

RESEARCH PAPER

Bosphorus – Double standards in European human rights protection?

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1. Introduction

The delimitation of competences in human rights review between the European Court of Human Rights (ECtHR) in Strasbourg and the European Court of Justice (ECJ) in Luxemburg has been questioned several times over the past decades. In the *Bosphorus* case, the ECtHR considered a question that goes beyond the familiar discussion on how far the Strasbourg court might explore its scrutiny in reviewing Community acts: might Europe see a two-tiered human rights system, where regionally among the EU and its Member States more flexible review is maintained, coupled with stricter review for other non-EU Member States of the Council of Europe (CoE)? To what extent is this judgment likely to create formal recognition of such a double standard in European human rights protection?

2. Facts and litigation

2.1. Proceedings before the Irish courts

A Turkish airline charter company, Bosphorus Hava Yollari Turizm (Bosphorus) leased and registered two aircraft belonging to a company residing in the Former Republic of Yugoslavia (FRY) and brought one of them to Dublin/Ireland in order to have maintenance work performed on it by an Irish company. Consequently, the Irish authorities impounded the aircraft on the authorization of the Irish Minister for Transport on the basis of EC Regulation 990/93/EC² that formed part of the UN sanctions regime against the FRY.³ Bosphorus went before the Irish High Court claiming that the Minister's decision had infringed its right to respect for property. However, the High Court held that the EC Regulation did not even apply to the present case because the applicant's Turkish company was neither held nor controlled by a person or under-

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2 Regulation (EC) no. 990/93 Concerning Trade Between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), *OJL* 102, 26.4.1993, p. 14.

3 UN Doc. S/RES/820, para. 24.

taking from the FRY. On appeal by the Irish Minister of Transport, the Irish Supreme Court subsequently asked for a preliminary ruling from the ECJ.

2.2. ECJ

The ECJ confirmed the decision of the Irish High Court.⁴ In its judgment of 30 July 1996, the ECJ ruled that: ‘As compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the Federal Republic of Yugoslavia, cannot be regarded as inappropriate or disproportionate.’⁵ Thus, the Court came to the conclusion that the applicant’s aircraft fulfilled the criteria for falling within the scope of application of the EC Regulation. However, the EC Regulation could not infringe the applicant’s right to respect of property as the impounding was ‘justified by the importance of the aims pursued, *i.e.* the dissuasion of the FRY from further violations of the integrity and security of the Republic of Bosnia-Herzegovina. (...) This fundamental objective of general interest was clearly intended by the UN Resolution that was then implemented on Community level.’⁶ The ECJ thus declared the impounding of the aircraft to be appropriate and proportionate and rejected the applicant’s argument that the proportionality principle had been infringed.

On 29 November 1996, the Supreme Court of Ireland allowed the appeal of the Irish Minister of Transport from the order of the Irish High Court, following the preliminary ruling of the ECJ. Finally, Bosphorus went to the ECtHR in order to have the Irish Minister’s decision examined on grounds of Article 1 of Protocol 1 to the European Convention of Human Rights (Right to have property respected).⁷

3. Legal assessment by the ECtHR

3.1. Potential conflicts

The present case provided the ECtHR with an opportunity to define its role regarding the review of Community acts more systematically. Furthermore, it required the Court to make a policy decision regarding the EC and CoE framework. The decision once more illustrates the ambition of the ECtHR to steer a middle ground between the necessity to confirm its former case-law on Member States’ responsibility for transferred powers so as not to give *carte blanche* to the EC and the difficulty of providing the EU Member States with a system of control as regards the compatibility of Community acts with the ECHR.

Undoubtedly, Community acts and national measures within a Community sphere, scope, field or area may be subject to review by the ECJ, which regularly uses the ECHR as a yardstick.⁸ The same applies to national measures implementing Community acts.⁹ But in these cases, strict judicial review by the ECJ creates the risk of potential conflict with the ECtHR. This risk is attached to the separate responsibilities of the Member States to respect and guarantee their

4 Case C-84/95, *Bosphorus*, [1996] ECR I-3953.

5 *Ibid.*, para. 26.

6 *Ibid.*, para. 45; also compare the more differentiated opinion of AG Jacobs, final conclusions of 30 April 1996, *supra* note 4.

7 Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No. 11), ETS No. 155, 4 November 1950.

8 Case C-260/89, *ERT* [1991] ECR I-2925; Case C-159/90, *SPUC v. Grogan* [1991] ECR I-4685; Joined Cases C-46/87 and C-227/88, *Hoechst AG v. Commission*, [1989] ECR 2859.

9 Case 5/88, *Wachauf*, [1989] ECR 2609.

obligations under the ECHR on the one hand, and their subordination to the supremacy of EU law over national law, on the other hand. The main concern for Member States in respect of the ECHR is that the protection of rights cannot be secured when the measure taken against an individual is the result of Community law.

The ECJ has always held that its application of the ECHR, as a general principle of law, offered the Member States enough security in ensuring the protection of ECHR rights. However, recent decisions of the ECtHR illustrate that this security might be questionable. Recent judgments, like *Bosphorus*, show that international obligations may collide and impose a serious dilemma on Member States.¹⁰

3.2. Developments in ECtHR case-law

Although nothing under the present jurisdiction of the ECtHR as codified prevents it from interpreting Community law, ECtHR case-law has for some time now revealed evidence of a self-imposed reluctance to judge on matters relating to the EU institutions and questions of Community law. The ECtHR has developed different solutions according to the specific nature of the contested act, based on the general principle laid down in Article 30(2) of the Vienna Convention on the Law of Treaties (VCLT)¹¹ that Member States' responsibility for an infringement of the ECHR must still be upheld when applying other rules of public international law, such as Community law. However, the question has remained unanswered where the boundary has to be situated for Member States' involvement when applying Community law before ECtHR jurisdiction can be established.

3.2.1. Early case-law

Quite early on, the Commission of Human Rights (CHR) already declared requests against the EC inadmissible *ratione personae*. In the *C.F.D.T. v. European Communities* case, the CHR considered itself 'not competent *ratione personae* to examine proceedings before or decisions of organs of the EC as the latter is not a Party to the Convention within the meaning of Articles 1, 19, 33 and 34 of the ECHR.'¹² The ECtHR confirmed this case-law in a number of subsequent judgments.¹³ However, in the *X. v. Germany* case dating back to the late 1950s, the CHR also held that 'when a Member State, having submitted itself to contractual obligations, concludes a later international agreement that does not allow for further observation of its obligations under the earlier Treaty, the State still is responsible under that preceding Treaty'.¹⁴ In the *Austria vs. Italy* case, the CHR explicitly ruled, that 'for the ECHR, this responsibility is even stronger due to the European public order'.¹⁵

3.2.2. New approach

The first case giving rise to a landmark decision as regards the ECtHR's competence to judicially review EC law is considered to be the *M. & Co. v. Germany* case¹⁶ from 1990.

10 *Bosphorus v. Ireland*, [2005], not yet reported; *Ermesa Sugar v. The Netherlands*, [2005], not yet reported; *DSR Senator Lines GmbH*, [2004] ECHR (Ser. IV); *Ségi et al.*, [2002] ECHR (Ser. V); *Bankovic v. Belgium and 16 other Member States*, [2001] ECHR (Ser. XII) and *Société Guérin Automobiles*, [2000], not reported.

11 1969 Vienna Convention on the Law of Treaties, *United Nations Treaty Series*, 1969, p. 331.

12 *C.F.D.T. v. The European Communities*, [1978] ECHR (Ser. A), p. 231.

13 *Dalfino*, [1985], not reported; *Associazione Spirituale per l'Unificazione del Mondo Cristiano*, [1987], not reported; *Dufay v. The European Communities*, [1989] ECHR (Ser. A), p. 125 and *Del la Fuente*, [1991], not reported.

14 *X. v. Germany*, [1958] ECHR (Ser. A), p. 256.

15 *Austria v. Italy*, [1961] ECHR (Ser. IV), p. 116.

16 *M. & Co. v. Germany*, [1990] ECHR (Ser. A), p. 138.

This case involved the enforcement of a decision by the European Commission imposing a fine for a violation of EC competition (anti-trust) law against a German partnership. The companies had lodged a complaint with the ECJ,¹⁷ which was only partially successful, and so the German Minister of Justice enforced the fine. The applicants then challenged the ECJ's decision under Article 6(2) and (3)(c) of the ECHR.

The CHR first recalled 'that it is in fact not competent *ratione personae* to examine proceedings before or decisions of organs of the European Communities, the latter not being a Party to the European Convention on Human Rights'. But 'the transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of transferred powers'.¹⁸ Thus, the EU Member States as Contracting Parties to the ECHR could not escape their obligations under the Convention by setting up supranational bodies and ceding their powers to an international organization, like the EU.

In this specific case, the CHR came to the conclusion that the enforcement of the European Commissions' decision had to be considered as a national act, for which reason the case was declared admissible *ratione personae*. However, inspired by the *Solange II* case-law of the German Constitutional Court,¹⁹ the ECtHR ruled that applications against individual EU Member States concerning material acts of Community law were inadmissible only under one condition: 'Provided that within that organization fundamental rights will receive an equivalent protection.'²⁰ The CHR found that this had been the case so far at Community level. This specific case was therefore declared inadmissible *ratione materiae* according to Article 27(2) of the ECHR.

As a consequence, this judgment clarified that no judicial review may be performed of national acts that are purely an implementation of acts of EU institutions with no discretionary power for the Member States, as long as the EU provides for equivalent protection of fundamental rights. Therefore, the *M. & Co.* decision can be interpreted as an attempt by the Strasbourg Court not to interfere in the establishment of a stable EU legal order by avoiding conflicts between Strasbourg and Luxemburg.²¹

3.2.3. Further developments

After 1996, the ECtHR gradually turned away from its *M. & Co.* case-law by establishing an ECtHR 'external control'²² regardless of whether the act in question was an act of an EU institution or a purely implementing act by a Member State.

3.2.3.1. *Cantoni v. France*

In the *Cantoni v. France* case²³ from 1996, the ECtHR examined a provision in the French Public Health Code and stated that the fact that it 'is based almost word for word on Community

17 Joined Cases C-100 and 103/80, *Musique Diffusion française*, [1983] ECR 1825, para. 128.

18 See *M. & Co. v. Germany*, *supra* note 16, p. 145.

19 *Solange II*, [1986], BVerfGE 73, p. 339; see also F. Krenc, 'La Décision Senator Lines ou l'Arrêt d'une Question Délicate', 2005 *RTDH*, p. 128; F. Benoît-Rohmer, 'A Propos de l'Arrêt Bosphorus Air Lines du 30 Juin 2005: L'Adhésion Contrainte de l'Union à la Convention', 2005 *RTDH*, p. 840; A. Bultrini, 'La responsabilité des Etats membres de l'Union européenne pour les violations de la Convention européenne des droits de l'homme imputables au système communautaire', 2002 *RTDH*, p. 15 and G. Ress, 'Die EMRK und das Gemeinschaftsrecht', 1999 *ZEuS*, p. 482.

20 See note 16, *supra*.

21 See Bultrini, *supra* note 19, p. 17.

22 J. Bröhmer, 'Die Bosphorus-Entscheidung des Europäischen Gerichtshofs für Menschenrechte', 2005 *EuZW*, p. 74.

23 *Cantoni v. France*, [1996] ECHR (Ser. V) 1996, p. 1614; see also *Etienne Tête v. France*, [1987] ECHR (Ser. A), p. 53; *Procola v. Luxemburg*, [1995] ECHR (Ser. A), p. 32 and *Pafitis et al. v. Greece*, [1998] ECHR (Ser. A), p. 15.

Directive 65/65 does not remove it from the ambit of Article 7 of the Convention'.²⁴ This meant that even national laws that were word for word identical to EU Directives could be referred to the ECtHR. As this specific case concerned a Directive and, consequently, the Member State in question had discretionary power in executing it, it concerned a national act which was open to full review by the ECtHR. However, the ECtHR did not refer to the approach as it had been taken by the European Commission of Human Rights in the *M. & Co. v. Germany* case, *i.e.* it made no distinction between an act issued by an EU institution and acts of Member States that purely implement Community law.

However, the *Cantoni* case made it possible for an applicant to first challenge a national act originating in EC law before a national court, in which he/she could fail after a preliminary ruling according to Article 234 of the EC Treaty²⁵ or Article 230 of the ECT by which the ECJ previously declared the underlying Community act as legal, and then after having exhausted all other remedies, to bring a case against the Member State before the ECtHR.²⁶ After *Cantoni* the ECtHR could examine (1) if the national act (which originated in EC law) constituted an infringement of the ECHR and (2) if the ECJ provided equivalent protection of the applicant's fundamental rights.

With this scenario, diverging judgments of the ECJ and ECtHR became possible.

3.2.3.2. *Waite & Kennedy v. Germany/Beer & Regan v. Germany*

In the two cases of *Waite & Kennedy v. Germany* and *Beer & Regan v. Germany*²⁷ of 1999, the ECtHR had to deal with the question of whether Germany had infringed Article 6(1) of the ECHR by declaring complaints against the European Space Agency (ESA) brought by temporary workers of ESA who pursued the approval of employment contracts inadmissible on grounds of ESA's immunity. Comparable to the approach taken by the European Commission of Human Rights in *M. & Co. v. Germany*, the ECtHR emphasized that 'it would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective.'²⁸ The Court found that the applicants were provided with 'equivalent protection' to Article 6(1) of the ECHR, even in the absence of access to the German Labour Courts.²⁹

In denying an infringement of Article 6(1) of the ECHR in this case, the ECtHR in a way avoided clearly answering the underlying question, as in the end, the German courts had no option other than denying judicial access to the applicants because the ESA founding statute left no discretionary power on that point. The ECtHR therefore did not clarify the general question of whether the EU Member States, by having signed the ESA founding statute, which is an act of an EU institution, might be liable for infringement of the ECHR.

If we compare this case to *M. & Co.*, it is surprising that in this judgment the ECtHR did not already declare the case inadmissible *ratione materiae*. However, this fact alone is not enough indirectly to conclude that the ECtHR will find future complaints against EU institutions

²⁴ See *Cantoni v. France*, *supra* note 23, para 30.

²⁵ 2002 Treaty establishing the European Community (consolidated version), *OJ C 325*, 24.12.2002, p. 1.

²⁶ A. Bultrini, 'L'interaction entre le système de la Convention européenne des Droits de l'Homme et le système communautaire', 1998 *ZEUS*, p. 496.

²⁷ *Waite & Kennedy v. Germany* and *Beer & Regan v. Germany*, [1999] ECHR (Ser. A), p. 13.

²⁸ *Ibid.*, para. 67; See also *Adam II of Liechtenstein v. Germany*, [2001] ECHR (Ser. C), para. 47.

²⁹ See *Waite & Kennedy et al.*, *supra* note 27, para. 68.

admissible. Nevertheless, some authors have already concluded from *Waite & Kennedy v. Germany/Beer & Regan v. Germany* that the ECtHR would declare future complaints against a EU Member State or all Member States collectively admissible – even if the applicant claims an infringement of the ECHR by an act of an EU institution.³⁰

However, this is doubtful as the judgment did not decide this question explicitly and the ECtHR did not use any opportunity to confirm such a conclusion in its following judgments. Furthermore, the legal situation differed very much from *M. & Co.* as the present case did not concern the European Communities but ESA.³¹

3.2.3.3. *Matthews v. U.K.*

In the *Matthews v. U.K.* case³² from 1999, the ECtHR also slightly extended its power to review Community law.

UK nationals residing in Gibraltar were, according to an interpretation by a British court, not allowed to vote in the elections to the European Parliament. The national court had performed an interpretation of the EC-Treaty³³ and, by virtue of its analysis, it had reached the conclusion that inhabitants of Gibraltar lacked the right to vote in European elections. The ECtHR held that the provision in the Treaty, as interpreted by the British court, was tantamount to denying the applicant's right to vote, as guaranteed by Article 3 of Protocol 1 to the ECHR.³⁴

Some have claimed that this judgment marks a milestone in the evolvement of the jurisdiction of the ECtHR as Article 1 of the ECHR had been declared applicable not only to direct exercise of powers at national level, but also to the exercise of transferred powers by international or supranational organizations as the Court stated that 'the Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be 'secured'. Member States' responsibility therefore continues even after such a transfer'.³⁵

However, it must be stressed that the concrete question singled out by the ECtHR concerned the compatibility of EU primary law with ECHR rights. In the case of EU primary law it is much easier to establish direct liability of a Member State than when issues relating to EU secondary law are at question. It could be argued that the treaties are the result of the Member States' own legislation – having been ratified by their respective Parliaments. By contrast, following the judgment in *M. & Co. v. Germany*, the ECtHR would have acted more in line with its own former jurisdiction to judge on matters relating to the transfer of powers to the EU. However, it did not do so.

Furthermore, the ECtHR did not take the opportunity to qualify the rejecting decision of the Gibraltar Electoral Registration Officer in application of the EC Treaty as decisive for the case, as the Officer would not have had any discretionary power due to the clear legal situation set out in the Treaty.³⁶ This means that the situation would have been the same as in the cases of *Waite & Kennedy v. Germany/Beer & Regan v. Germany*.

30 N. Philippi, 'Divergenzen im Grundrechtsschutz zwischen EuGH und EGMR', 2000 *ZEuS*, p. 106.

31 See Bultrini, *supra* note 19, p. 23 and Krenc, *supra* note 19, p. 131.

32 *Matthews v. U.K.*, [1999] *ECHR* (Ser. A), p. 45.

33 Decision (EC) no. 76/787 (Act providing for direct elections of the European Parliament), *OJL* 278, p. 1 is regarded as a Treaty amending the EC Treaty for the purpose of Art. 307 (former Art. 234); on this T.C. Hartley, *The Foundations of European Community Law*, 2003, pp. 29-30 and R. Joliet, *Le droit institutionnel des Communautés européennes: Les Institutions; Les sources; Les rapports entre ordres juridiques*, 1983, p. 75.

34 See *Matthews v. U.K.*, *supra* note 32, para. 32.

35 *Ibid.*, para. 33; See Bultrini, *supra* note 19, p. 496; C. Grabenwarter, 'Europäisches und nationales Verfassungsrecht', 2001 *VVDStRL* 2001, pp. 330-331.

36 See note 32, *supra*; on this see Bröhmer, *supra* note 22.

However, the ECtHR rather than taking this approach, examined the case as an issue of EU primary law. The *Matthews v. U.K.* case might therefore be said not to serve as such a strong precedent in respect of the ECtHR's expanded right to review (secondary) Community law. Even after *Matthews v. U.K.* it remained clear, therefore, that a complaint against the EC as such would be declared inadmissible *ratione materiae*. Such complaints might only be possible indirectly, by means of suing EU Member States. However, whether a complaint as a result of *Matthews v. U.K.* could also be brought against all Member States collectively was a question which the Court had not answered yet.

3.2.4. Recent case-law

Recently lodged applications against all EU Member States did not only concern measures by national authorities transposing or executing EU legislation, but also concerned the exercise of powers by EU institutions themselves.

3.2.4.1. *Société Guérin Automobiles*

Further clarification of the question whether all EU Member States might be liable collectively was expected from the *Société Guérin Automobiles* case.³⁷ In this case the applicants lodged a complaint against all 15 Member States in order to challenge a judgment by the ECJ whereby the latter had denied the existence of a right to information concerning judicial remedies in Articles 189, 190, 191 and 192 of the EC Treaty.³⁸ The ECHR had already declared the case inadmissible *ratione materiae* on grounds of Articles 6 and 13 of the ECHR that provide for a right of fair trial, but do not encompass a right to information about judicial remedies.³⁹ However, the question of whether a complaint against all (15) Member States is actually possible was again left unanswered by the Court.

3.2.4.2. *DSR Senator Lines GmbH*

In the *DSR Senator Lines GmbH* case⁴⁰ from 2004 the applicant alleged that a fine procedure initiated by the European Commission had violated Articles 6 and 13 of the ECHR. The Court of First Instance (CFI) and – on appeal – the ECJ rejected the applicant's request for interim relief against the interim enforcement of a fine of 13.75 million. euros.⁴¹ The applicants then lodged a complaint before the ECtHR alleging an infringement of Article 6 of the ECHR – directed against all EU Member States.⁴² In the meantime, however, the CFI annulled the imposed fine.⁴³ As a consequence, the ECtHR had to declare the proceedings inadmissible because the company was no longer the victim of an infringement of the ECHR.⁴⁴ Consequently, the Court did not get around to pronouncing upon Member States' liability for a Community act.

37 *Société Guérin Automobiles*, [2000], not yet reported; see *Ségi et al.*, [2002] *ECHR* (Ser. A), p. 56.

38 Case C-154/98 P, *Guérin automobiles EURL*, [1999] *ECR* I-1451.

39 See *Société Guérin Automobiles*, *supra* note 37.

40 *DSR Senator Lines GmbH*, [2004] *ECHR* (Ser. A), p. 1; see also *Bankovic v. Belgium and 16 other Member States*, [2001] *ECHR* (Ser. A), p. 76 (inadmissible *ratione loci*).

41 Case T-191/98 R, *DSR Senator Lines GmbH v. Commission*, [1999] *ECR* II-2531 and Case C-364/99 P, *DSR Senator Lines GmbH v. Commission*, [1999] *ECR* I-8733.

42 Still 15 at that time.

43 Joined cases T-191/98 and T-212-214/98, *Atlantic Container Line AB a.o. v. Commission*, [2003] *ECR* II-3275.

44 See *DSR Senator Lines GmbH*, *supra* note 40, p. 13.

3.2.4.3. *Ermesa Sugar v. The Netherlands*

In the case of *Ermesa Sugar v. The Netherlands*⁴⁵ from 2005 the applicants also challenged a previous decision by the ECJ, whereby the latter had ruled that a lack of opportunity to reply to the Advocate General's opinion did not violate the right to adversarial proceedings in Article 6(1) of the ECHR.⁴⁶ In this case the ECtHR had the opportunity to finally specify the approach taken in its *M. & Co.* case-law; that is to say, to draw a formal link between the fundamental rights review of EU secondary law and the setting up of supranational bodies by ceding powers to an international organization.

However, the Court again circumvented the question by first going into the merits of the case that are normally examined only after the question of admissibility. As the ECtHR found that the scope of protection of Article 6(1) of the ECHR was at issue, it again omitted to decide whether EU Member States can be liable for infringements caused by a judgment of the ECJ.

3.2.5. *Partial conclusions*

It follows that EU Member States are apparently held responsible for acts of primary Community law as these concern Public International (Treaty) Law.⁴⁷

By contrast, where secondary Community law is concerned, the CHR and the ECtHR have only found Member States responsible when these applied Community acts with discretion and have reviewed the resulting national act.⁴⁸ However, where Member States did no more than execute a Community act on their territory, applications have been dismissed as inadmissible *ratione materiae*.⁴⁹ However, since the *M. & Co.* decision, the ECtHR has declined to take the opportunity to further specify this approach; *i.e.*, to delineate the boundary of Member States' collective or individual responsibility when implementing Community acts.⁵⁰ This was about to change with the *Bosphorus* case.

3.3. *Refined approach*

3.3.1. *Notion of 'jurisdiction'*

By clarifying that the notion of 'jurisdiction' (Article 1 of the ECHR) has to be understood as 'primarily territorial',⁵¹ the ECtHR overcame the practice of the CHR to declare applications that are connected to Community acts inadmissible *ratione materiae*. When examining compatibility with Article 1 of the ECHR, the Court therefore focused on the concrete national decision rather than on its original basis in Community law. This interpretation allowed the Court to avoid dismissing the complaint straight away on procedural grounds and to examine the merits of the case. Indeed, this can be considered a step forward as compared to the *M. & Co.* decision. However, as EC law also applies on the territories of the EC Member States (Article 299 of the EC Treaty), this interpretation fails to provide a convincing answer to the question of whether the EC (or a Member State) is bound by the ECHR in the implementation of Community acts.⁵²

45 *Ermesa Sugar v. The Netherlands*, [2005], not yet reported.

46 Case C-249/96, *Ermesa Sugar v. Aruba*, [2000] ECR I-665.

47 See *Matthews v. UK*, *supra* note 32.

48 See cases cited at note 23, *supra*.

49 See *M. & Co. v. Germany*, *supra* note 16, p. 138.

50 See cases cited at note 8, *supra*; on international context compare M. Kotzur, 'Eine Bewährungsprobe für die Europäische Grundrechtsgemeinschaft / Zur Entscheidung des EuG in der Rs. Yusuf u.a. gegen Rat', 2006 *EuGRZ*, p. 24.

51 See *Bosphorus v. Ireland*, *supra* note 10, para. 136.

52 F. Hoffmeister, 'Case note on "Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland"', 2006 *AJIL*, 2.

Although the Court stressed that Article 1 of the ECHR applies to Community law as well,⁵³ it still considers, in accordance with the traditional rule of State responsibility under international law, the conduct of a Member State organ to be an act of that State.⁵⁴ Thus, the ECtHR (still) seems to emphasize a formal approach rather than a functional one with regard to Member States' responsibility for the implementation of Community acts.⁵⁵

3.3.2. Concrete examination of Community acts

With the *Bosphorus* judgment, the ECtHR also introduced a new theory for justifying interference with human rights by Member States when applying Community acts. The Court had always emphasized that it is sufficient in abstracto that an act has been adopted by an international organization that provides an equivalent standard of human rights protection compared to the ECHR.⁵⁶ In the *Bosphorus* judgment, the Court applied a more concrete test to conclude to the general equivalence of human rights protection at Community level by reviewing the Community's substantive guarantees and procedural mechanisms for potential 'manifest deficiency'. On the one hand, the ECtHR clarified its ambition to examine the specific circumstances of future cases in order to effectively review potential shortcomings in the protection of human rights at Community level. On the other hand, this also indicates that the Court will not fully review Community acts, but rather engage in a general abstract review of the Community system.

3.3.3. Problematic aspects and unanswered questions

3.3.3.1. Indeterminate definition of 'manifestly deficient'

The ECtHR stated that there had not been any 'dysfunction' in the case under review,⁵⁷ but it did not specify what is to be understood by 'manifest deficiency'; *i.e.*, which legal shortcomings this would include. It may be assumed that a deficiency arises when the ECJ lacks competence, has been too restrictive in allowing individual access to it, or in case of an obvious misinterpretation or misapplication by the ECJ of an ECHR right or of a deviation from well-established case-law of the ECtHR. However, not every deviation from the ECtHR's case-law can be considered a shortcoming as Article 53 ECHR ensures that allowing more rights or interpreting them more broadly will be given legitimate effect as well. This definition is likely to create legal uncertainty in practice, which has already become obvious as the ECtHR – despite a final unanimous decision – was split on the details of the test. Seven judges providing concurring opinions presented rather far-reaching examples of legal shortcomings.⁵⁸ Only future cases will clarify whether the Court will continue to apply this relatively low threshold.

3.3.3.2. ECJ as a national remedy (Article 35(2)(b) of the ECHR)?

An applicant to the ECtHR must prove that he/she has used all available and efficient national remedies (Article 35(1) of the ECHR). This raises the question of whether recourse to the ECJ should be regarded as a national remedy. When interpreting the status of the ECtHR strictly, the Court is not an instance for appeal in the meaning of Article 35(2)(b) of the ECHR, but the

53 *United Communist Party of Turkey et al. v. Turkey*, [1998] ECHR (Ser. A), para. 29.

54 See *e.g.* Art. 4 of the Articles on Responsibility of States for Internationally Wrongful Acts (Report of the International Law Commission on the Work of Its Fifty-third Session, UN Doc. A/56/10 (2001)).

55 See Hoffmeister, *supra* note 52, p. 3.

56 See *M. & Co. v. Germany*, *supra* note 16; compare also AG Jacobs, Final conclusions of 30.4.1996, *Bosphorus*, *supra* note 4, para. 53.

57 See *Bosphorus v. Ireland*, *supra* note 10, para. 166; on this see Bröhmer, *supra* note 22, p. 74.

58 See *Bosphorus v. Ireland*, *supra* note 10, p. 49.

(supreme) court for the interpretation of the ECHR. However, in deviation from its common practice, the ECtHR did not refer to Section 2(b) of the ECHR in the *Bosphorus* judgment. Thus, it is doubtful whether decisions of the ECJ are still considered final, and moreover, whether future applications to the ECtHR on the same subject matter will have to be declared inadmissible. One might assume that such individual complaints will not necessarily be declared inadmissible any longer. This appears problematic, as under the Member States' domestic laws, the ECJ is considered a legal judge (*gesetzlicher Richter*),⁵⁹ and a refusal to request a preliminary ruling from the ECJ can be successfully appealed against before the national court of last resort.

3.3.3.3. Priority of Community law endangered?

Presently, EU Member States now seem to face the unenviable choice between incompatible laws under EC law and conflict with obligations under the ECHR. Practically, the Member States might make the implementation and execution of such Community acts dependent upon the outcome of a preliminary review as regards compatibility with the ECHR at national level.⁶⁰ This situation creates practical problems for the Member States, as they have to defend legislation that is only an execution of EC law and are thereby put in a similar situation as the German authorities were by the *Solange I* decision of the German Constitutional Court,⁶¹ that authorized German courts to review the compatibility of EC law with fundamental constitutional rights 'as long as' no adequate human rights protection exists at Community level.⁶² Furthermore, this also appears to disfavour the EC as the Community has no formal standing in Strasbourg, either for appointing judges, or for defending its legislation, because it is not answerable to the ECtHR. It may only intervene on behalf of a Member State,⁶³ whose defence it cannot however control. In interpreting the notion of 'jurisdiction' (Article 1 of the ECHR) as being 'primarily territorial',⁶⁴ the ECtHR does not make any distinction as to the type of law or measure in question, even if the contested act was purely one executing Community law. Although it would have been more appropriate to at least attribute the act to both the Member State and the EC, this is not yet legally possible as the Community is still not a Contracting Party to the ECHR.

3.3.3.4. Risk of double standards

Furthermore, the presumption of equivalence appears problematic given the procedural differences between the ECJ and the ECtHR. Six out of a total of seventeen judges⁶⁵ specifically pointed to individuals' limited access to the ECJ according to stricter standing rules and to its function when compared to the ECtHR.⁶⁶ They held that despite its value, 'a reference for a preliminary ruling entails an internal, a priori review. It is not of the same nature and does not replace the external, a posteriori supervision of the ECtHR, carried out following an individual

59 E.g. for Germany: Art. 103 Para. 2 of the Basic Constitutional Law (*Grundgesetz, GG*).

60 On this J.-P. Jacqué, 'L'arrêt Bosphorus, une jurisprudence « Solange II » de la Cour européenne des droits de l'homme?', 2005 *RTDH*, p. 761 and see Benoît-Rohmer, *supra* note 19, p. 846.

61 *Solange I*, [1974], BVerfGE 37, pp. 271 *et seq.*

62 On this see Jacqué, *supra* note 60.

63 According to Art. 36 Para. 2 of the ECHR: 'The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.'

64 See *Bosphorus v. Ireland*, *supra* note 10, para. 154.

65 *Ibid.*, Joint concurring opinion of judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki, para. 3.

66 On further proposals to strengthen the threshold of individual complaints for the ECtHR as well compare Proposition B.4 of final report 'Garantir l'efficacité à long terme de la Cour européenne des droits de l'homme' (www.coe.int); G. Cohen-Jonathan, 'Garantir l'efficacité à long terme de la Cour européenne des droits de l'homme: Quelques observations à partir des derniers travaux du comité directeur pour les droits de l'homme', 2003 *RTDH*, p. 1125 and F. Tulkens, 'La réforme de la Cour européenne des droits de l'homme', in: Nemesis/Bruylant (eds.), *Droit et justice*, 2003, pp. 53-80.

application'.⁶⁷ The much-lauded role of national courts within the preliminary ruling procedure can be doubted when it comes to providing sufficient compensatory protection in this context,⁶⁸ especially with regard to gaps in legal protection in highly sensitive areas like 'Visas, Asylum and Immigration' (Title IV of the ECT)⁶⁹ and 'Police and Judicial Cooperation in Criminal Matters' (Title VI of the EU-Treaty⁷⁰).⁷¹ Only the action for damages might allow for an adequate complementary mechanism to Articles 230 and 234 of the EC Treaty, as a violation of fundamental rights will certainly constitute a sufficiently serious infringement of Community law.⁷² Moreover, substantial differences exist between the EC's and the CoE's fundamental rights system. The ECJ's fundamental rights review appears more differentiated, as on the one hand it refers to general principles and on the other hand to fundamental freedoms. It might thus create more complex scenarios of conflicts between fundamental rights.⁷³ In this vein, for example, unlike the ECtHR, the ECJ in its *Bosphorus* judgment upheld an extensive interpretation of the term 'common welfare' as a collection of fundamental freedoms with economic aspects. As a consequence, 'common welfare' as interpreted by the ECJ will not likely be outweighed by 'individual welfare'.⁷⁴ These features are likely to create a less stringent standard of protection as the manifest deficiency test establishes a relatively low threshold for the EU, in contrast to the supervision generally carried out under the ECHR for other CoE Member States. This test is often compared with that applied in the case-law of the German Constitutional Court as of *Solange II*.⁷⁵ According to this decision, applications that challenge the protection of fundamental rights have to be declared inadmissible 'as long as' the applicant does not give evidence that the Community standard of human rights protection has slipped. Actually, it is doubtful whether the German *Solange II* doctrine can be abstracted to Convention level, especially as Article 53 of the ECHR lays down a minimum standard that without exception prohibits the lowering of protection in specific cases.⁷⁶ The ECHR level of protection can only ever be 'equivalent' in terms of the means, not of the result. Articles II-112(3) and II-113 of the EU Constitutional Treaty⁷⁷ also acknowledge this.⁷⁸ The interest served by good cooperation within the EC cannot justify any

67 See note 63, *supra*.

68 On this compare Case T-177/01, *Jégo Quéré vs. Commission*, [2002] ECR I-2365, para. 46 and Final conclusions of Advocate General Jacobs of 21.3.2002 in Case C-50/00 P, *Union de Pequeños Agricultores*, [2002] ECR I-6677.

69 Art. 68 Paras. 1 and 2 of the ECT provides for special regulations on the preliminary decisions procedure and others that prevent the ECJ from fully reviewing certain measures in respect of Title IV of the ECT.

70 2002 Treaty on European Union (consolidated version), OJ C 325, 24.12.2002, p. 110.

71 According to Art. 35 Para. 5 of the EUT the ECJ can only act on the basis of an optional clause for measures based on Title VI EUT. Thus, it has no jurisdiction to review the proportionality of action taken by the police or other law enforcement agencies.

72 Case C-352/98 P, *Bergaderm*, [2000] ECR I-5291 para. 44; see also Case C-5/94, *Hedley Lomas*, [1996] ECR I-2553 para. 28; compare on this Jacqué, *supra* note 60, p. 764.

73 See Bröhmer, *supra* note 22, p. 75 and, e.g. Case C-112/00, *Schmidberger v. Austria*, [2003] ECR I-5659.

74 Case C-84/95, *Bosphorus*, [1996] ECR I-3953, para. 21; Case C-280/93, *Banana Market Regulation*, [1994] ECR I-4973, Para. 78, compare on this G. Schohe, 'Das Urteil Bosphorus: Zum Unbehagen gegenüber dem Grundrechtsschutz durch die Gemeinschaft', 2006 *EuZW*, p. 33.

75 See note 17, *supra*; see also *Banana Market Regulation*, [2000], BverfGE 147, p. 102; compare on this N. Lavranos, 'Das So-Lange-Prinzip im Verhältnis von EGMR und EuGH', 2006 *EuR*, p. 76.

76 F. Tulkens *et al.*, 'La Cour de justice, la Cour européenne des droits de l'homme et la protection des droits fondamentaux', in: M. Dony *et al.* (eds.), *L'avenir du système juridictionnel de l'Union européenne, Institut d'études européennes*, 2002, pp. 198-199; M. Breuer, 'Offene Fragen im Verhältnis von EGMR und EuGH: Der Fall Ermes Sugar', 2005 *EuGRZ*, p. 232.

77 2004 Treaty establishing a constitution for Europe, OJ C 310, 16.12.2004, p. 1.

78 Art. II-112 Para. 3: 'Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

Art. II-113: 'Nothing in the Charter may be interpreted as restricting or adversely affecting the human rights and fundamental freedoms recognised (...) by international agreements (...), including the ECHR (...).'

deviation from this basic rule.⁷⁹ By keeping the option of concrete examination open in specific cases the ECtHR has even created a much lower threshold.⁸⁰

Therefore, it might be doubted whether the EC's procedural mechanisms in fundamental rights review inherently create a presumption of Convention compliance in relation to all ECHR rights for the future.⁸¹ In particular, Article 6(1) of the ECHR (fair trial) would have to be interpreted more extensively in that case.⁸² Unfortunately, the ECtHR in *Bosphorus* leaves these questions open.

3. Final conclusions

With the *Bosphorus* judgment, the ECtHR confirmed its former case law that it has no competence to review Community acts as such. But the Court recognizes a competence to review these acts indirectly through examining specific implementation measures at national level. Initially, the *Bosphorus* judgment confirms the ECtHR's case-law that secondary Community law leaves discretion in implementation for the Member States.⁸³ As a consequence, both primary and secondary Community law are now subject to review by the ECtHR and EU Member States can be held responsible for (nearly) all Community acts as they originally participated in the legislation process as the authors of these acts and are considered the original legislators of Community acts, and thus responsible for any shortcomings in this context.⁸⁴ However, one remaining category of cases is not yet subject to review by the ECtHR, namely Community acts which do not require any implementation by the Member States, *i.e.*, whose effect is purely internal to the Community. It can be doubted whether the arguments given above are also applicable to these acts in the light of the lack of attributability to individual Member States.⁸⁵ Whether there might be collective responsibility of all Member States, the Court has yet to decide.

Moreover, the *Bosphorus* judgment reflects the current political environment: the EC/EU have not yet acceded to the ECHR, while the EU Constitutional Treaty which explicitly provides for accession (Article I-9, second item, first sentence, see also Article 17 of Protocol 14 to the ECHR) has failed to be adopted for the moment. This judgment must thus be read as a political decision. Even if 'forced'⁸⁶ accession as a consequence of the *Bosphorus* judgment might be too strong a term to use, it nevertheless puts the EC under the de facto control of the ECtHR through indirectly invoking the Member States' responsibility. With the new manifest deficiency approach, the ECtHR has endowed itself with a considerable measure of discretion. The ECtHR has thus left no doubt that it is prepared to stress its role as the final arbiter on human rights protection in Europe. This aggravates the already existing tensions between the EU and its

79 Differing opinion L. Wildhaber, 'Europäischer Grundrechtsschutz aus der Sicht des Europäischen Gerichtshofs für Menschenrechte', 2005 *EuGRZ*, p. 692.

80 Compare on this Jacqué, *supra* note 60, p. 763 and Benoît-Rohmer, *supra* note 19, p. 845.

81 *Ibid.*; see also F. Krenc, 'La Comparaison des Systèmes de Procédure Communautaire avec ceux de la Convention Européenne des Droits de l'Homme', in: IDHAE (ed.), *Quelle Justice pour l'Europe? La Charte Européenne des Droits Fondamentaux et la Convention pour l'Avenir de l'Europe*, 2004, p. 84; see also Krenc, *supra* note 19, p. 153 and Benoît-Rohmer, *supra* note 19, p. 847.

82 See *Bosphorus v. Ireland*, *supra* note 10, Concurring opinion of Judge Ress, para. 2; see also Benoît-Rohmer, *supra* note 19, p. 849; Differing opinion: Bröhmer, *supra* note 22, p. 75.

83 See Benoît-Rohmer, *supra* note 19, p. 844; Krenc, *supra* note 19, p. 150; Jacqué, *supra* note 60, p. 766; Differing opinion: Breuer, *supra* note 76, p. 232; Philippi, *supra* note 30, p. 105: 'Emphasis still lays on national act (...), as regards preliminary rulings of the ECJ the following decision of the national judge, even if determined by the ECJ's ruling.'

84 See Benoît-Rohmer, *supra* note 19, p. 851 and Krenc, *supra* note 19, pp.136 and 157.

85 See Benoît-Rohmer, *supra* note 19, p. 853.

86 See Jacqué, *supra* note 60, pp. 762-766 and Benoît-Rohmer, *supra* note 19, p. 839.

Member States, making the accession of the EU to the ECHR more desirable than ever.⁸⁷ Moreover, this is likely to put pressure on the identity of the ECtHR itself to further define the outlines of a consistent standard of human rights protection across Europe,⁸⁸ essentially by leaving the choice of elaborating the manifest deficiency test on a concrete, case-by-case basis or by getting stuck in general and indeterminate verification. It will largely depend on the outcome of this issue whether the external boundaries of human rights jurisdiction in an enlarging Europe will expand in a coherent manner, both geographically and legally.

87 On this note compare S. Alber *et al.*, 'Mögliche Konfliktbereiche und Divergenzen im europäischen Grundrechtsschutz', 2006 *EuGRZ* p. 122; Cohen-Jonathan, *supra* note 66, , pp. 59-63; J. Callewaert, 'Paris, Luxembourg, Strasbourg: Trois juges, une discrimination', 2005 *RTDH*, p. 232; H.C. Krüger *et al.*, 'Proposals for a Coherent Human Rights Protection System in Europe', 2001 *HRLJ*, p. 97; R. Badinter, 'Unité ou Pluralisme, à propos de la Garantie des Droits de l'Homme en Europe', 2000 *Revue Québécoise de Droit International*, p. 29; F. Benoît-Rohmer, 'L'adhésion de l'Union à la Convention européenne des droits de l'homme', 2000 *RTDH*, p. 63; I. Canor, 'Primus inter partes. Who is the Ultimate Guardian of Fundamental Rights in Europe', 2000 *ELRev*, p. 16; J. Limbach, 'Inter-Jurisdictional Cooperation within the Future Scheme of Protection of Fundamental Rights in Europe', 2000 *HRLJ*, pp. 333-335; M. Meehan, '(Un)Chartered Waters: The Legal Background to Fundamental Rights Protection in the EU', in: K. Feus (ed.), *An EU Charter of Fundamental Rights*, 2000, p. 94; C. Turner, 'Human Rights Protection in the European Community: Resolving Conflict and Overlap between the European Court of Justice and the European Court of Human Rights', 1999 *European Public Law*, p. 455 and P. Alston *et al.*, 'The European Union and Human Rights: Final Project Report on an Agenda for the year 2000', in: *Leading by Example – A Human Rights Agenda for the European Union for the Year 2000* (1998), p. 95.

88 On the identity of the ECtHR, set off against plans for a EU Human Rights Agency compare N.P. Engel, 'EGMR-Junktim', 2006 *HRLR*, p. 328.