Systemic accountability of the European Border and Coast Guard: the legal responsibility of Frontex for human rights violations

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9 Legal Accountability in Practice: ECtHR and Domestic Courts

1 Introduction

The Lisbon Treaty brought one more change relevant for the adjudication of cases concerning the accountability of Frontex for human rights violations, namely the accession of the EU to the ECHR. According to Article 6 TEU, the EU has to accede the ECHR and become subject to the judgment of the ECtHR. The ECtHR has been in several cases confronted with issues regarding the responsibility of the EU (in connection with an act of a member state), but could not examine them due to lack of jurisdiction *ratione personae*.[1] The new provision of the Lisbon Treaty opened a new road for the legal accountability of Frontex, one that would mitigate the accessibility issues to the CJEU, allowing for an individual complaint before the ECtHR. It would allow for the realisation of *systemic accountability*, holding Frontex to account and offer solutions that facilitate joint responsibility.

Regrettably, this possibility has become fairly distant following Opinion 2/13 of the CJEU, in which the Court found the Draft Agreement on the Accession of the EU to the ECHR incompatible with EU law on a large number of points. [2] This section looks into this new potential legal route, which is regarded temporarily closed, but not fully unattainable, in the context of EBCG operations and through the lens of the Nexus theory and the model of *systemic accountability*.

This work primarily focuses on legal accountability before the two European High Courts. However, the role of domestic courts deserves a separate mention.[3] The EU judicial framework does include not only the procedures before the CJEU but also before national courts. The same holds for the procedure before the ECtHR, to the extent that this can be briefly considered here. Therefore, this chapter deals with the role of domestic EU courts in the context of the CJEU and the ECtHR. It does so based on

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1 E.g. European Commission of Human Rights 10 July 1978, No. 8030/77 (*Confédération Française Démocratique du Travail v European Communities*), par. 3; European Commission of Human Rights 9 February 1990, No. 13258/87 (*M. & Co. v Germany*), p. 138; ECtHR 11 November 1996, Judgment, App. No. 17862/91 (*Cantoni v France*), p. 161; ECtHR 18 February 1999, Judgment, App. No. 24833/94 (*Matthews v United Kingdom*), p. 251; S ECtHR 10 March 2004, Decision on Admissibility, App. No. 56672/00 (*Senator Lines v Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and United Kingdom*), p. 331; ECtHR, 30 June 2005, App. No. 45036/98, (*Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*), p. 107.

2 Opinion 2/13 CJEU.

3 Litigation avenues outside the EU fall outside the scope of this research.

the understanding that responsibilities within EBCG operations should be viewed as a nexus construction and asks the question how national courts contribute (and how they can further contribute) to the main application of systemic accountability, namely, not allowing for gaps in accountability and holding Frontex to account.

2 European Court of Human Rights

2.1 Present status of the EU before the ECtHR

Presently, the EU, not being party to the ECHR cannot be held directly responsible for violations of the ECHR (Convention) resulting from its primary or secondary law or its other activities, as any case directed against the EU itself is deemed inadmissible ratione personae. However, EU law itself has been considered by the ECtHR on several occasions in applications against member states, where a violation was brought about as a result of EU law.[4] Such is *Matthews v. the UK*, where the ECtHR held the United Kingdom responsible for a violation rooted in the EC Act on Direct Elections of 1976.[5] The Court then stated that the transfer of competences to international organisations does not affect the responsibility of the member states, while earlier in the case of *Cantoni v. France* it had held that the applicable domestic legislation still fell within the ambit of the ECHR, even though it was based almost word by word on an EC Directive.[6]

Perhaps, the most important of this series of judgements is the *Bosphorus* case[7], which complemented *Matthews*. Here the Court formulated the famous Bosphorus presumption stating that the state will be presumed to have acted in compliance with the Convention as long as the international organisation in question 'is considered to protect fundamental rights (...) in a manner which can be considered at least equivalent to that for which the Convention provides', under the condition that the state had no discretion in implementing the legal obligations flowing from its membership in the organisation.[8] The presumption can be rebutted where the protection in a particular case is deemed 'manifestly deficient'.[9] The Court considered the human rights protection offered by the EU to pass the Bosphorus test in general as well as in that case in particular. The interference with the

4 A list of cases where issues relating to Community law have been raised before the ECtHR is available in the ECtHR, Factsheet – Case-law concerning the EU, July 2019, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwiW1PHck7fjAhUEGuwKHTTCC2oQFjAAegQIAhAC&url=https%3A%2F%2Fwww.echr.coe.int%2FDocuments%2FFS_European_Union_ENG.pdf&usg=AOvVaw3hxmzjO8lqXQh2OJGT9wsl.

5 ECtHR 18 February 1999, Judgment, App. No. 24833/94 (*Matthews v United Kingdom*).

6 ECtHR 11 November 1996, Judgment, App. No. 17862/91 (*Cantoni v France*), par. 30.

7 *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*.

8 *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, paras. 155, 156.

9 *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, par. 156.

applicant's property rights under Article 1 of the Protocol to the ECHR was justified. [10] The decisive factor in these cases is whether the member state in question exercised discretion[11] and had freely accepted the international obligation concerned.[12]

A few years later, the *Connolly* decision[13] clarified that a member state can only be held responsible if the violation came about through a domestic act.[14] This means that in cases where there is no domestic implementing act, the action of the international organisation, namely the EU that violated the Convention could not be attributed to the member states and thus could not be examined by the Court even in this indirect manner.[15]

The current practice before the ECtHR, even though it touches upon questions concerning the compatibility of EU law with the ECHR rights, does not cover the responsibility of the EU as such. Thus, it leaves a significant gap in the human rights protection against EU actions and omissions, even more so in cases such as *Connolly*, where there is no national implementing act. Following the accession of the EU to the ECHR, individual applications against the EU will, in principle, no longer be inadmissible and it will be possible for the EU to be held accountable before the ECtHR, provided that the Bosphorus presumption will not be upheld after the accession.

2.2 The accession of the EU to the ECHR: a recurring promise

The accession of the EU to the ECHR is far from a novelty. In fact, the two bodies, the Council of Europe (CoE) and the European Communities have been trying to find common ground ever since the drafting of the European Political Community Treaty in 1953, with a series of negotiations rounds and political declarations. The accession is now a Treaty obligation for the EU (Article 6(2) TEU). However, the process has been significantly hindered by Opinion 2/13, where the CJEU ruled that the Agreement was incompatible with the TEU.[16]

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10 *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, paras. 159-166.

11 *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, par. 157.

12 *Matthews v United Kingdom*, paras. 33 and 34; *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, par. 157.

13 ECtHR 9 December 2008, Decision on Admissibility, App. No. 73274/01 (*Connolly v 15 Member States of the European Union*).

14 It is clear from Kokkelvisserij case that a request for a preliminary reference by a national court qualifies as a domestic act. ECtHR 20 January 2009, Decision on Admissibility, App. No. 13645/05 (*Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v Netherlands*).

15 T. Lock, 'Accession of the EU to the ECHR: Who Would Be Responsible in Strasbourg' in D. Ashiagbor, N. Countouris and I. Lianos (eds.), *The European Union after the Treaty of Lisbon*, Cambridge: Cambridge University Press 2012, p. 114.

16 For a concise consideration of the Court's reasoning, see, S. Douglass-Scott, 'The EU as a Member of the ECHR Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice', *Verfassungsblog*, 2014, https://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/.

While it would be unrealistic to expect the accession in the near future due to the complex issues raised by the CJEU in Opinion 2/13, and international crises currently occupying the agenda of the EU, the member states of the CoE have decided in the Declaration of Copenhagen to maintain their commitment to the accession and ask the EU institutions to take the necessary steps as soon as possible.[17] According to the Chairperson of the ad hoc accession negotiations group, Tontje Meinich, while striking a new broad compromise will be challenging, 'where there is a will, there is a way'.[18] Negotiations for the accession were resumed in 2020.[19]

Moreover, the present status does not allow for adequate representation of the EU before the ECtHR, and cannot ensure the sustainability and longevity of the practice of the two Courts to maintain consistency in their jurisprudence.[20] In light of the above, it is still worthwhile taking a short look on what legal accountability would look like under the Draft Accession Agreement,[21] and formulating some preliminary observations on the potential of this new legal framework to generate special rules on attribution of responsibility between the EU and its member states, especially from the perspective of the nexus and of *systemic accountability*.[22]

2.3 The Accession Agreement

The Draft Agreement that allows for the accession to the ECHR is based on three principles: equal footing before the ECtHR, autonomy, and subsidiarity.[23] According to the agreement, the accession shall impose on the EU obligations with regard to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf.[24] The EU shall not be required to act outside of its competences, as it had already

17 J. Callewaert, 'Do we still need Article 6(2) TEU? Considerations on the absence of EU accession to the ECHR and its consequences', *Common Market Law Review*, 55, 6, 2018, pp. 1686-1687; Council of Europe, *Copenhagen Declaration on the reform of the European Convention on Human Rights system*, 12-13 April 2018, par. 63.

18 T. Meinich, 'EU accession to the European Convention on Human Rights – challenges in the negotiations', *The International Journal of Human Rights*, 2012, https://www.tandfonline.com/doi/full/10.1080/13642987.2019.1596893, p. 5.

19 European Commission, *The EU's accession to the European Convention on Human Rights: Joint statement on behalf of the Council of Europe and the European Commission*, 29 September 2020.

20 Callewaert 2018, p.p.: 1688 – 1712.

21 The latest Draft Accession Agreement is of 2013. Fifth Negotiation Meeting Between the CDDHD Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, 5 April 2013.

22 A more detailed description is deemed unnecessary for the purposes of this dissertation, as there is no way to predict the direction that the re-negotiations would take and what will be the final content of the Accession Agreement. For further discussion, see Kosta, Skoutaris and Tzevelekos 2014.

23 F. Tulkens, Vice-President of the ECtHR, speech at the XXV FIDE Congress, May 30 – 1 June 2012, Tallinn.

24 Article 1 of the Draft Accession Agreement.

been made clear in Article 6(2) TEU. The Convention will become directly binding part of EU law, ranking over secondary law and below primary, including the EU Charter.[25] From a substantive point of view, the accession will not significantly influence the EU system of fundamental rights protection, since the case law of the ECtHR has been a substantial source of inspiration for the ECJ long before the accession. The ECHR rights have found their way in the jurisprudence of the CJEU as general principles of EU law (Article 6 (3) TEU), while the Charter rights need to be interpreted in accordance with the ECHR and the case law of the ECtHR (Article 52(3) Charter). Regarding the rules on attribution of responsibility between the EU and its member states, however, the relevant rules enshrined in the Agreement (for example co-respondent mechanism) will constitute *lex specialis* vis-à-vis the international law framework on responsibility in the meaning of Article 64 ARIO.[26]

Post accession, the EU will be bound not only by the entire content of the ECHR but also by the Protocols to which all its member states are signatories, namely the Protocol (i.e. the first Protocol) concerning property, education, and elections, and Protocol 6, concerning the abolition of the death penalty.[27] The EU may, at a later date, after having become a party to the ECHR, take a separate decision to accede to the other Protocols.[28]

Regulating the involvement of the CJEU, Article 3(6) of the Agreement provides for the prior involvement of the CJEU in order to ensure that CJEU is given the opportunity to assess the compatibility of the provision in question with EU law, in case it has not already done so. The ECtHR would then suspend the proceedings in Strasbourg awaiting for the CJEU to decide on the matter. The EU shall make sure that the ruling is delivered quickly, thus the accelerated procedure will be followed in such cases. Following the decision by the CJEU, the parties will be expected to make observations, while the ECtHR is in no way bound by the assessment of its counterpart in Luxembourg.[29]

Furthermore, a delegation of the EP shall be entitled to participate, with the right to vote, in the sittings of the Parliamentary Assembly of the CoE whenever the Assembly exercises its functions related to the election of

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25 C. Landenburger, 'European Union Institutional FIDE Report' in J. Laffranque (ed.), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*, Tartu: Tartu University Press 2012, p. 148.

26 D'Aspremont 2014, p. 82.

27 C. Jones, 'Statewatch analysis: The EU's accession to the European Convention on Human Rights: a cause for celebration or concern?', *Statewatch journal*, 21, 4, 2012, http://www.statewatch.org/analyses/no-187-echr.pdf, p. 3.

28 Council of Europe, *Accession by the European Union to the European Convention on Human Rights Answers to frequently asked questions*, 30 April 2013, http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Accession_documents/EU_accession-QA_updated_2013_E.pdf.

29 On the details of the negotiations of the different articles, see Jones 2012, p.p.: 2-4.

judges, while the EU will have its own judge at the ECtHR in Strasbourg.[30] In certain cases the EU shall be entitled to participate in the Committee of Ministers, with the right to vote.[31] The Draft Rule will be added to the Rules of the Committee of Ministers for the supervision of the execution of judgements and of the terms of friendly settlements, covering the cases to which the EU is a party.[32]

2.4 The nexus and systemic accountability after the accession

As mentioned above, the ECtHR, has already, even before the accession, dealt with issues related to EU, while Frontex itself has not gone unnoticed. The widely celebrated *Hirsi case* abounds in mentions of the involvement of Frontex during the Nautilus operation of 2009 in facilitating the Italian practice of push backs to Libya,[33] while the interim measures procedure has already been used twice to suspend Frontex return operations from Greek islands to Turkey in the context of the EU-Turkey deal.[34]

However, the legal significance of the accession lies in the fact that Frontex will be submitted to Strasbourg's external control system. The agency itself has taken the accession into account, indicating in its Fundamental Rights Strategy that it should adapt its activities accordingly.[35] Individual applicants will have the right to bring their complaint concerning Frontex acts before the ECtHR, which will have the competence to review them and hold the EU accountable for violations of the Convention. Therefore, the accessibility barriers of the CJEU will be mitigated by a procedure that allows for effective legal protection through an individual complaints mechanism. The admissibility procedure also makes the ECtHR a desirable alternative for strategic litigation initiatives. Moreover, the EU will be subject to the enforcement mechanism of the CoE, consisting mainly of the Committee of Ministers, the policy-making and executive organ that has been assigned the task to supervise the execution of the Court's judgments.[36]

Next to the improved level of individualist accountability that the accession provides, allowing for protection that is practical and effective, other aspects of *systemic accountability* also seem to be accommodated with the process before the ECtHR, which would allow for all actors responsible in a violation to be brought to account, while some of its already existing structures aim by design to addressing systemic issues behind a violation.

30 Article 6 Draft Accession Agreement.
31 Article 7 Draft Accession Agreement.
32 Rule 18 Draft Accession Agreement, Annex III.
33 *Hirsi Jamaa and Others v. Italy*, par. 27-37.
34 Angelidis 2017.
35 Frontex, Fundamental Rights Strategy, p. 3.
36 Article 46(2) ECHR.

These follow the direction of *systemic accountability*, which has been defined here as *accountability aiming at dealing with the systemic issues, which underlie and cause or allow for consistent violations, via focusing on structural solutions*.

Such instances of consistent violations of a systematic nature that affect large numbers of people are the source of inspiration for the model of *systemic accountability*. This aims to address not only a particular violation but also the underlying systemic issues. The consequences of such accountability should reach beyond one particular violation.

Looking at the procedure before the ECtHR, we see that the Court has in place certain measures to address structural issues behind consistent and systemic violations in order to prevent further violations in the future.

Such are the general measures requested by the ECtHR next to the compensation afforded to individuals (*individualist accountability*), which range from practical measures, such as the hiring of judges, to changes of jurisprudence or legislative amendments.[37] For instance, in the case of *Kim v. Russia*,[38] where violations of Articles 3 and 5 ECHR were found with respect to the detention of a stateless person in view of his expulsion, the Court, besides the just satisfaction to Mr Kim, also considered it necessary to request that Russia limits detention periods and provides for a mechanism that would allow individuals to bring proceedings for the examination of the lawfulness of their detention pending expulsion.

Such potential is also found in the infringement proceedings for failure of a state to implement a judgement of the ECtHR (Protocol No. 14), leading to a violation of Article 46(4) ECHR, [39] as long as it is not only implemented in narrow terms and does in fact lead to general measures that can create broader impact. [40]

The pilot judgement procedure, which the Court introduced to deal with 'repetitive cases' resulting from common dysfunctions at the national level, is another such measure. According to this procedure, the Court deals with several applications with the same systemic deficiencies as a cause, by prioritising one of them. The judgment that results from that application is treated as a pilot for the others. There the systemic problems are identified, and concrete measures are requested by the state needed to

37 The Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR), created by the Committee of Ministers of the Council of Europe has developed an inventory of general measures taken by the ECHR bodies. Available here: www.coe.int/t/DGHL/Monitoring/Execution/Source/Documents/Docs_a_propos/H-Exec(2006)1_GM_960_en.doc.

38 ECtHR 17 July 2014, Judgment, App. No. 44260/13 (*Kim v Russia*).

39 Proceedings under Article 46(4) in the case of Ilgar Mamadov v. Azerbaijan, Application No. 15172/13, of 29 May 2019.

40 See for instance criticism by Strasburg Observers, Toby Collins, The impact of infringement proceedings in the Mammadov/Mammadli group of cases: a missed opportunity, May 2021, https://strasbourgobservers.com/2021/05/28/the-impact-of-infringement-proceedings-in-the-mammadov-mammadli-group-of-cases-a-missed-opportunity/.

address these problems, often even reserving the question of just satisfaction until these measures are adopted.[41] The general measures of the ECtHR and the pilot judgments procedure, one can say, are practical applications of *systemic accountability*. These are also valuable, of course, in the present pre-accession system as far as the acts of member states are concerned, for example, regarding push-backs. Post-accession, however, these applications of systemic accountability could become even more relevant as their subject matter would be Frontex activities. A pilot judgment could concern for instance the supervisory and preventive structures of the agency, while general measures could be ordered with respect to the risk analysis or the operational plans, for instance regarding the presence of interpreters and legal advisors on land in all operations. This has increased potential to improve protection standards in all Frontex-led operations in a top-down manner.

Moreover, regarding issues of allocation of responsibility, I have shown that the ECtHR is familiar with and rules in accordance with the international framework on responsibility and the ILC Articles in particular, while it already has a more established and developed framework of joint liability, compared to that of the CJEU.[42] The ECtHR may even be bound by the ARIO as 'relevant rules of international law applicable in the relations between the parties', to the extent that no more specific provision is made in the Accession Agreement.[43] In this regard, the correspondent mechanism is most relevant.

Furthermore, a possibility opens up before the ECtHR for breaches of the Convention by the EU/Frontex and a member state to be assessed in the same judgement by the ECtHR, such as in the case of *MSS v. Belgium and Greece*. In this landmark case, regarding the transfer under Dublin III Regulation of Mr MSS, an Afghan interpreter, from Belgium to Greece where he suffered inhuman living conditions and risked to be returned to Afghanistan without a serious examination of his asylum claim. The responsibility of both Belgium and Greece were examined in this case regarding Article 3 ECHR and Article 3 in conjunction with Article 13 ECHR. Applying this practice to EBCG operations, we can foresee a case against the EC and an EU member state. More specifically, under Article 3 of the 2013 Draft Accession Agreement, a complaint to the ECtHR may be directed either against a member state or against the EU itself or both. In this way, the nexus of different responsibilities can be addressed more successfully without any of the responsible 'hands' evading their responsibility.

41 Rule 61 of the Rules of the Court; ECtHR 28 September 2005, Judgment, App. No. 31443/96 (*Broniowski v Poland*).

42 Chapter VI.

43 Article 64 ARIO; Article 31(3) Vienna Convention on the Law of the Treaties; A. Savarian, 'The EU Accession to the ECHR and the Law of International Responsibility' in V. Kosta, N. Skoutaris, and V. P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing 2014, p. 89; ECtHR 12 December 2001, Decision on Admissibility, App. No. 52207/99 (*Banković and Others v Belgium*), par. 83.

Still, it should be kept in mind that the co-respondent mechanism in the way it is described in Art. 3 of the Draft Accession Agreement has been rejected by the CJEU as incompatible with the particular characteristics of the EU and EU law and is being currently renegotiated. Thus, what is discussed here is under the reservation of a co-respondent mechanism that is ultimately different at least in its details.[44]

If the complaint is not addressed to the EU, the latter may still become involved in the proceedings through the co-respondent mechanism (Article 3(2) Accession Agreement), which has been introduced to ensure that complaints are addressed to member states and the EU as appropriate. As a result of the co-respondent mechanism, the EU becomes a party to the case even if the initial complaint was not addressed to it, and it is bound by the eventual judgment. Parallel to that, an EU member state may also become co-respondent to a case, where the application is directed against the EU. [45] In other words, the co-respondent mechanism is a construction that ensures the joint participation of the EU and the member states in the proceedings brought against any of them, as a 'way to avoid gaps in participation, accountability and enforceability in the Convention system'.[46]

It is important to note that not all cases that call into question EU law would result in the EU being invited to become co-respondent to the case. Only when the member state, acting as main respondent, has acted on the basis on an EU order, which led to the alleged violation, and when the said violation could only have been avoided by disregarding an obligation under European law, can the EU become co-respondent. Thus, only when the state is deemed to have no discretion under EU law that the co-respondent mechanism can be activated.[47] It is a matter of interpretation for the ECtHR whether it will consider only formally binding rules, or also de facto binding acts of Frontex, as limiting the discretion of the host member state in order for the co-respondent mechanism to be activated. In the latter case, the co-respondent mechanism can prove useful in a case regarding EBCG operations, bringing the different relevant actors before the same forum, realising, thus, the requirements of joint responsibility and *systemic accountability*. However, it should be noted that as a result of the compromise during the negotiations, it was decided that the EU would become co-respondent only if it had so requested, one of the main flaws of the co-respondent mechanism.[48]

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44 Opinion 2/13 CJEU, par. 215-235.

45 Article 3(3) Draft Accession Agreement. Member states may only join the proceedings that involve primary EU law.

46 Explanatory Report to the Draft Accession Agreement, par. 39.

47 E.g. ECtHR 23 May 2016, Judgment, App. No. 17502/07 (*Avotiņš v Latvia*); Meinich 2012, p. 3.

48 Meinich 2012, p. 4. Article 3(2) and (3) and (5) Draft Accession Agreement. Explanatory Report to the Draft Accession Agreement, par. 53.

In this respect, joint responsibility becomes the general rule on responsibility in the cases concerning the EU and its member states. Article 3(7) of the Accession Agreement provides that in the context of the co-respondent mechanism, the respondent and the co-respondent are jointly responsible for the violation, unless the ECtHR, decides that only one of them should be held responsible. The ECtHR has limited discretion to decide otherwise, only on the basis of reasons given by the main respondent and the co-respondent.[49] The ECtHR, however, will not be responsible for allocating the responsibility between the parties, which is deemed as an internal EU issue. In its earlier Opinion 1/91, the CJEU ruled that no court other than itself should decide on the competences of the EU and its member states,[50] while the Explanatory Report of the Accession Agreement states that the ECtHR apportioning responsibility would risk assessing this very same issue of distribution of competences.[51] Thus, according to the CJEU, the ECtHR should have no discretion whatsoever. Special Rapporteur of the ILC for the Responsibility of International Organisations, Georgio Gaja, doubts that issues of competence would indeed be as common, and commented that 'this issue is viewed as a delicate internal matter, which should be dealt with in the EU "cousin".[52] Thus, no indication of the criteria to be used to allocate responsibility was made in the Accession Agreement. The EU and its member states will be jointly responsible for taking appropriate general or individual measures to remedy the situation and compensate the applicant, but also to avoid the repetition of the violation.[53] This creates, according to De Witte, 'a special post-accession task for the CJEU to define more rigorously the criteria' for allocating responsibility between the EU and the member states.[54]

2.5 The future of the Bosphorus presumption

Delving into the more substantive aspects of the Strasbourg Court's ruling on the responsibility of the EU for Frontex acts, we can ask about the future of the Bosphorus presumption. According to the Bosphorus judgment,

49 Meinich 2012, p. 4.

50 CJEU 14 December 1991, Opinion 1/91, Draft Agreement between the European Community and the countries of the European Free Trade Association relating to the creation of the European Economic Area [1991] ECR I-6079 at I-6104-5, paras.: 33-36.

51 Draft Accession Agreement, p. 7.

52 G. Gaja, "'The Co-respondent Mechanism" According to the Draft Agreement for the Accession of the EU to the ECHR' in V. Kosta, N. Skoutaris, and V. P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing 2014, p.p.: 345, 346.

53 M. Claes and J. Gerards, 'Netherlands report of XXV FIDE Congress' in J. Laffranque (ed.), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*, Tartu: Tartu University Press 2012, par. 9.2.

54 B. de Witte, 'Beyond the Accession Agreement: Five Items for the European Union's Human Rights Agenda', in: Vasiliki Kosta, Nikos Skoutaris, and Vassilis P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing 2014, p. 351.

cases, where the alleged violation was a result of an EU member state applying EU law, which allowed it no discretion, are inadmissible, as the EU is presumed to provide protection equivalent to that offered by the ECtHR.[55] Thus, the presumption is that the EU complies with the ECHR, due to the EU fundamental rights framework (general principles of EU law and Charter), and the judicial protection offered by the EU system.[56] This presumption is, of course, not irrefutable and the individual circumstances of the particular case may find the protection 'manifestly contrary to the principles of the Convention'.[57] The Court has since confirmed the presumption in several cases.[58]

The question of whether the Bosphorus presumption is still justified after the accession, or whether it would nullify the effects of the accession itself has been the topic of debate amongst EU constitutional and human rights experts.[59] The Bosphorus presumption can constitute a substantial barrier to *systemic accountability* in the case at hand, as it shields EU law and the conduct of EU institutions and agencies from the full scrutiny of ECtHR, attending to the responsibility of the host state alone. In the author's view, maintaining the Bosphorus presumption after the accession would be counterproductive, as this would go against the purpose of the accession as a whole and would render it obsolete. Moreover, such preferential treatment of the EU vis-à-vis the other signatories to the ECHR would no longer be justified under the new regime. The survival of Bosphorus is, however, conceivable in an alternative form, for instance 'national courts will not be obliged either to depart from the interpretation of EU law imposed by the CJEU or to prioritise the obligations imposed under the ECHR'.[60] It is up to the ECtHR to resolve this issue after the accession becomes a reality unless the survival of the Bosphorus presumption becomes the subject of the renewed accession negotiations.

A discussion regarding the future of the Bosphorus presumption is relevant however also in the present pre-accession state, following Opinion 2/13, which was received with 'great disappointment' by the ECtHR.[61]

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55 *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, paras. 149-158.

56 *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, paras 160-165.

57 Such as in *M.S.S. v. Belgium v. Greece*, paras. 333-340.

58 E.g. ECtHR 10 October 2006, Decision on Admissibility, App. No. 16931/04 (*Coopérative des agriculteurs de la Mayenne and Coopérative laitière Maine-Anjou v. France)*.

59 For an accurate representation of the various arguments, see L. Besslink, 'General Report of XXV FIDE Congress' in J. Laffranque (ed.), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*, Tartu: Tartu University Press 2012, p.p.: 35-37.

60 O. De Schutter, 'Bosphorus Post-Accession: Redefining the Relationships between the European Court of Human Rights and the Patries to the Convention' in V. Kosta, N. Skoutaris, and V. P. Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford and Portland: Hart Publishing 2014, p. 184.

61 ECtHR, *Annual Report 2014*, Strasbourg: Registry of the European Court of Human Rights 2015, https://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf, p. 6.

In this regard, appropriate guidance is given by the *Avotiņš* judgment of the ECtHR, which is perceived as a response to the negative Opinion of the CJEU. The case came a few years after Onion 2/13 and concerned a commercial dispute between a Latvia citizen and a Cypriot company. Mr *Avotiņš* was sued and tried in his absence before Cypriot courts and was ordered to pay his debt along with interest. The company requested recognition and enforcement of the judgment, which was eventually issued by the Latvian courts. Mr *Avotiņš* argued that the recognition was in breach of EU law,[62] as the judgement was given in default of appearance, while the appropriate procedure of due notification of the defendant has not been followed. As a result, the applicant claimed a violation of the right to a fair trial, Article 6(1) ECHR. Nevertheless, the ECtHR found no violation, as it held that Latvia was bound by the EU Regulation, and thus, applied the Bosphorus presumption.

In this case, the Court showed its intention to continue applying the Bosphorus presumption, while it upheld the doctrine of equivalent protection by the EU fundamental rights system. However, it is to be noted that the Court gave significant space in the judgment to the consideration of the relevant questions, namely whether the member state had no discretion in the application of EU law and whether the protection provided at the EU level was indeed equivalent. Compared to this laborious consideration, the Court had until then brushed off the issue of equivalent protection in its previous case law, indicating that the reputability of the presumption will be from now on more closely investigated and that it should no longer be taken from granted.[63] As a matter of fact, the Court came close, for the first time, to declaring the protection 'manifestly deficient', and turned the rebuttal of the presumption into a real possibility in the minds of the readers of the ECtHR case law.[64] As a result of the Bosphorus presumption being rebutted, member states that were under the binding control of EU law, may still, in the future, be held responsible before the ECtHR for violations of the ECHR. Thus, awaiting for the accession, the Bosphorus presumption still survives, but is, in any case, awarded closer scrutiny, as the ECtHR seems, already, to be taking a stricter approach towards its preferential treatment of the EU.

62 Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1.

63 D. Spielmann, *The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights or how to remain good neighbours after the Opinion 2/13* (Lecture of FRAME High-Level Lecture Series, Brussels), 2017, p. 15, http://www.fp7-frame.eu/wp-content/uploads/2017/03/ConventionCJUEdialog.BRUSSELS.final_.pdf.

64 L. R. Glas and J. Krommendijk, 'From Opinion 2/13 to Avoti□š: Recent Developments in the Relationship between the Luxembourg and Strasbourg Court', *Human Rights Law Review,* 17, 3, 2017, p. 585.

3 Domestic courts

3.1 Domestic courts complementing the EU system of legal remedies

As far as the EU framework is concerned, Article 19(1) TEU provides that the EU shall provide a system of remedies that can ensure effective legal protection. This constitutes a 'complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions' and is composed of the CJEU on the one hand and the courts and tribunals of the member states on the other.[65] National courts become the first line guardians of the EU legal order, and the two tiers of the judicial system meet at the preliminary reference procedure.[66]

In the context of EBCG operations, the role of domestic courts is obvious regarding the accountability of host and participating member states, as well as regarding the civil and criminal liability of the officers participating in Frontex operations. As far as the accountability of the agency itself is concerned, though, the primary role belongs to the CJEU and the ECtHR. Still, we may regard national courts, especially those of the host member states, as having a role to play in the legal accountability of Frontex.

National courts have a leading role in the preliminary reference procedure, where they may instigate a response from the CJEU by referring a preliminary question to it. According to the Lisbon treaty, all courts may refer a preliminary question to the CJEU, while the higher courts have an obligation to do so. The applicant cannot claim a right, as such, according to EU law for the court to send a preliminary reference.[67] A relevant right may, however, exist, under the jurisprudence of the ECtHR.[68]

With regard to an action for annulment or failure to act, national courts lack the key power to review the legality in terms of EU law of acts of EU institutions and agencies. Prioritising the need for uniformity of EU law, the CJEU has ruled that national courts cannot declare Union acts and omissions invalid.[69] This power belongs to the CJEU, while national judges are

65 CJEU 8 March 2011, C-1/09, Opinion 1/2009, paras. 66, 70,71; Peers and Costa 2012, p. 93, note that 'It is notable that the Court of Justice has stressed the role of national courts pursuant to Article 19(1), even though they are not expressly mentioned in that Treaty provision.'; *Inuit Tapiriit Kanatami and Others v Parliament and Council*; *Microban v. Commission*.

66 Harlow 2002, p. 148.

67 *Firma Foto-Frost v Hauptzollamt Lübeck-Ost*; Damian, Gareth and Giorgio 2010, p.p.: 159, 160.

68 Section 3.4.

69 *Firma Foto-Frost v Hauptzollamt Lübeck-Ost*; J. Manuel and C. Martín, 'Ubi ius, Ibi Remedium? — Locus Standi of Private Applicants under Article 230 (4) EC at a European Constitutional Crossroads', *Maastricht Journal of European and Comparative Law*, p.p.: 233, 251-3.

only empowered to issue provisional measures.[70] In the case *Firma Fotofrost v. Hauptzollamt Luebeck-Ost*,[71] however, the ECJ stated that there is a duty for national courts to allow, in cases where no implementing measure exists, the individual to challenge the legality of EU acts since the case will be subsequently brought before the ECJ as a preliminary question. While, undoubtedly, maintaining its legal value, the enforcement of this duty is rather weak, since the Court has held that there are no sanctions for courts that fail to do that.[72] National courts still may have a role to play in the context of the legality review, and in particular, the strict admissibility requirement of 'direct and individual concern'. Domestic courts are responsible for interpreting and applying the relevant procedural rules in a way that enables the challenging of any decision.[73]

3.2 In search of systemic accountability: the national judge ruling on damages

A claim for damages concerning the non-contractual liability of the EU cannot be brought before domestic courts, by virtue of Article 268 TEU, which has been interpreted as providing the CJEU with exclusive jurisdiction to rule on EU law, whether this concerns the genuine interpretation of EU law, or the legality review of actions by the EU and its institutions, organs and agencies and their liability.[74] The exclusive jurisdiction of the CJEU is basically a manifestation of the immunity of the EU, namely immunity from the jurisdiction of national courts. Thus, the national court can only rule on the liability of the member state. Given the obligation for exhaustion of domestic remedies, the national liability procedures need to finish first before the CJEU hears a related liability case against Frontex. Since *Kampffmeyer,* the CJEU will refuse to hear a claim for damages against the EU, when compensation can be sought against the member state before the national courts.[75] In the example of the Frontex return flight from Germany to Afghanistan discussed in the same section, Germany would be liable before national courts for the full extent of the damage. Only if the domestic courts fail to issue full compensation, or more generally if there is

70 CJEU 21 February 1991, Joined Cases C-143/88 and C-92/89, [1991] ECR I-415 (*Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn*); and CJEU 9 November 1995, C-465/93 [1995] ECR I-3761 (*Atlanta Fruchthandelsgesellschaft mbH and others v Bundesamt für Ernährung und Forstwirtschaft*).

71 *Firma Foto-Frost v Hauptzollamt Lübeck-Ost*.

72 Damian, Gareth, Giorgio, 2010, p.p.: 159, 160.

73 *Union de Pequenos Agricultores v Council*, paras. 41, 42, 45; CJEU 1 April 2004, C-263/02 P, ECLI:EU:C:2004:210 (*Commission v Jégo-Quéré*), paras. 33 and 34.

74 This is not explicitly stated in the provision but has been read into it by the Court in its established case law. *Asteris and Others v Greece and EEC*; CJEU 14 January 1987, C-281/84, ECLI:EU:C:1987:3 (*Zuckerfabrik Bedburg v Council and Commission*); CJEU 29 July 2010, C-377/09, ECLI:EU:C:2010:459 (*Hanssens-Ensch v European Community*).

75 Chapter VIII, section 8.

no effective national remedy, will the CJEU agree to rule on the remaining amount as part of the liability of Frontex.[76]

As already concluded, the current judicial status quo does not accommodate the Nexus theory, as it does not give the opportunity for the individual to seek damages from any of the responsible actors (*joint and several liability*). It further falls short of the model of systemic accountability as even though it provides for the compensation of the victim (*individualist accountability*) it practically renders Frontex unaccountable for the damage caused and does not allow for the investigation of its responsibility (*systemic accountability*). A structure that allows for all actors responsible for a violation to be held to account is one that brings the respective actions before a single court. It has been argued that this court should be the CJEU.[77] Here, also for the sake of verification of the previous argument, I examine the alternative that would allow for the liability of both the agency and the member state to be examined in joined cases by a domestic court.

In principle, the EU, as an international organisation, can under the rules of international diplomatic law[78] choose not to invoke its immunity for the purpose of local proceedings or the domestic court could exceptionally reject the claim for immunity, arguing that the particular breach cannot be considered as part of the mission of the organisation and supporting its regular function.[79] This could lead to the possibility of the national court becoming the common forum for dealing with the responsibility of both the agency and the member state.

The graveness of the human rights violations at stake and the strict admissibility requirements before the CJEU are compelling reasons to this end. Still, while in theory, the EU may become a party to domestic lawsuits, in practice, waiving of jurisdictional immunity would go against the exclusive jurisdiction of the CJEU, and the rejection of its immunity by domestic courts seems quite unlikely. This would contradict the autonomy of the EU and EU law as well as the exclusive jurisdiction of the CJEU.

For the sake of argument, however, this remote possibility is examined. Thus, the argument could be made that cases dealing with violations during EBCG operations, where both the host state and Frontex may be involved, may be more reasonably heard by a national judge, especially in the context of systemic accountability and the complications of the joint liability frame-

76 Another less possible angle for the CJEU to assume jurisdiction is if the national court rules that the member state bears no responsibility for an existing violation because that has been committed by the agency's deployed personnel without the involvement or knowledge of the host state.

77 Chapter VIII, section 8.4.

78 Vienna Convention on Diplomatic Relations, Customary International Law on the Immunity of International Organisations, 1961.

79 A case in point is Supreme Court of the Netherlands 13 November 2007, LJN: BA9173, 01984/07 CW, (Euratom). The Dutch Appeals court had rejected the claim of immunity by Euratom, but the decision was later overturned by the Dutch Supreme Court.

work.[80] There is, here, an argument to be made in terms of joint responsibility. The domestic court is responsible for dealing with the responsibility of the host state. The non-invocation or rejection of the immunity of the EU, could give the same court the opportunity to also rule on the responsibility of Frontex, thus, making space for dealing with the different responsibilities as a nexus,[81] pursuing their joint responsibility more effectively. As discussed earlier, bringing the two cases under the same judicial roof also allows for the aims of systemic accountability to be fulfilled.

This structure could indeed be another way for systemic accountability to be achieved, while it even has certain benefits compared to the construction based on the jurisdiction of the CJEU under the principle of subsidiarity proposed earlier, according to which the CJEU can claim a more extended role in ruling on the joint liability of the EU and the member state.[82] These benefits include the direct and uninhibited access of individuals to the national courts and the significantly shorter and less costly proceedings compared to the liability procedure before the CJEU. Moreover, starting from domestic courts, a remedy can be further sought before the ECtHR with regard to violations occurring from the decisions of national courts, concerning, for instance, the right to an effective remedy or the right to a fair trial. An added benefit to using the route of national courts is that even though public interest litigation seems improbable before the CJEU, this possibility still exists in some member states, such as the Netherlands or France, depending on national procedural law. In any case, the matter can still be referred to the CJEU for a preliminary reference, thus, also involving the EU Court in the decision-making process. Nevertheless, this argument may be overly ambitious, as it has been suggested that the exclusive jurisdiction of the CJEU may be a mandatory rule, which the EU is not at liberty to waive. As a matter of fact, the CJEU has, so far, treated it as such.[83]

3.3 Ruling on the liability of members of teams

The national judge can rule, in any case, on the responsibility of individual national border guards as a result of a civil action. The national courts of the host state have jurisdiction over the civil liability of members of the teams operating in the host state.[84] A national case on the responsibility

80 Chapter VIII, section 8.3

81 To the extent possible, as the nexus can also include other responsibilities that will not necessarily be part of the same legal action, such as that of participating states, third states, or private actors.

82 Chapter VIII, section 8.4.

83 Oliver 1997, introduction by Schermers p. xiii.

84 Article 84 EBCG Regulation. The national courts also have jurisdiction over the criminal liability of members of the teams. Article 85 EBCG Regulation. In this regard, however, a civil remedy may be proven to be the preferable option for a human rights case, as the burden of proof in criminal cases, may be difficult to reach especially due to the lack of transparency characterising Frontex operations.

of individual border guards could be used as an initial way to reach the CJEU through the preliminary reference procedure.[85] It could be used as an opportunity to ask the CJEU to clarify certain points of EU law related to the responsibility of Frontex. Such can be, for instance, the issue of a border guard's or return escort's conduct being ultra vires based on whether the agency has been acting outside its mandate.

The status of national border guards before domestic courts is quite different compared to that of Frontex officials participating in joint operations. These have immunity from jurisdiction.[86] As a matter of fact, all Union servants are immune from prosecution before national courts for acts performed in their official capacity, i.e. in the performance of their duties, in accordance with Article 12(a) of the Protocol No. 7 on the Privileges and Immunities of the EU. The Court has ruled that the immunity has a purely functional character, and is intended to avoid any interference with the functioning and the independence of the EU.[87] According to H.G. Schermers and C.R.A. Swaak, the meaning of the phrase 'performed by them in their official capacity', allowing for the servant's immunity, is narrower than that of the phrase 'in the performance of their duties', which results in the liability of the Union. The latter includes but is not limited to acts performed in their official capacity.[88]

Immunity should be granted only when necessary for the performance of the Union's tasks, and it can be waived pursuant to Article 17 of the Protocol on Immunities, wherever this is not contrary to the interests of the Communities. This is another area, where there can be space for national courts in the context of accountability within EBCG operations. As a matter of fact, a duty even for the international organisation to waive their immunity (at least on a human rights matter) when there are no alternative remedies, can be induced from the case law of the ECtHR. Looking at the intrinsic difficulties of the procedures before the CJEU, and the uncertain future of the accession to the ECHR, this would not be an unreasonable argument to make before the ECtHR in the case of Frontex.[89] Finally, there have been other attempts in legal doctrine to find more restrictive solutions

85 Chapter VIII, section 4.

86 This, in the period studied in this dissertation, concerns only a very limited number of people, such as the Frontex coordinating officer. However, this will become more relevant in the future as the agency will be increasingly operating with its own border guards.

87 *Claude Sayag and Another v. Jean-Pierre Leduc*, paras. 401-402; CFI EU 29 March 1995, ECLI:EU:T:1995:58 (*Hogan v CJEU*), p. 718, par. 48; An interesting observation has been made by Schermers and Swaak 1997, p.p.: 176, 177: 'Claiming immunity involves liability. Whenever the Community invokes immunity of jurisdiction for a particular act of a servant, it implicitly accepts that the act is an act of the Community, because it has no right to invoke immunity for any other act. The Community can then be held liable'.

88 Schermers and Swaak 1997, p. 177.

89 Majcher 2015, p.p.: 73, 74; S. Carrera, M. De Somer and B. Petkova, *The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice*, CEPS Paper in Liberty and Security in Europe No. 49, 2012, p. 4.

to avoid unlimited immunity for international organisations.[90] With the immunity of Frontex personnel waived, domestic courts may rule on their liability, thus providing an argument in favour or against the liability of Frontex.

3.4 The relevance of national courts in the ECHR legal system

With regard to the proceedings before the ECtHR, a domestic case against a member state or a border guard may lead to an application before the ECtHR. For such a case to be deemed admissible, the exhaustion of domestic remedies is a necessary prerequisite according to Article 35(1) of the ECHR, as the ECtHR is intended to be subsidiary to the national systems. Depending on the circumstances of the case, the ECtHR may then rule on the compatibility with the Convention on the basis of the Bosphorus presumption.

As a matter of fact, there may be a growing relevance for national courts in light of the *Avotiņš* judgment and the development of the Bosphorus doctrine after Opinion 2/13. The ECtHR signalled in *Avotiņš* that it intends to scrutinise more vigorously the requirements of the Bosphorus presumption. If the Bosphorus presumption is rebutted because the EU legal framework is not found to be providing equivalent protection, a member state can still be held liable even though it was following the binding instructions of Frontex. Such manifest deficiency of the protection offered at the EU level could be argued perhaps on the basis of the national court failing to refer a question to the CJEU, thus not giving the EU court the opportunity to rule on the issue, and utilise the full potential of the EU protection framework, but mainly on the basis of the problematic access for individuals to the CJEU.

Still, the Court has shown lenience in *Avotiņš*, where it ruled that there is no need to refer a question to the CJEU when this concerns an acte clair or an acte éclairé. Nevertheless, there should be reasons for the lack of referral, if a request for preliminary reference has been made by the applicant, in order to avoid a violation of Article 6(1) ECHR on the right to a fair trial.[91] Thus, the role of domestic courts may acquire greater importance, seen under the right of a further element of enforcement of the duty to request a preliminary ruling.

The accession of the EU to the ECHR is not expected to affect the role of domestic courts noticeably. After the accession, domestic courts will, naturally, have a role to play in enforcing the accountability of Frontex to

90 A. Reinisch and U. A. Weber, 'In the Shadow of Waite and Kennedy - The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement', *International Organizations Law Review*, 1, 1, 2004.

91 *Dhahbi v Italy*; *Schipani et al. v Italy.* For further on the role of domestic courts in the preliminary reference procedure, see section 3.

the extent that they may be called to implement a relevant decision of the ECtHR, including pilot judgments. As far as the exhaustion of domestic remedies is concerned, the references in the Draft Accession Agreement and its Explanatory Memorandum are few and only concern the co-respondent mechanism. Discussing cases in which the EU is a co-respondent, the Explanatory Memorandum notes that the applicant will first need to exhaust domestic remedies available in the national court of the respondent state. The national courts may use the option to send a preliminary reference request to the CJEU, however, as this is not a right of the parties to the proceedings, who may only suggest such a reference, this procedure is not included amongst the national remedies that the applicant needs to exhaust before applying to the ECtHR.[92]

4 Conclusion

This chapter has dealt with ways to address the accountability of Frontex in judicial fora other than the CJEU. It has looked in particular into the role that the ECtHR and domestic EU courts may have in realising the standards of the Nexus theory and systemic accountability.

The gaps and complications in the EU liability framework can be filled with the accession of the EU to the ECHR, when individuals can bring complaints concerning violations by Frontex before the ECtHR in Strasbourg. The accession negotiations had reached an impasse after Opinion 2/13 of the CJEU, in which the Court found the Accession Agreement to be incompatible with the EU Treaties. However, negotiations were recently resumed, and to the extent that the accession remains a Treaty obligation for the EU, the accession is still a future possibility.

As a matter of fact, the route before the ECtHR is more straightforward and is already designed around joint responsibility and an intuitive understanding of *systemic accountability*. In fact, the post-accession procedure before the ECtHR provides for the joint responsibility of EU/Frontex and the host state, which takes the form of *joint and several responsibility*, as the complaint can be addressed to any of the responsible actors. In this way, the nexus of different responsibilities can be addressed more successfully without any of the responsible 'hands' evading their responsibility.

Moreover, both the co-respondent mechanism and the practice of the Court to join relevant cases can be used to seek damages from all responsible parties, and ensure that they can be held accountable under the same judicial roof, satisfying, thus, the goals of *systemic accountability*. The general measures ordered by the ECtHR and the pilot judgments procedure are further examples of how the *systemic accountability* model can be implemented in practice. Finally, the ECtHR is more familiar with the interna-

92 Draft Accession Agreement, p. 27.

tional law on joint responsibility, while the Accession Agreement itself holds that the respondent and co-respondent are, as a rule, jointly responsible for the violation.

This, however, depends on the decision of the ECtHR upon the future of the Bosphorus presumption. Were the ECtHR to continue prioritising the doctrine of equivalent protection over factual attribution, the accession would not be able to provide protection that is practical and effective, as the EU would continue to be sealed from the full scrutiny of the ECtHR.

Even though a highly desirable legal route, certain procedural and substantial aspects of the accession may prove rather thorny regarding *legal accountability* in joint EBCG operations. Firstly, it can prove problematic if the ECtHR follows the concept of formally binding rules, when determining whether to regard the EU as correspondent to the case, excluding, thus, effective control and de facto binding powers. Moreover, the prior involvement of the CJEU can be time-consuming, while the Bosphorus presumption, if upheld, can become a substantial barrier to *systemic accountability*. Nevertheless, the Strasbourg court seems to be the natural environment for joint responsibility and *systemic accountability* to flourish, which justifies yet another call for the realisation of the accession of the EU to the ECHR. The new rounds of negotiations may be long and painful, but in the words of the Chairperson of the ad hoc accession group, 'where there is a will there is a way'.

In the context of EBCG operations, the role of domestic courts is obvious with respect to complaints against member states and the civil and criminal liability of the deployed officers participating in Frontex operations. Their role may also become growingly relevant in the context of proceedings before the ECtHR in light of the *Avotiņš* judgment and the development of the Bosphorus doctrine after Opinion 2/13. This can lead to further enforcement of the duty of national courts to request a preliminary ruling, in order to avoid a violation of Article 6(1) ECHR on the right to a fair trial.

Related to the proceedings before the CJEU, national courts are the first stop in a preliminary reference procedure, while they may also have a limited role in legality review. In particular domestic courts should interpret and apply rules of procedure in a broad way that enables the challenging of any decision.

Finally, with respect to an action for damages, the aim of bringing the examination of joint responsibility under the same judicial roof in realisation of *systemic accountability* has been discussed in the previous chapter, where a solution based on the jurisdiction of the CJEU under the principle of subsidiarity has been proposed. Here, I examine the possibility of both cases being examined by the domestic court of the host state, provided that the EU waives its jurisdictional immunity, in particular the exclusive jurisdiction of the CJEU. This solution, however, seems less feasible, as the CJEU holds its exclusive jurisdiction to be a mandatory rule, which the EU is not at liberty to waive. Thus, the CJEU remains for the time being the most appropriate forum that can support *systemic accountability*.