substantially similar* to that offered by the German constitutional law and mechanisms, claims attacking the EU law on the basis of their non-conformity with German domestic constitutional human rights will be considered inadmissible by the German constitutional court. By doing so this court did not give up its sovereign jurisdiction over securing constitutional human rights, but simply ceased to exercise it for the time it wishes to defer to the EU law, in order to avoid conflict with the latter.

Seven years after *Solange II,* in 1990,the Strasbourg Court its decision in the *M. & Co.* case. The Strasbourg Court effectively adopted the *Bundesverfassungsgericht* approach to this issue, ruling that:

> The transfer of powers to an international organization is not incompatible with the Convention provided that within that organization fundamental rights will receive an equivalent protection. […] The Commission notes that the legal system of the European Communities not only secures fundamental rights but also provides for control of their observance.[15]

[14]BVerfGE 73, 339 2 BvR 197/83 Solange II-decision, paragraph f, available at: http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=572 (last accessed: 16 June 2012).

[15] M. & Co. v. Federal Republic of Germany, European Commission of Human Rights, Decision on Admissibility, No. 13258/87, Dec. 9 February 1990.

Arguably, the *M. & Co.* case, with its approach modeled after *Solange II*,[16] in turn, paved the way for the 2005 *Bosphorus* ruling,[17] which will be discussed in the next section. *M. & Co.* emphasizes the fact that EU member states' obligations under the ECHR will not be breached if these states transfer powers to the EU granted that the latter offers the same protections to human rights as the ECHR system. With the new ruling, Strasbourg immunizes the EU human rights regime from its control. More positively, one could say that *M. & Co.* opened the way for a mutual understanding between the Strasbourg Court and the EU human rights regime. Many would argue, however, that it did so only because of the fear that the Luxembourg Court would refuse to accept a ruling of the Strasbourg Court. This situation was exhibited by *Hauer v. Land Rheinland-Pfalz*, wherein the Luxembourg Court had incentivized an allergy towards Strasbourg by holding that 'the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself.'[18] In the light of this case, it is fair to conclude that *M. & Co.* shows that the Strasbourg Court is relinquishing some of its power to control the human rights regime of the EU, by acknowledging that the EU has an 'equivalent' system of human rights protection.

A close reading of *M. & Co.* reveals that the Strasbourg Court speaks of two things when it refers to equivalent protection: firstly, that the EU secures the human rights in the sense that it provides a normative basis for their protection; and, secondly, that the EU enforces observance of human rights – and complements the normative ground – via a specialized court, *i.e.* the Luxembourg Court. This general – and rather odd proclamation – is later reemphasized in *Waite & Kennedy* and *Beer & Regan*,[19] and finally advanced and further developed in *Bosphorus*.[20]

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[16] *See also*, Laurent Scheeck, *The Relationship between the European Courts and Integration through Human Rights*, 65 ZAÖRV 837 (2005).

[17] Although *M. & Co.* continue to hold that: 'Under Article 1 of the Convention the member States are responsible for all acts and omissions of their domestic organs allegedly violating the Convention regardless of whether the act or omission in question is a consequence of domestic law or regulations or of the necessity to comply with international obligations.' (M. & Co. v. Federal Republic of Germany, No. 13258/87, Dec. 9 February 1990., at 145.)

[18] Hauer v. Land Rheinland-Pfalz, Judgment of the Court of 13 December 1979**,** case 44/79 [1979] ECR 3727.

[19] Waite & Kennedy v. Germany and Beer & Regan v. Germany, [1999] ECHR (Ser. A), at 13.

[20] The Strasbourg Court had the chance to decide the *Bosphorus* standards even before in *DSR Senator Lines GmBH* and *Ermesa Sugar* v. *The Netherlands*, but it did not. (*See* ECHR, DSR Senator Lines GmbH v. the 15 member states of the EU, App. No. 56672/00, 2004).

C. *Bosphorus* and the Scope and Nature of the Doctrine of Equivalent Protection

Having faced a number of cases challenging certain EU legal acts, the *Bosphorus* case, decided in 2005,allowed the Strasbourg Court to clarify the relationship between the EU's and the Council of Europe's human rights regimes, or – more particularly – its relationship with the Luxembourg Court. In the judgment the Strasbourg Court ruled that:

> The Court finds that the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, "equivalent" to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the European Community.[21]

This crucial paragraph warrants at least three observations about the (new) relationship between the Luxembourg human rights regime and that of Strasbourg. First, the paragraph illustrates Strasbourg's engagement with the merits of an appeal generally challenging an EU legal act (although not only). It exhibits the determination of the Strasbourg Court to engage with petitions that implicitly –as opposed to explicitly–claim that certain segments of the EU law have violated the ECHR. It shows signs of the power Strasbourg thought it has to deal with the acts of regional organizations that are not a party to the ECHR.

Secondly, in this and other paragraphs of *Bosphorus*, the Court, similar to the German court in *Solange II*, establishes a standard according to which the EU human rights regime is held to be equivalent to its ECHR counterpart. To come to this conclusion, the Court applies the double check taken from *M. & Co.*: firstly, the equivalence of the substantive guarantees provided by the EU law, where *Bosphorus* refers specifically to the Charter of Fundamental Rights of the EU; and secondly, the equivalence as regards the mechanisms that observe the application of the legal obligations in terms of human rights deriving from the EU law.[22] The outcome of this two-fold approach to the Doctrine of Equivalent

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10 March 2004, (2004) E.H.R.R. SE 3; ECHR, *Ermesa Sugar* v. *The Netherlands*, App. No. 62023/00, 13 January 2005 (2005).

[21]Bosphorus Hava Yollari Turizm v. Ireland, Application no. 45036/98 ECtHR 30 June 2005. (Judgement, Grand Chamber).

[22]Bosphorus Hava Yollari Turizm v. Ireland, Application no. 45036/98 ECtHR 30 June 2005. (Judgement, Grand Chamber), at para. 155.

Protection, which Hoffmeister calls *systemic* equivalence,[23]is a certification of the EU human rights regime as equivalent with that of the Council of Europe and an authentication of the EU judicial mechanisms as equivalently protective with the Strasbourg Court.

Thirdly, *Bosphorus* does not only immunize the EU human rights law from being challenged before the Strasbourg Court, but also immunized the EU member states' acts implementing EU law – where states have no discretion – from being challenged before the Strasbourg Court.[24]To acknowledge this, the Strasbourg Court follows a highly presumptive standard by ruling that in this specific case Ireland did not depart from the ECHR obligation simply because it was implementing the provision of an EU legal act. By doing so, the Court creates a wide-spectrum immunity for the EU member states when they implement EU law, provided that a state 'does no more than implement legal obligations flowing from its membership in the organization'.[25]

The scope of the Doctrine of Equivalent Protection as developed by the Strasbourg Court in *Bosphorus* is not absolute. Following *M. & Co.*, *Bosphorus* reconfirms that –with respect to the scope of the doctrine– the equivalent protection is presumed since, *inter alia*, the EU judicial mechanisms provide for the observance of human rights. This acknowledges that in order for an act of the EU to be immunized with the equivalent protection status, it must have been – or there must have been room for – the EU judicial mechanisms to observe that certain act. Conversely, if the EU judicial mechanisms would have no right to observe certain legal acts as to their conformity with the EU human rights law, such an act would not be considered immunized by virtue of the equivalent protection doctrine. In this fashion, the scope of the equivalent protection doctrine is limited: it encapsulates only those legal acts that have been, or that could have been, observed or reviewed by the EU judicial mechanisms with respect to their conformity with the EU human rights law. Strictly speaking, the Doctrine of Equivalent Protection is no more than a presumption that immunizes only those legal acts that can be and are observed by the EU judicial mechanism. In this context, it is worth recalling that the EU primary law – that is, the establishing treaties of the EU – cannot be reviewed by the EU judicial mechanisms as to its

[23]Frank Hoffmeister, *Bosphorus Hava Yollari Turizm v. Ireland, App. No. 45036/98*, 100 (2) AMER. J. OF INT'L L. 442, 447, 449 (2006).

[24]Bosphorus seems a rather high level of 'privileging' Union law and the member states law implementing it. *See* Geoff Sumner, We'll Sometimes Have Strasbourg: Privileged Status of Community Law Before the European Court of Human Rights, 16 IRISH STUD. L. REV. 127 (2008).

[25]Luzius Wildhaber, *The Coordination of the Protection of Fundamental Rights in Europe*, Address by the President of the ECtHR (8 Sept. 2005).

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conformity with the human rights standards, as the EU judicial mechanisms have absolutely no power to invalidate any provision of the EU primary law. This observation was also made by the Strasbourg Court in *Matthews*:

> Indeed, the 1976 Act cannot be challenged before the European Court of Justice for the very reason that it is not a "normal" act of the Community, but it is a treaty within the Community legal order. The Maastricht Treaty, too, is not an act of the Community, but a treaty by which a revision of the EEC Treaty was brought about. The United Kingdom, together with all the other parties to the Maastricht Treaty, is responsible *materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol No. 1, for the consequences of that Treaty.[26]

On basis of *Matthews* and *Bosphorus*, it can be safely stated that the scope of the Doctrine of Equivalent Protection does not include the EU primary law as the states have *freely* entered into those international treaties. As long as an establishing treaty of the EU cannot be challenged before an EU judicial mechanism, it will be reviewed by the Strasbourg Court as to its conformity with the ECHR. The Doctrine of Equivalent Protection will not provide full immunity. Thus, the doctrine immunizes only EU secondary law.[27]

Moreover, arguably, *Bosphorus* limits itself to the 'law of the "first pillar"' of the EU,[28] and does not apply to the entire spectrum of EU law. Although with the Lisbon Treaty the pillars' system is dismissed, one is forced to argue that *Bosphorus* at that time gave the status of equivalent protection only to the policy areas belonging to that-time first pillar. This said, the logical expectation is that with the Lisbon Treaty changes, *Bosphorus* will continue to suppose the equivalent protection only on those branches of EU law that formerly belonged to the first pillar (as also reiterated in *M.S.S. v. Belgium and Greece)*.[29]

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[26] Matthews v. United Kingdom, App. No. 24833/94, ECtHR 18 February 1999 (Judgement, Grand Chamber).

[27] That being said, the Strasbourg Court continues to apply the *X v Federal Republic of Germany* standard on all legal acts of the EU that could not be brought under the observance of an EU judicial mechanism, whereas it immunizes those legal acts that could and are observed by the EU judicial mechanisms with the presumption of the Doctrine of Equivalent Protection. (See, for instance: Cathryn Costello, *The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*, 6(1) HUM. RTS. L. REV. 87, 103 (2006).

[28] ECtHR, Bosphorus Hava Yollari Turizm v. Ireland, App. No. 45036/98, 30 June 2005. (Judgement, Grand Chamber), at para. 72.

[29] *See* this confirmation reiterated also in ECHR, M.S.S. v. Belgium and Greece, App. No. 30696/09, 21 January 2011 (Judgment, Grand chamber), at para. 338.

The foregoing feeds the main very criticism of the Doctrine of Equivalent Protection, viz. that it offers a very broad immunity to EU law, be it primary or secondary. The claimant in *Bosphorus* therefore rightly argued that:

> "The percentage of domestic law sourced in the European Community is significant and growing and the matters now covered by Community law are increasingly broad and sensitive: to accept that all State acts implementing a Community obligation fall outside its Convention responsibility would create an unacceptable lacuna of human rights protection in Europe".[30]

The growing body of EU law and of EU member states' law implementing EU law, severely circumscribes the possibility that a particular right is not subject to the Doctrine of Equivalent Protection, and thus reviewable by the Strasbourg Court. A key issue here is that the scope of the Doctrine is so broad that it includes the entirety of member states' actions that implement EU law. This troubles the waters, as it is rather unclear how to demarcate the border between the member states' actions that implement EU law and the member states' actions that are not derived from an obligation arising from EU law. In addition, with the steady increase of the member states' law that is somehow – if not explicitly – aimed at implementing obligations arising from EU law, it becomes rather difficult to understand what remains outside the scope of the Doctrine at the member state level.[31]

To counterbalance the claimant's argument, the European Commission provided its own concern for what would happen if the court were to dismiss the Doctrine of Equivalent Protection, by arguing that:

> 'It was an approach [referring to the Doctrine] which was especially important for the European Community given its distinctive features of supra-nationality and the nature of Community law: to require a State to review for Convention compliance an act of the European Community before implementing it (with the unilateral action and non-observance of Community law that would potentially

[30] ECHR, Bosphorus Hava Yollari Turizm v. Ireland, App. No. 45036/98, 30 June 2005 (Judgement, Grand Chamber), at para. 117.

[31] However, it is clear that the Doctrine does not immunize a member state action aimed at implementing an obligation deriving from EU law, where the state had and used discretion. The Strasbourg Court has, in many cases such as *Van de Hurk v. the Netherlands*, reviewed state discretion when member states where implementing EU law, acknowledging that state discretion in the implementation of EU law is not immunized from its review by the Doctrine of Equivalent Protection. *See* ECHR, Van de Hurk v. the Netherlands, App. No. 16034/90, judgment of 19 April 1994).

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> entail) would pose an incalculable threat to the very foundations of the Community, a result not envisaged by the drafters of the Convention, supportive as they were of European cooperation and integration.'[32]

The argument of the European Commission is also well-grounded, as it is true that dismissing the Doctrine of Equivalent Protection would give room to member states and parties coming there from to challenge the direct effect and the primacy of EU law, by means of requiring the EU law measures to be first reviewed nationally as to their compliance with the ECHR, as had happened in *Solange I* of the German *Bundesverfassungsgericht*.[33]

The Doctrine of Equivalent Protection, as it was laid down in *Bosphorus*, continues to define the relationship between the Strasbourg Court and the EU human rights regime: take for instance the Strasbourg's recent reiteration in *M.S.S. v. Belgium and Greece*[34]. In its latest ruling concerning an implicit EU law measure, the Strasbourg Court reconfirmed that the Doctrine of Equivalent Protection accords'…great importance to the role and powers of the ECJ – now the CJEU – in the matter, considering in practice that the

[32]Bosphorus Hava Yollari Turizm v. Ireland, App. No. 45036/98, 30 June 2005 (judgement, Grand Chamber), at para. 124.

[33]BVerfGE 37, 271 2 *BvL* 52/71 Solange I-Beschluß. Available at: http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=588 (last accessed: 16 June 2012). It can be argued that this reasoning shows that even while the human rights advocates view the Doctrine as something that could be used to undermine human rights at the level of EU law, the EC would have the Doctrine sustained for opportunistic reasons– to save the EU law's primacy and direct effect from challenges. This reasoning suggests that, even following the accession of the EU to the ECHR the Strasbourg Court should remain deferential to the Luxembourg Court – more so than it would be with respect to an ordinary state – in order to protect the EU's foundational characteristics and save its law from member states' defiance. The Italian Government advanced a similar argument in submission to *Bosphorus* case, that 'any imposition of an obligation on a State to review its United Nations and European Community obligations for Convention compatibility would undermine the legal systems of international organizations and, consequently, the international response to serious international crises.'(Bosphorus Hava Yollari Turizm v. Ireland, App. No. 45036/98, 30 June 2005 (judgement, Grand Chamber) at para. 129). This argument made by the Italian Government suggests that the importance of the ECHR should be outweighed by the need of international organizations to perform their role, a proposition that seems simply naïve in the face of modern approaches to human rights. Moreover, it conflicts with the principle of construing rights and freedoms broadly, established in *Loizidou (*ECHR, Loizidou v. Turkey, (1997) 23 E.H.R.R. 513 ECHR App. No. 15318/89, and Loizidou v Turkey (Preliminary Objections) A 310 (1995), ECtHR; *see also* Concurring opinion of Judge Jambrek in Fischer v Austria A 312 (1995), ECtHR. In this case, the Strasbourg Court decided that the ECHR's role as a constitutional document for Europe cannot be outweighed by the need of the international organizations to cooperate and perform their function.)

[34]ECHR, M.S.S. v. Belgium and Greece, App. No. 30696/09, 21 January 2011 (judgment, Grand chamber), at para. 338.

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effectiveness of the substantive guarantees of fundamental rights depended on the mechanisms of control set in place to ensure their observance.'[35] This confirms the continual application of the Doctrine, suggesting that the Doctrine's shape continues to function progressively.

D. The 'Manifest Deficiency' Concept: A Last Resort Instrument to Intervene over EU law

As regards the use of the Doctrine of Equivalent Protection, *Bosphorus* does provide for one important exception: the Doctrine of Equivalent Protection "can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient." In such cases, the interests 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.[36]

It is not quite clear what Strasbourg means when it speaks of 'manifest deficiency.'[37]Clearly, the Court uses the concept as an instrument of last resort, which it could draw upon on the basis of its self-governing power to intervene over EU law.[38] As such, it is the hidden story inside *Bosphorus*, which Strasbourg holds in reserve should it need to have the last word on EU human rights law and mechanisms, and where it "has endowed itself with a considerable measure of discretion."[39]

That said, it cannot be denied that the use of the 'manifest deficiency' exception remains rather odd and uncertain as a practical concept. *Bosphorus* does not make it clear what the Strasbourg Court means when it speaks about it. Also, in situations of manifest deficiency, it is not clear whom the Strasbourg Court would find responsible for violations such as the

[35]ECHR, M.S.S. v. Belgium and Greece, App. No. 30696/09, 21 January 2011 (judgment, Grand Chamber).

[36] ECHR, Bosphorus Hava Yollari Turizm v. Ireland,App. No. 45036/98, 30 June 2005 (judgement, Grand Chamber), at para. 156.

[37]See a very general criticism at Kathrin Kuhnert, *Bosphorus – Double standards in European human rights protection?* 2(2) UTR. L. REV. 177, 185 (2006).

[38] See a general view on this, at: Hoffmeister, Frank (2006) '*Bosphorus Hava Yollari Turizm v. Ireland,* App. No. 45036/98', *The American Journal of International Law,* Vol. 100, No. 2, pp. 442-449 (p. 447).

[39] Kunhert, *supra* note 37, at 189.

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EU secondary law self-executing acts in *DSR Senator Lines GmBH*[40] – the EU or its member states collectively.[41]In *DSR-Senator Lines* the Strasbourg Court was asked to call into responsibility the EU member states for an act of EC supposed to be in violation of ECHR: Strasbourg certainly refused to engage in the issue, and called the case inadmissible.
Digging deeper into the problem of 'manifest deficiency,' one could speculate on some clarifications. *Bosphorus*, *inter alia*, does briefly deal with the question of whether the presumption of equivalent protection had been rebutted in that specific case. The decision provides a rather compound answer:

> 'The Court has had regard to the nature of the interference, to the general interest pursued by the impoundment and by the sanctions regime and to the ruling of the ECJ (in the light of the opinion of the Advocate General), a ruling with which the Supreme Court was obliged to and did comply. It considers it clear that there was no dysfunction of the mechanisms of control of the observance of Convention rights.'[42]

This passage contains three standards that must be fulfilled in order for a case to be considered to have passed the threshold of 'manifest deficiency'. *Firstly*, and most importantly, that it has gone through the review mechanisms of the EU. It is quite clear that –as the above paragraph of *Bosphorus* provides –it is not necessary that the review of the EU mechanisms be done specifically and individually for that certain case. It could be a preliminary ruling of, let us say, the Luxembourg Court, on a broader issue, which then serves as basis for a member state court to resolve one individual case. That being said, the first and most important factor that makes a case not manifestly deficient is that it has gone somehow – even in the abstract sense– through the review mechanism of the Luxembourg Court, even if not strictly as an individual case. The issue of finding that an EU member state violated Article 6 of the ECHR if it has not asked for a preliminary ruling from the Luxembourg Court has been emphasized in *Soc. Divagsa v. Spain* and *Fritz& Nana S v France*,[43] suggesting that Strasbourg would consider this to be a manifest deficiency.

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[40] *DSR Senator Lines GmBH* and *Ermesa Sugar* v. *The Netherlands*, *supra* note 20.

[41] *See* Hoffmeister, *supra* note 23, at 448. Consider finding an answer for this by reviewing the outline presented broadly at: Costello, *supra* note 27, at 87-130.

[42]ECHR, Bosphorus Hava Yollari Turizm v. Ireland, Application no. 45036/98, 30 June 2005, (judgement, Grand Chamber), at para. 166.

[43]SocDivagsa v Spain (1993) 74 DR 274, ECHR, and Fritz and Nana v France, Admissibility Decision of 28 June 1993, ECHR, App. No. 15669/89.

The *second* step that a case must pass in order to not be considered manifestly deficient, is for the national bodies of a member state to have had implemented and stood in compliance with a ruling(s) of the Luxembourg Court dealing individually or abstractly with that case.
Thirdly, *Bosphorus* provides another condition, although implicitly, that the limits on rights made by an EU mechanism in accordance with the *general interest* - which stands as a highly abstract concept – in order not to be considered manifestly deficient. All told, *Bosphorus*, in a concealed way, nevertheless, does not put one single condition for a case to pass the manifest deficiency. *Bosphorus* leaves open the view that a case could be manifestly deficient even if it has gone through Luxembourg, but that one of the two other conditions has failed to be tackled.

The foregoing is our interpretation based on a specific paragraph in *Bosphorus*. It remains rather hard to anticipate the outcome of applying the test of manifest deficiency in other, future cases. We can however assume that the test will seldom be strict or hard. In one of the concurring opinions to *Bosphorus* one judge observes that "the criterion 'manifestly deficient' appears to establish a relatively low threshold, which is in marked contrast to the supervision generally carried out under" the ECHR.[44] A similar observation is made in literature.[45]This situation contrasts with the *Solange II* approach of the German *Bundesverfassungsgericht*, given that the German court held that equivalent protection is presumed *as long as* the standard of protection remains substantially similar to the *unconditional* rights enshrined by the German Law, clearly removing any possibility for such a low standard as being absent a 'manifest deficiency'.[46]

Hence, goes the argument, *Bosphorus* puts the standard of human rights protection under a presumption that remains very uncertain due to the broadness of its application. The low threshold also contrasts with thresholds set by the ECHR in other contexts. In *Saadi v. the United Kingdom*, for example, it is ruled that the ECHR

> [h]ad to be interpreted in a manner which ensured that rights were given a broad construction and that limitations were narrowly construed, in a manner which gave practical and effective protection to human rights, and as a living instrument,

[44] Joint Concurring Opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky & Garlicki, Bosphorus Hava Yollari Turizm v. Ireland, App. No. 45036/98, 30 June 2005, (judgement, Grand Chamber), at para. 4.

[45]For instance, *see* Costello, *supra* note 27, at 87, 102.

[46]BVerfGE 73, 339 2 *BvR* 197/83 Solange II-decision, paragraph f, available at: http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=572 (last accessed: 16 June 2012).

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> in light of present day conditions and in accordance with developments in international law so as to reflect the increasingly high standard being required in the area of the protection of human rights.[47]

It is difficult to see how *Bosphorus* could stand in the light of the standards prescribed in *Saadi*. There is seemingly a clear conflict of standards between these two landmark decisions, highlighting that *Bosphorus* remains defective in the low-bar protection that it offers by introducing the manifest deficiency concept.

One last issue with the *manifest deficiency* doctrine concerns the apparatus of confirming if a manifest deficiency has in fact appeared in a certain case. This would request that the Strasbourg Court judge the case *in concreto*,[48] as a manifest deficiency cannot be proven without adjudicating the case on the basis of individual review. As such, *Bosphorus* fails to indicate why the EU passes the test of manifest deficiency successfully, because the Strasbourg Court does not judge the case *in concreto*, but, rather, undertakes an abstract review of the case.[49]Stated differently, it remains unconvincing to hold that the EU regime of human rights is equivalently protective with that of the ECHR, if the Strasbourg Court has never tested this proposition *in concreto*. To this extent, recognizing such a broad presumption as the Doctrine of Equivalent Protection by ruling *in abstracto* is a real lacuna in the rational behavior of a specialized court like Strasbourg.

It is therefore rather clear that the 'manifest deficiency' exemption introduced by *Bosphorus* is a formal instrument that the Strasbourg Court wanted the EU to be aware of, rather than a matter it really engaged with in its review.

E. The Prospects for the Doctrine in Light of the EU's Accession to the ECHR

As explained during the course of this article, the Doctrine of Equivalent Protection is an instrument created to maintain a peaceful relationship between the EU human rights regime and that of the Council of Europe. The reason behind having to maintain such a relationship between these two human rights regimes is that the EU is not yet a party to the ECHR,[50] and, hence, the Strasbourg Court has no jurisdiction to review the EU legal

[47]Saadi v. The United Kingdom, Application no. 13229/03, Grand Chamber, ECtHR, 29 January 2008.

[48]*See also Bosphorus Hava Yollari Turizm v. Ireland*, App. No. 45036/98, *supra* note 44.

[49] *See* a more general approach to this, at Costello, *supra* note 27, at 103.

[50]The Luxembourg Court had in its *Opinion 2/94*, regarding the accession of EU to ECHR, inter alia, ruled: 'Accession to the Convention would, however, entail a substantial change in the present Community system for

order. It is well-known that that the EU has determined itself to become a party to the ECHR, through the Lisbon Treaty, and is now negotiating its accession to the ECHR with the Council of Europe. As a normal step, the accession treaty would have to provide for the participation of the EU in the ECHR mechanisms and control, as is the case with any other Contracting Party of the ECHR. In accordance with the Lisbon Treaty's determination to accede EU into ECHR, the European Commission and the Council of Europe have agreed upon the Draft Accession Treaty, which specifies all details regarding the post-accession position of the EU into the ECHR mechanisms. The Draft Accession Treaty would now have to be ratified by all Council of Europe member states and the EU institutions. The Accession Treaty, once ratified, will introduce numerous changes to the ECHR system, as the EU would become a state-alike party therein.

The current proposal of the Draft Accession Treaty has outlined a number of issues that will be part of its substance.[51]Besides the issue of EU representation in the ECHR treaty system, the concepts on citizenship and nation/member state, the Draft Accession Treaty deals with more unambiguous issues also. One such issue is the adaptation of the *exhaustion of legal remedies* principle for the EU. Hence, as is evident from the discussions being held between the European Commission and the Council of Europe, it is suggested that the Strasbourg Court will deal with applications" against the European Union, if all remedies available within the legal order of the European Union have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken."[52] Should such a proposal appear in the accession treaty – as it most likely shall – arguably, the Doctrine of Equivalent Protection will fall collapse as a criterion for determining the admissibility of cases, as the Strasbourg Court would be empowered to hear complaints against the EU, and will no longer be able to reject an application *rationae personae*, as it did in *CFDT* v. *European Communities*.[53]Another important issue within the context of the accession is whether the

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the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.'(ECJ, Opinion 2/94 [1996] ECR I-1759, at paras. 34 & 35).

[51] *See* the list of problems being currently discusses by the negotiating groups, at: *Draft list of issues to be discussed regarding the accession of the European Union to the European Convention on Human Rights*, 1st Working Meeting Of The CDDH Informal Working Group On The Accession Of The European Union To The European Convention On Human Rights (CDDH-UE) With The European Commission, CDDH-UE (2010).

[52]Proposal by the Meijers Committee, sent to the members of the Informal Group on Accession of the EU to the ECHR (CDDH-UE) of the Council of Europe and the members of the delegation for the negotiations on accession of the EU to the ECHR of the European Commission. *See* Meijers Committee, *Admissibility of claims in the light of accession of the EU to the ECHR* (2011).

[53]Confederation Francaise Democratique du Travail v. the European Communities, no. 8030/77 (Sept. 10, 1978).

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Strasbourg Court would accept to adjudicate a case if it has not been specifically – as opposed to formally – exhausted by the Luxembourg Court. That said, should Strasbourg refuse to recognize the Doctrine's applicability to cases not specifically exhausted by Luxembourg, it would certainly be a positive development for the autonomy of EU law.[54] This issue is not specifically dealt with in the Draft Accession Treaty.

Therefore, the accession of the EU to the ECHR will enable applications attacking the Luxembourg Court's decisions to be filed at Strasbourg, and the latter would have no competence to declare the parties filing those applications inadmissible. This stands true so far as admissibility *rationae personae* is concerned, as the Strasbourg Court could continue to hold the Doctrine of Equivalent Protection as a *rationae materiae* standard.[55] This means that although Strasbourg is obliged – after the accession – to accept the applications against the Luxembourg Court's decisions, it might nevertheless continue to consider *in meritum* that the decisions of Luxembourg remain *substantively* under the shield of the Doctrine of Equivalent Protection. Altogether, the accession of the EU to ECHR – and the adaptation of the *exhaustion of legal remedies* mechanism for EU law – will only guarantee that the Doctrine of Equivalent Protection is no longer an admissibility standard observed by the Strasbourg Court; the latter could continue to refuse to adjudicate cases *in meritum* and *in concreto*, although admissible procedurally, based on the argument that the EU human rights law and mechanisms are equivalently protective with the ECHR. The Strasbourg Court could ground this behavior in the rationale of the *Tyrer Case*, where it ruled that "[t]he Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, [and] must be interpreted in the light of present-day conditions."[56] However, this would defeat the *substantive* reasons that legitimize the accession of the EU to the ECHR,[57] delegitimizing both the Strasbourg Court's international law role and the status of human rights in the EU. Moreover, if the Strasbourg Court would continue to uphold the Doctrine after the accession, the former

[54] *See* a broad analysis on the autonomy concerned at Tobias Lock, *Walking on a Tightrope: The Draft Accession Agreement and the Autonomyof the EU Legal Order*, 48(4) CMLR 1033 (2011).

[55] *See* a general support for this argument, at: Leonard Besselink, *The European Union And The European Convention On Human Rights: From Sovereign Immunity in Bosphorus to Full Scrutiny under the Reform Treaty?*, *in* CHANGING PERCEPTIONS OF SOVEREIGNTY AND HUMAN RIGHTS: ESSAYS IN HONOUR OF CEES FLINTERMAN 295-309 (2008).

[56] ECHR, Tyrer v. United Kingdom, App. No. 5856/72 (Apr. 25, 1978).

[57] *See* the doubtful view on the accession of EU into ECHR of the Advocate General Francis G. Jacobs, at Francis Jacobs, *Accession of the European Union to the European Convention on Human Rights*, Hearing organized by the Committee on Legal Affairs and Human Rights (Sept. 11, 2007), available at: http://www.statewatch.org/news/2007/sep/jacobs-eu-echr.pdf (last accessed: 16 June 2012).

Advocate General would be right in his assertion that the accession of the EU to the ECHR is "widely regarded as valuable for political and symbolic reasons, [but which] will have rather limited concrete effects on the observance of human rights standards."[58]

Although the aforementioned situations are likely to occur, and even if the Strasbourg Court might not want to continue applying the Doctrine of Equivalent Protection while adjudicating cases against the EU *in meritum*,[59] it is likely that the European Commission will continue to argue that dismissing the application of the Doctrine *rationae materiae* by the Strasbourg Court would challenge the direct effect and primacy of EU law and its supranational characteristics, as 'everyone' could be granted the standing to attack EU law at Strasbourg (building upon the argument that the EU's *sui generis* features must be saved from external 'attacks').[60] However, the Luxembourg Court could also retain its dualist approach to international law, as in *Kadi*, considering a" constitutional guarantee stemming from the EC Treaty as an *autonomous legal* system which is not to be prejudiced by an international agreement."[61] All this remains to be seen in practice, keeping in mind that the Doctrine itself is an unsafe adventure for human rights *as such*.

Another basic remark is that the Strasbourg Court would have to defer to Luxembourg – and accordingly rigidly adhere to the Doctrine – in cases where an application involves the adjudication of EU law. Not only has the TFEU provided for an explicit provision that prohibits the interpretation of EU law by any other tribunal,[62] but the same has been explicitly provided for in the Draft Accession Treaty of the EU to the ECHR.[63]However, the

[58] *Id.*

[59]Consider some of the general comments of Van Dijk, as regards the use of the Doctrine, at Pieter Van Dijk, *Comments on the Accession of the European Union/European Community to the European Convention on Human Rights*, European Commission for Democracy through Law, 96 CDL (2007).

[60]On the *sui generis* nature of EU, *see* for instance, Joseph Weiler & Ulrich Haltern, *The Autonomy of the Community Legal Order – Through the Looking Glass*, 37(2) HARV. INT'L L. J. 420 (1996).

[61]CJEU, Joined Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat/Council and Commission, Judgment of 3 September 2008, at para. 316. Emphasis added.

[62]TFEU, Art. 344; This also follows from the argument in Tobias Lock, *The ECJ and the ECtHR: The Future Relationship between the Two European Courts* 8(3) L. & PRA.C INT'L CTS. & TRIB. 389 (2009).

[63] 'Nothing in the [Accession Treaty] […] shall affect Article 344 of the Treaty on the Functioning of the European Union.' Art 3 of Protocol No. 8 to the Treaties.

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argument goes that as long as a case brought before Strasbourg involves a question of the interpretation of EU law – or, more appropriately, EU law autonomy – it will be deemed to be shielded from the adjudication by Strasbourg, notwithstanding that the presumed violation might seem to have ECHR implications as well. Therefore, the Doctrine will continue to serve both as an admissibility mechanism, as well as in the *meritum* standard when cases brought before Strasbourg involve the interpretation of EU law.

A last feature that may empower the idea of retaining the Doctrine substantively – as opposed to an admissibility standard – is the co-respondent mechanism developed in the Draft Accession Treaty.[64] Although accession will provide for the possible admissibility of cases filed before the Strasbourg Court, the co-respondent mechanism will allow the EU to adhere to each procedure whenever any issue of EU law is being adjudicated at Strasbourg. In the substantive context, the co-respondent mechanism – although quite a significant innovation aimed at protecting the EU's supranational characteristics – will provide room for the EU to save its actions from being overturned by the Strasbourg Court. This may allow the EU to make a better pitch in convincing the Strasbourg Court that its law and mechanisms offer equivalent protection to those of the ECHR, hence providing further support for the Doctrine's substantive survival even after accession.

The foregoing reflections show that the accession will not necessarily means the end of the Doctrine of Equivalent Protection. The degree to which Strasbourg will continue to adhere to the Doctrine after accession[65] – as regards the *in meritum* adjudication of cases – will be an indicator for the extent of the EU law's autonomy. As a theoretical rule, the longer the Strasbourg Court continues to apply the Doctrine, the more likely it becomes that the EU law's autonomy will be sustained. In contrast to this, a full decline of the Doctrine at the hands of the Strasbourg Court will be an indicator of the decline of the EU law's autonomy with respect to Strasbourg. That said, the extent of the Doctrine's applicability will determine whether the spirit of *Van Gend en Loos*[66] and *Costa/ENEL*,[67] upheld within years,

[64]The Draft Accession Treaty reads: "[w]here an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it *appears* that such allegation calls into question *the compatibility with the Convention rights at issue of a provision of European Union law*, *notably where that violation could have been avoided only by disregarding an obligation under European Union law*." (Art. 3 (2) of the Draft Accession Agreement; CDDH-UE 009 (2011).

[65]*See* for instance a recent case, ECHR, M.S.S. v. Belgium and Greece, App. No. 30696/09, 21 January 2011.

[66]CJEU, Case 26/62, Van Gend & Loos, Judgment of the Court of 5 February 1963.

[67] CJEU, Case 6/64, Costa/ENEL, Judgment of the Court of 15 July 1964.

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will continue to survive, adding that the extent of the Doctrine's applicability after accession would rearrange the concept of the EU as a new legal order under international law having full supremacy over member states' national legal orders.

Note equally that the accession of the EU to the ECHR will not change the *Mathews* standard, namely that the EU primary law will continue to remain shielded from the Luxembourg Court's review and the Strasbourg Court will accordingly continue to hold EU member states responsible for potential violations of the ECHR arising from the EU primary law. Therefore, it remains to be seen whether the institutional peace will continue to be maintained after the accession.[68]

Finally, it is important to mention that the question of the Doctrine's applicability and/or survival after the accession of EU to ECHR will also prove important for the 'contest' over Europe's constitutional court. The argument would be that should the Strasbourg Court defer to its Luxembourg counterpart – thus, applying the Doctrine *in meritum*–it would nevertheless prove its position as a constitutional court for Europe,[69] which does not engage with individual complaints but, rather, rules very occasionally on a more abstract basis. This would certainly root Strasbourg's legitimacy as a more subsidiary, abstract European court, while retaining Luxembourg's status as a more national, ordinary court.

F. Conclusion

The article provided a discussion and analysis on the legal significance, scope, nature and prospects of the Doctrine of Equivalent Protection: the instrument that has for a number of years regulated and managed the peaceful relationship between the EU and Council of Europe regimes of human rights. The article preliminarily offered a brief background on the issue, and explained the roots of the implications deriving there from. In general, the article concludes that the Doctrine has served the cooperation between the Luxembourg and Strasbourg regimes of human rights, offering space for mutual respect and understanding.

More particularly, the article first dealt with the more general understanding of the Doctrine of Equivalent Protection, its scope and nature in light of the case law of the

[68]Kirsten Schmalenbach, *Struggle for Exclusiveness: The CJEU and Competing International Tribunals*, *in* INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION. FESTSCHRIFT IN HONOUR OF GERHARD HAFNER (Isabelle Buffard, James Crawford *et. al.* eds., 2008).

[69]The original idea on viewing Strasbourg as a constitutional court stems from a careful reading of STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS (2006).

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Strasbourg Court. It argued that the Doctrine remains a very uncertain presumption, and that its broadness of application produces problems in the context of legal certainty in the EU, as there is no external layer of judicial control on the human rights performance of the latter. Accordingly, the article described two – most representative positions – as regards the Doctrine, that of the European Commission and that of the claimant, both represented at the *Bosphorus* case. The article therefore concludes that the Doctrine immunizes the EU law from an external human rights control, clearly favoring cooperation before human rights. Although the Commission's argument on the possibility that the dismissal of the Doctrine could have on EU law primacy is founded, it remains very problematic for a serious human rights approach to accept it.

Following, the article engaged with the concept of 'manifest deficiency' – the instrument that the Strasbourg Court introduced as a means to abrogate the Doctrine should it consider that the EU has not provided rights and protections equivalent to the ECHR. Additionally, it discussed the main criticisms as regards the manifest deficiency concept, and engaged with some of the arguments that speak for its rather formal status. The article concludes that the manifest deficiency instrument produces legal uncertainty, clearly pushing forward the argument that it is done to meet a formal aim. With the hint that the manifest deficiency concept remains an unusable instrument for human rights benefits of claimants, the article concludes that *Bosphorus* presumption on the Doctrine of Equivalent Protection is hardly rebuttable.

The article also discussed the prospects of the Doctrine in light of the accession of the EU to the ECHR, hinting on the possible survival of the Doctrine, this time not anymore as an admissibility standard but as a *rationae materiae* standard in the adjudication by the Strasbourg Court of applications against EU law. The article concludes that the *rationae materiae* Doctrine's application could continue even after the accession, offering space to critics to argue that the post-accession Strasbourg's external control of human rights over Luxembourg is rather formal and merely for political reasons.