

# The accession of the European Union to the European Convention on Human Rights



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COUNCIL OF EUROPE



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# **The accession of the European Union to the European Convention on Human Rights**

**Johan Callewaert**

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*L'adhésion de l'Union européenne  
à la Convention européenne  
des droits de l'homme*

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# Terminology

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**F**or ease of reading, the following simplified terminology is used:

The terms “**Convention**” and “**European Convention on Human Rights**” refer to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 14.

The term “**Court**” refers to the European Court of Human Rights.

The abbreviation “**ECtHR**” refers to the European Court of Human Rights in the footnotes and in references to judgments.

The term “**European Union**” and the abbreviation “**EU**” refer, as the case may be, to the European Union or to the various European Communities which preceded it.

The term “**EU law**” refers, as the case may be, to law resulting from the Treaty of Lisbon or to law resulting from the treaties in their version prior to the Treaty of Lisbon, including so-called “Community law”.

The abbreviations “**TEU**” and “**TFEU**” refer respectively to the Treaty on European Union and the Treaty on the Functioning of the European Union in the versions resulting from the Treaty of Lisbon.

The term “**Charter**” refers to the Charter of Fundamental Rights of the European Union.

The term “**Court of Justice of the European Union**” and the abbreviation “**CJEU**” refer, as the case may be, to the Court of Justice of the European Union or its predecessor, the Court of Justice of the European Communities.

The term “**Contracting Party**” currently refers to states bound by the Convention. Upon accession, the European Union, which is not a state, will join them. In anticipation of this change, the term “Contracting Parties” has therefore been preferred to “Contracting States”.

The term “**accession treaty**” refers to the draft agreement on accession of the EU to the Convention, as adopted by the negotiators on 5 April 2013.

The term “**accession**” refers to the accession of the European Union not only to the Convention but also to the Protocol and Protocol No. 6, because the accession treaty will cover the accession of the European Union to these three instruments.

The term “**2002 study**” refers to the “Study of technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights”, adopted on 28 June 2002 by the Council of Europe’s Steering Committee for Human Rights (CDDH).

The term “**Working Group II**” refers to the working group “Incorporation of the Charter/ accession to the ECHR” set up by the “European Convention on the Future of Europe”.<sup>1</sup>

Provisions of the Convention are referred to by the number of the article; provisions of the EU treaties are referred to by the number of the article followed by the abbreviation of the relevant treaty (TEU or TFEU).

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1. See below II.C. 6. Preliminary studies.

# Foreword

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**T**he accession of the European Union to the European Convention on Human Rights denotes the process whereby the European Union will join the community of 47 European states which have entered into a legal undertaking to comply with the Convention and have agreed to supervision of their compliance by the European Court of Human Rights. The European Union will thus become the 48th Contracting Party to the Convention. Required under the Treaty of Lisbon, EU accession to the Convention is destined to be a landmark in European legal history because it will make it possible, at last, for individuals and undertakings to apply to the European Court of Human Rights for review of the acts of EU institutions, which unquestionably play an increasingly important role in our everyday lives.

After nearly three years of negotiations, a draft agreement on accession was adopted in Strasbourg on 5 April 2013.<sup>2</sup> This draft document, which is available on the Council of Europe website,<sup>3</sup> serves as a guiding thread for the analysis set out in this paper. Admittedly, it has so far only been adopted at the level of the negotiators. Before it can come into force, the agreement will have to pass numerous other hurdles, including consultation of the Court of Justice of the European Union, the European Court of Human Rights, the European Parliament and the Council of Europe's Parliamentary Assembly. Then it will have to be ratified by the Council of Europe and European Union member states. Nevertheless, the adoption of this draft by the negotiators marks a very important stage on the road to EU accession, since it is the outcome of a consensus between all the delegations involved in the talks. The draft thus has the backing of the governments of the 47 Council of Europe member states and the European Commission. It therefore provides, at this stage, a sufficiently solid and stable basis to warrant discussion of its contents.

Given the small size of this publication, however, the aim is not to conduct a comprehensive legal analysis of each of the provisions in the draft agreement but rather to give an overview, in the light of this draft, of the reasons for EU accession to the Convention, the means whereby this is to be achieved, and its effects. For ease of understanding, I have opted as far as possible for simple and accessible language, without, however, sacrificing the rigour which is necessary to treat a subject of sometimes fearsome complexity. This paper is therefore a compromise between writing for a general readership and an academic dissertation, between simplification and exhaustiveness. As with any compromise, it is likely that no one will be fully satisfied. I apologise to readers for this and ask them also to note that the views expressed are mine alone and do not necessarily reflect those of the institution to which I belong.

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2. Doc. 47+1(2013)008rev2. This version, dated 10 June 2013 and reproduced in the appendix, includes minor revisions of the initial draft dated 5 April 2013.

3. [www.coe.int](http://www.coe.int).





# Introduction

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## European Union accession: a matter of coherence

**T**he idea of having the European Union accede to the European Convention on Human Rights can undoubtedly be counted among the great European legal projects. Officially envisaged by the European Commission as early as 1979 and delayed since then, sometimes for political and sometimes for legal reasons, it is now written into Article 59, paragraph 2, of the Convention and Article 6, paragraph 2, of the TEU, which requires the European Union to accede to the Convention.<sup>4</sup> Now that nearly all European states are Contracting Parties to the Convention and the European Union is seen increasingly as the missing link in the structure, this requirement is all the more pressing.

Despite the delays, however, the need for EU accession to the Convention has continued to assert itself, because it is an imperative which derives its strength from its simplicity. EU accession means quite simply making Europe coherent with its own legal and ethical ideas, those underlying its own conception of fundamental rights, which, for this reason, are restated, *inter alia*, in the preamble to the European Union's Charter of Fundamental Rights.

The coherence in question is firstly of a formal nature because, by acceding to the Convention, the European Union will at last be in the same position as its member states with regard to the external supervision exercised by the Court, and at the same time this will ensure greater coherence between the European Union's words and deeds relating to fundamental rights.

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4. On EU accession to the Convention, see, among many others: Paul Craig, "EU Accession to the ECHR: Competence, Procedure and Substance", *Fordham International Law Journal*, Vol. 36, No. 1115, 2013; Olivier De Schutter, "L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme: feuille de route de la négociation", *Revue trimestrielle des droits de l'homme*, 2010, p. 535; Clemens Ladenburger, "Vers l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme", *Revue trimestrielle de droit européen*, 2011, p. 20; Tobias Lock, "End of an Epic? The Draft Agreement on the EU's Accession to the ECHR", 31 *Yearbook of European Law* 162 (2012); Vassilios Skouris, "First Thoughts on the Forthcoming Accession of the European Union to the European Convention on Human Rights", in Dean Spielmann, Marialena Tsirli and Panayotis Voyatzis (eds.), *The European Convention on Human Rights, a Living Instrument* (Essays in Honour of Christos L. Rozakis), Brussels, Bruylant, 2011, p. 556; Françoise Tulkens, "La protection des droits fondamentaux en Europe et l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme", *Revue critique trimestrielle de jurisprudence et de législation*, 2012, p. 14.

But the coherence promised by accession is also substantive, related to the substance and effects of the fundamental rights to be protected. While much progress has already been made in this area, thanks in particular to a good level of co-operation between the two European Courts, Europe is not, for all that, immune from setbacks. With the increased prominence of fundamental rights in the European Union, reflected in the adoption and entry into force of the Charter, we are seeing the emergence of a kind of second focal point for European fundamental rights, alongside the Convention. This increased role of fundamental rights in the European Union is to be wholeheartedly welcomed, but at the same time care must be taken to ensure that it does not lead to a divide in this area, to a perception that there are now two “worlds” of fundamental rights based on two different types of fundamental rights in Europe, with the same rights possibly having a different substance depending on whether EU law applies or not. This is precisely what the Treaty of Lisbon seeks to prevent by requiring the European Union to accede to the Convention.

For the continent which saw the proclamation of the Declaration of the Rights of Man and of the Citizen, and for the Union itself, whose leaders have always supported the idea of the universality of human rights, not only on the international stage, but also in the recent Treaty of Lisbon (Article 21 of the TEU), such a divide would represent a legal and moral failure. Drawing on centuries of tradition, but also on the painful lessons of past barbarism, post-war Europe has always proclaimed the equal and inviolable dignity of all human beings and has vested them with elementary rights stemming from that dignity, known as human rights. To afford better protection to these values of civilisation, it established a single court, the European Court of Human Rights, to ensure equal application of those rights throughout the continent. If now, slowly but surely, Europe were to go against everything it stands for by being divided on fundamental rights, all the benefit of the work of several generations, and the European credibility gained from it, would be lost.

Yet centrifugal forces are clearly at work in this field, as regards both legislation and case law. For example, basing itself on the new Article 82, paragraph 2, of the TFEU, the European Union has recently set to work on producing directives on the rights of the defence in criminal proceedings.<sup>5</sup> Because of the overlap with Article 6 of the Convention, the drafting of these directives involves regular consultations between the institutions of the Union and the Council of Europe to ensure that the new directives do not afford a lower level of protection than the Convention. It must be acknowledged, however, that this exercise sometimes proves difficult in practice. First of all because of the constant risk that case law, which is supposed to be dynamic, will be “set in stone” by instruments of this kind. If in future the Court raises the level of protection in one of the fields covered by a new directive, what will we do? Secondly, and above all, because these consultations show that some member states appear to want to take advantage of this exercise to “rewrite” Article 6 so as to reduce the level of protection which it enjoys in the case law of the Court.

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5. See below I.C.2.3.c. Sector-specific instruments – the example of the directives on procedural rights in criminal proceedings.

Another instance of centrifugal forces at work is the fact that some recent judgments of the CJEU, admittedly without disregarding the Convention and its case law in substance, nevertheless ignore them almost completely in favour of the Charter, whereas previously, even after the Charter came into force, cross references between Luxembourg and Strasbourg were legion and bore clear witness to the existence of a common heritage of fundamental rights shared by the “two Europes”. Similarly, we are seeing the appearance of judgments which seem to promote a kind of division of responsibilities between EU law and the Convention, thus lending credence to the (mistaken) idea that the Convention is inapplicable to EU law or that its content is incompatible with it.

It may be that these fears derive from misunderstandings and are therefore unfounded. It is true that compliance with the Convention is not measured by the number of explicit references to it. The practice of national courts bears witness to this. It is also true that, as a court internal to the EU legal order, the CJEU can be equated with national courts. Nevertheless, the CJEU also has a particular responsibility in this area, which is distinct from that of national courts, in that it is the only court, together with the European Court of Human Rights, to lay down a standard of protection on a European scale. That standard does not solely concern the CJEU, but applies to all the EU member states and is superimposed on national standards and on the Convention. Consequently, the standard set by the CJEU is not “isolated”: it permeates the member states’ legal systems and, in so doing, has a far greater impact than national standards.

For this reason, the relationship between the Convention and EU law is not comparable with that which exists between the Convention and national laws, whose effects are confined to their own legal systems. EU law brings a second European standard for the protection of fundamental rights which is superimposed on the Convention’s pan-European standard. Member states are therefore faced with two “layers” of European fundamental rights which are similar in some respects and dissimilar in others. In the face of this complexity, which is a source of confusion and legal uncertainty, it is important to ensure that this coexistence is not only harmonious and coherent, but also *intelligible*. In order to retain their “fundamental” nature, fundamental rights must at least be understood as such by their beneficiaries and by those who apply them. This is why the authors of the Charter, in their wisdom, wanted the two European standards to complement one another. They wanted the first to be the bedrock of the second, *and this to be clear*. For this to be clear, and for it to be understood, it also needs to be seen. Care must therefore be taken here not to create appearances which clash with legal reality.

Consequently, whether they are real or only apparent, such centrifugal tendencies need to be curbed. The most effective and most lasting way of achieving this is to join the two centres by having the European Union accede to the Convention, so as to create an unambiguous legal relationship between them. That would be a strong signal given to the world by Europe, a solemn affirmation that, above and beyond all the differences and specificities, which, incidentally, are legitimate, whether they are local, regional or systemic, Europe shares a common core of fundamental

rights, known as human rights, which reflect the deep-seated belief of Europeans that everyone coming under their jurisdiction is entitled to respect for the same basic individual rights, without prejudice to the enjoyment of more extensive rights. Ultimately, what is at stake in EU accession is to some extent the European conception of human rights, which is measured by the ability of all Europeans to adhere to the same catalogue of unequivocal minimum fundamental rights. If they are unable to do so, the rights in question will become increasingly relative and, hence, less and less fundamental.

## Chapter I

# Reasons for accession

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### A. The problem: the European Union as the missing link

The Convention system and the European Union were both founded in the aftermath of the Second World War. For a long time, they developed independently of each other. It was only gradually, as the European Union extended its competences, that its actions acquired the potential to affect, and indeed infringe, fundamental rights, with the result that EU law set about organising their protection, mainly through the case law of the CJEU. In most areas, the protection afforded to fundamental rights by EU law has reached a level such that the Court has felt able to describe it as being equivalent to that of the Convention.<sup>6</sup> Sometimes it even surpasses it. The Convention system, for its part, has seen tremendous growth, with over 60 years of case law and over 15 000 judgments delivered by the Court.

Over the course of this process, the mutual influences between the Convention and EU law have grown, with the result that the two systems now rely extensively on each other, a shining illustration of this in EU law being Article 52, paragraph 3, of the Charter.<sup>7</sup> As noted by CJEU President V. Skouris, “[t]hese two systems of protection, which are superimposed moreover on the national systems, are complementary in function and interdependent in terms of their rule-making powers”.<sup>8</sup> Unlike all its member states, however, the European Union is not yet part of the Convention system. It may therefore be described as the missing link. This is an anomaly which should long since have been rectified.

So the situation today is that we have two legal systems which function as major sources of fundamental rights in Europe but whose interrelations have not yet been given a legal structure despite the fact that their spheres of competence increasingly overlap, which is a source of dysfunction and jeopardises legal certainty. The purpose of the European Union’s accession to the Convention is precisely to provide the missing structural elements by regulating relations between the Convention and the European Union *mutatis mutandis* on the model of the relations between the Convention and states. This will make it possible to achieve four different but complementary aims.

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6. See below I.C.2.3.d. The presumption of equivalence.

7. See below I.C.2.3.b.ii. Article 52, paragraph 3, of the Charter and its application by the CJEU.

8. *Dialogue between judges, European Court of Human Rights*, Council of Europe, Strasbourg, 2009, p.31.

## B. Aims

### 1. Filling the gaps in EU law in the protection of fundamental rights

Initially, the main aim of accession was to ensure a minimum level of protection of fundamental rights in EU law. This was because the founding treaties contained no provision requiring compliance with fundamental rights in the development and application of EU law. Nor did they contain a catalogue of fundamental rights comparable to that found in many national constitutions. The reason for this was quite simply that, at the time, the goals pursued by the then European Communities were mainly economic and no one imagined that fundamental rights – which had not yet developed to their current level – might be relevant in that field. Accession to the Convention was thus seen as a way of filling this gap, partly at least. Perceived as an alternative to the European Communities having their own catalogue of fundamental rights, it was intended to ensure that compliance with fundamental rights in EU law could at least be subject to scrutiny by the Court.

Since then, however, protection of fundamental rights by EU law has increased considerably. A highly symbolic stage in this development was the entry into force of the Charter on 1 December 2009. Nevertheless, accession to the Convention remains on the agenda because Article 6, paragraph 2, of the TEU as amended by the Treaty of Lisbon requires the European Union to see it through. So what was once an *alternative* to a catalogue of fundamental rights of the European Union has become a *complement* to such a catalogue. In this respect, the situation of the European Union is similar to that of states, most of which have their own catalogue of fundamental rights, usually enshrined in the constitution, as well as being Contracting Parties to the Convention.

### 2. Maintaining external supervision of fundamental rights in respect of the European Union

Another aim of accession is to place the European Union on an equal footing with its member states in terms of the external supervision exercised by the Court. To gauge the full importance of external supervision in this context, it must be remembered that all the powers currently exercised by the European Union are conferred powers, i.e. powers which initially lay with states and which they have transferred to it. This principle is stated in Article 5, paragraph 2, of the TEU, which says that “[c]ompetences not conferred upon the Union in the Treaties remain with the Member States”. Prior to this conferral, and following the Convention’s entry into force in 1953, the exercise of these powers by the member states was therefore subject to compliance with the Convention and to scrutiny by the Court. This is no longer the case with the powers that have since been transferred to the European Union, and will not be the case until the European Union becomes a Contracting Party to the Convention. Many important powers have been transferred, especially since the Treaty of Maastricht came into force on 1 November

1993, and they include sensitive issues from the standpoint of fundamental rights, such as those which currently fall within the area of freedom, security and justice (Articles 67 *et seq.* of the TFEU).

In other words, every transfer of powers by the member states to the European Union has had the concomitant effect of removing the exercise of the powers in question from the Court's scrutiny, although that is not provided for in the Convention and, indeed, is not in keeping with its spirit. This constitutes a regression in the protection of citizens' fundamental rights. Although the powers of the European Union and its member states are of the same nature, given that, initially, only states possessed them, until such time as the European Union accedes to the Convention its actions will continue to escape the scrutiny of the Court and citizens will be unable to challenge any of them before the Court.<sup>9</sup> This is a major shortcoming, a lack of coherence which requires rectification.

In this context, the effectiveness of the protection currently afforded to fundamental rights under EU law is not a sound basis for inferring that it renders all supervision by the Court superfluous. The protection afforded in most States Parties to the Convention is no less effective than that of the European Union, but this does not, for all that, lead to an exemption from the obligation to submit to the Court's jurisdiction. The fact is that the Court exercises a different kind of supervision, because it is external supervision, supervision exercised by an international court outside the legal order within which the impugned decision was taken. The preamble to the accession treaty stresses this key point.

External supervision brings real added value in relation to purely national supervision exercised "from within". The international court's different position and perspective, marked by a greater distance in relation to the constituent elements of a dispute, introduce added impartiality and objectivity, providing a view which is not better than that of the domestic court but different from it and complementary to it. It is a view capable of identifying problems which, as a result of always applying the same rules, the domestic courts perhaps no longer see. One of the most significant examples of this was the case law of the Court relating to the role played, at the time for over a hundred years, by the public prosecutor in proceedings before the Court of Cassation in Belgium and France. The Court held, *inter alia*, that the presence at the deliberations of the Court of Cassation of a representative of the public prosecutor's department – who had already expressed an opinion on the case at the hearing – was incompatible with the requirement of impartiality enshrined in Article 6 of the Convention.<sup>10</sup>

The recent judgment in the *Eon* case offers another enlightening example of the impact of external supervision.

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9. ECtHR, 18 February 1999, *Matthews v. United Kingdom*, No. 24833/94, paragraph 32.

10. ECtHR, 30 October 1991, *Borgers v. Belgium*, No. 12005/86.



■ ECtHR, 14 March 2013, *Eon v. France*, No. 26118/10

During a visit by the President of France to Laval on 28 August 2008, the applicant waved a small placard reading “*Casse toi pov’con*” (“Get lost, you sad prick”). This was an allusion to a much publicised phrase uttered by the President himself on 23 February 2008 at the International Agricultural Show in response to a farmer who had refused to shake his hand. The phrase had given rise to extensive comment and media coverage and had been widely circulated on the Internet and used as a slogan at demonstrations.

On 6 November 2008, the *tribunal de grande instance* of Laval found Mr Eon guilty of the offence of insulting the President under the Press Act of 29 July 1881 and fined him 30 euros, a penalty which was suspended. The court held, *inter alia*, that, in adopting the phrase as his own, the applicant had clearly intended to insult the Head of State. This judgment was upheld on 24 March 2009 by the Court of Appeal of Angers, which held that Mr Eon, an activist and former Socialist elected representative in the *département* of Mayenne, could not claim to have been acting in good faith because he explained to the court that he had been feeling bitter at the time of the events owing to the failure a few days previously of his long-running campaign in support of a Turkish family residing unlawfully in France. The applicant’s appeal on points of law was declared inadmissible by the Court of Cassation.

Relying on Article 10, the applicant submitted that his conviction for insulting the President had infringed his freedom of expression. While recognising that the phrase at issue was, in literal terms, offensive to the President, the Court held that it should be examined within the overall context of the case. In its view, the repetition of the phrase uttered by the President had not targeted the latter’s private life or honour and had not simply been a gratuitous personal attack against him. The criticism expressed by Mr Eon was political in nature, the Court of Appeal having established a link between his political involvement and the very nature of the terms he had used. There is little scope under Article 10 for restrictions on freedom of speech in the political field. The Court noted that politicians inevitably and knowingly laid themselves open to close scrutiny of their every word and deed by the public at large, and must consequently be more tolerant of criticism against them.

The Court further noted that in echoing an abrupt phrase that had been used by the President himself and had attracted extensive media coverage and widespread public comment, much of it humorous in tone, Mr Eon had chosen to express his criticism through the medium of satire. This being a form of social commentary which naturally aimed to provoke and agitate, any interference with the right to use this means of expression should be examined with particular care. Imposing a criminal penalty for conduct such as that of Mr Eon could have a deterrent effect on satirical forms of expression. These could contribute to discussion of questions of public interest, without which there was no democratic society.

The Court concluded, therefore, that the recourse to a criminal penalty against Mr Eon had been disproportionate and that his right to freedom of expression had accordingly been infringed.

Barely two months later, on 15 May 2013, the French National Assembly responded to the Court’s judgment by abolishing the offence of insulting the

Head of State. The explanatory memorandum to the legislative amendment states that “[w]hile the President of the Republic obviously deserves the respect of his fellow citizens, a provision of this kind derogating from ordinary law is no longer justified in a modern democracy”.

On the other hand, where the Court endorses choices made by the national authorities of a state, the latter receive a major boost to their credibility at both national and international level. Examples include the sensitive case of the criminal convictions handed down by the reunified Germany against former East German leaders<sup>11</sup> and other cases relating to the consequences of German reunification. The mere fact of an international court being able to intervene in case of need acts in itself as a factor for credibility, because the more political action agrees to open up to external scrutiny, the more credible and acceptable it becomes to public opinion and the more coherent it is with its own discourse on respect for fundamental rights. In contrast, action which seeks to evade external scrutiny becomes suspicious in the eyes of the public, who, as we know, put great trust in the Court.

It cannot be denied that the external supervision exercised by the Court sometimes disturbs the national authorities which are subjected to it. But is that not one of its aims? Was international supervision not introduced precisely in order to disturb, to challenge and to provoke thought by proposing a different view? If its outcome were always consensual and met with general assent, external supervision would no doubt be unnecessary because it would duplicate internal supervision. From this point of view, a legal system which rejected external supervision of its compliance with human rights would be a legal order closed in on itself which, with no input from outside, would be in danger of fossilisation.

Hence, by acceding to the Convention and allowing external judicial supervision of its acts, the European Union will be showing that it has “nothing to hide”, that it agrees to its acts being subject to the same requirements of compliance with human rights as those which apply to the acts of European states, and that it, too, agrees to the occasional challenge and disturbance. As the European Parliament noted in its Resolution of 19 May 2010 on the accession of the European Union: “promotion of respect of human rights, a core value of the EU as enshrined in its founding treaty, constitutes common ground for its relations with third countries; [the European Parliament] takes the view, therefore, that accession will further enhance the confidence of citizens in the European Union and the EU’s credibility in talks on human rights with non-member States”. It should be pointed out here that, where the European Union is concerned, the CJEU cannot replace the Court in this exercise because while the CJEU is indeed an international court in terms of its composition and its status, it is not so in terms of its function, which is to be the supreme court of the legal order of the European Union. It cannot take an external view of the legal order of the European Union because it is part of it.

As well as being a factor for credibility, external supervision by the Court is a factor for progress. To take just one significant example, it can be said that most of the

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11. ECtHR, 22 March 2001, *Streletz, Kessler and Krenz v. Germany*, Nos. 34044/96, 35532/97 and 44801/98.

advances achieved in Europe in the fight against discrimination – whether on grounds of birth, gender or sexual orientation – were initiated and subsequently confirmed in Strasbourg. A more recent example is to be found in the *Zaunegger* case, which concerns discrimination on grounds of marital status. Consequently, if the European Union is deprived of external supervision from Strasbourg, it will also be deprived of the factor for progress which the Strasbourg Court represents.

■ ECtHR, 3 December 2009, *Zaunegger v. Germany*, No. 22028/04

The applicant is the father of a daughter born out of wedlock in 1995, who lived with both her parents until they separated in August 1998. From then until January 2001, she lived with her father. She then went to live with her mother.

The relevant rules of domestic law in force at the time, namely Article 1626a, paragraph 2, of the German Civil Code, gave sole custody to the mother of the child. Since the mother was unwilling to agree to a joint custody declaration, the applicant applied for a joint custody order. The Cologne District Court dismissed his application on the grounds that, under German law, joint custody for parents of children born out of wedlock could only be obtained through a joint declaration, marriage or a court order, the last requiring the other parent's consent. Its judgment was upheld by the Cologne Court of Appeal in October 2003.

Both courts had relied on a leading judgment of the Federal Constitutional Court of 29 January 2003 holding the relevant provision of the Civil Code to be constitutional in the case of parents of children born out of wedlock. By decision of 15 December 2003, the Federal Constitutional Court declined to consider the constitutional complaint which the applicant had lodged with it.

In its judgment, the Court found a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (protection of family life). It did not share the Federal Constitutional Court's assessment that joint custody against the mother's will must be presumed contrary to the child's interests, especially as the same presumption did not apply in the case of separated parents who were married or divorced or had opted for shared parental authority. Consequently, the Court argued, there was not a reasonable relationship of proportionality between the general exclusion of judicial review of the initial attribution of sole custody to the mother and the aim pursued, namely the protection of the best interests of a child born out of wedlock.

On 21 July 2010, the German Constitutional Court amended its own practice to bring it into line with the Court's judgment.

### 3. Harmonising the protection of fundamental rights in Europe

A further aim of accession is to ensure greater consistency in the protection of fundamental rights in Europe. Even if it is not the only means of achieving that aim, as may be seen from the progress made in this field through case law, accession will in any event have a harmonising effect insofar as it will ensure that the protection of fundamental rights by the EU does not fall below the standard of protection of the Convention, which is regularly raised by the Court. Admittedly, compliance with that standard is now also ensured through the Charter, but accession will bring added

value by making compliance subject to external supervision by the Court, as it does in the case of states. The fact that the same international court, namely the European Court of Human Rights, by applying the same text, will ensure compliance with the same standard of protection by national legal systems and the EU legal order will undoubtedly have a harmonising effect.

In addition to this, by acceding to the Convention, the European Union will be anchored in a bedrock of fundamental rights common to the 47 Council of Europe member states, which cover virtually the entire European continent. The European Union will thus confirm the Convention in its role as the ordinary law of European fundamental rights, the embodiment at European level of the idea of the universality of human rights, itself championed by the European Union (Article 21, paragraph 1, of the TEU). In the words of the European Parliament (Resolution of 19 May 2010):<sup>12</sup> “while the Union’s system for the protection of fundamental rights will be supplemented and enhanced by the incorporation of the Charter of Fundamental Rights into its primary law, its accession to the [Convention] will send a strong signal concerning the coherence between the Union and the countries belonging to the Council of Europe and its pan-European human rights system”.

Fortunately, case law contains few examples of open conflict between EU law and the Convention.<sup>13</sup> However, this can be partly explained by the lack of external supervision in respect of the European Union, which means that some discrepancies never come to light. This is the case, for example, in the field of competition law, where all the procedures established on the initiative of the European Commission escape the Court’s scrutiny. But harmony does not mean uniformity. The Convention itself is designed only to ensure a *minimum* level of protection and does not seek to impose uniform protection. It is for this reason that it allows Contracting Parties to go beyond its requirements (Article 53). Consequently, accession will not prevent EU law from affording greater protection to fundamental rights than the Convention, as indeed Article 52, paragraph 3, of the Charter permits it to do.

#### **4. Ensuring the participation of the European Union in proceedings before the Court**

Lastly, accession will allow the European Union to participate fully, i.e. as a party, in proceedings before the Court whenever they involve EU law. With the gradual expansion of the EU’s sphere of competence, this is increasingly the case. From the citizen’s standpoint, the main benefit of this change in the EU’s procedural status lies in the fact that where the EU is a party to proceedings, the Court’s judgments will be enforceable in respect of it. They will be binding on the EU, which will therefore be under a legal obligation to execute them (Article 46, paragraph 1). At present, being unable to claim full party status, the European Union can only participate in

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12. See below, II.C.4. The European Parliament resolution.

13. In this connection, see Johan Callewaert, “The European Convention on Human Rights and European Union Law: a Long Way to Harmony”, *European Human Rights Law Review*, 2009, p. 768.

proceedings as an intervening third party. Consequently, the Court cannot deliver a judgment against it, but only against one or more member states. When EU law is at issue and, for that reason, execution of the judgment calls for the involvement of the EU as such (for a change in secondary law) or of all its member states (for a change in primary law), that can give rise to inextricable problems, as illustrated by the execution of the judgment in the *Matthews* case,<sup>14</sup> where a member state was forced to give a response in national law to a problem of EU law.

## C. Context

It was mentioned above that one purpose of EU accession is to give a legal structure to the Convention-EU law relationship. To give a full idea of the implications and effects of EU accession, the main features of the two legal systems in question will now be briefly described.

### 1. A brief typology of the Convention system

#### 1.1. The rights protected

Having been drafted under the aegis of the Council of Europe, the Convention was opened for signature in Rome on 4 November 1950 and came into force on 3 September 1953. Its authors saw it as a first step towards collectively guaranteeing some of the rights set forth in the 1948 Universal Declaration of Human Rights. Since it came into force, the Convention has been supplemented and amended by 16 additional or amending protocols.

The list of rights protected currently includes: the right to life (Article 2), the prohibition of torture and ill-treatment (Article 3), the prohibition of slavery and forced labour (Article 4), the right to liberty and security (Article 5), the right to a fair trial (Article 6), no punishment without law (Article 7), the right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression and of the press (Article 10), freedom of assembly and association (Article 11), the right to marry (Article 12), the right to an effective remedy (Article 13), the prohibition of discrimination (Article 14; Protocol No. 12), the right to protection of property (Article 1 of Protocol No. 1), the right to education (Article 2 of Protocol No. 1), the right to free elections (Article 3 of Protocol No. 1), the right to freedom of movement (Article 2 of Protocol No. 4), the abolition of capital punishment (Protocols Nos. 6 and 13), the right of appeal in criminal cases (Article 2 of Protocol No. 7), the right to compensation for wrongful conviction (Article 3 of Protocol No. 7) and the prohibition of being punished twice for the same offence (*non bis in idem*, Article 4 of Protocol No. 7).

In interpreting these provisions, the Court has recognised other fundamental rights which do not appear explicitly in the Convention or the protocols thereto. Examples

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<sup>14</sup>. See below I.C.1.6. Leading judgments relating to EU law.

include the right to protection of personal data and the right to protection against serious forms of pollution, both derived from Article 8 of the Convention, and the right to retrospective application of the more lenient criminal law, inferred from Article 7.

## 1.2. Scope

The Convention is binding on the 47 member states of the Council of Europe, which brings together all European states except Belarus and the Holy See, in other words some 800 million people. Although the 28 EU member states are all parties to the Convention, it is not binding on the European Union as such, which is a separate entity having a legal personality of its own (Article 47 of the TEU). It is precisely by acceding to the Convention, as Article 59, paragraph 2, thereof permits it to do, that the European Union will be able to become a Contracting Party alongside the Contracting States.

In each of those states, the Convention now forms an integral part of the domestic legal order, where it is usually accorded a higher status than that of ordinary law, and sometimes a status equivalent to that of the constitution (as in Austria). It can therefore be said that the Convention has today become a constituent element of the pan-European legal identity, a reflection of a Europe-wide consensus on the fundamental rights which, in principle, can be claimed by every human being in his or her capacity as a human being.

The rights and freedoms set forth in the Convention are secured to everyone within the “jurisdiction” of the Contracting Parties (Article 1), irrespective of nationality. A national of a country not party to the Convention who is affected by the actions – or failure to act – of any Contracting State can therefore claim those rights and freedoms against the state in question. That is a significant difference in relation to EU law, whose scope *ratione personae* is sometimes restricted, depending on the field in question, to nationals of the member states and their families. EU citizenship, to which only persons holding the nationality of a member state are entitled (Article 20 of the TFEU), is a prominent example. Further evidence of this can be found in Articles 39 to 46 of the Charter, forming Title V on citizens’ rights, the enjoyment of which is usually limited to EU citizens and to natural or legal persons residing or having their registered office in a member state.

Furthermore, the Court has held that it is with respect to their “jurisdiction” as a whole that the Contracting Parties are called on to show compliance with the Convention; no part of it is excluded from the scrutiny of the Court and no distinction is made as to the type of rule or measure concerned.<sup>15</sup> Consequently, the Convention governs – and the jurisdiction of the Court extends to – any act or measure attributable to one of the Contracting Parties, of whatever nature and whatever origin, constitutional or European.

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15. ECtHR, 30 January 1998, *United Communist Party of Turkey and Others v. Turkey*, No. 19392/92, paragraph 29.

Another significant difference between the Convention and EU law can be seen here. Whereas the rights enshrined in the Convention are generally applicable, since they apply to all acts of the Contracting States, the scope *ratione materiae* of the fundamental rights protected by EU law is more limited because it corresponds to the scope *ratione materiae* of EU law, which is not general since it results from the competences conferred on the EU by its member states (Article 5, paragraph 2, of the TEU). A reference to this can be found in Article 51, paragraph 2, of the Charter, which provides as follows: “The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties” (in this connection, see also Article 6, paragraph 1, sub-paragraph 2, of the TEU). Accordingly, the fundamental rights recognised under EU law will only apply if the conditions for the application of EU law are met.<sup>16</sup> If not, only the fundamental rights recognised under national law will apply, including the Convention.

### 1.3. A specialised international court

However, the greatest innovation associated with the adoption of the Convention, one that continues to this day to lend it a unique and irreplaceable character, was the establishment of a system for monitoring compliance with the Convention, centred on a *specialised international court*: the European Court of Human Rights. The Convention not only requires States Parties to comply with the rights and obligations enshrined in it but also established a judicial body, the Court, which is empowered to make findings of violation or non-violation of the Convention in final judgments with which the States Parties have undertaken to comply (Article 19 taken together with Article 46, paragraph 1). In addition, it established a mechanism for supervising the execution of judgments, for which the Committee of Ministers is responsible (Article 46, paragraph 2).

The Court is international not only in terms of its *status* and its *composition*, but also in terms of its *position*. It consists of a number of judges equal to that of the Contracting Parties (Article 20), i.e. currently 47. This composition gives the Court a unique view of the situations referred to it, unique because it is truly international and significantly more detached, not to say more objective, than that of the domestic courts in that it is a combination of all the legal traditions present in Europe and represented in Strasbourg. This “detachment” is further enhanced by the fact that the Court is truly “external” to all the legal systems coming under its authority, because, being outside all of them, it belongs to none of them. This differentiates it from the CJEU, which, although international in terms of its status and composition, is nevertheless the supreme court of the EU legal order and hence an integral part of it.

The Court is not only an international court in all senses of the term but also a *supreme* and *specialised* court: its jurisdiction is confined to applying the Convention and the protocols thereto in all the cases brought before it (Article 32), but it alone

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16. See, for example, CJEU, 8 November 2012, *Yoshikazu Iida*, C-40/11.

is empowered to give authoritative interpretations of these texts. That does not prevent it from frequently drawing inspiration from other international instruments in interpreting the Convention and the protocols thereto, with Union law, and the Charter in particular, featuring prominently among these. Nevertheless, the Court is only empowered to give rulings on the application of the Convention and/or the protocols thereto. In view of the importance of the rights involved, the fathers of the Convention wished to entrust responsibility for last-instance review to a specialised court, wholly dedicated to the cause of human rights.

## **1.4. The right of individual application**

The right of individual application is the cornerstone of the protection mechanism established by the Convention. By virtue of this right, any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the Contracting Parties of the rights set forth in the Convention or one of the protocols thereto, may lodge a complaint with the Court by means of an application. For the application to be admissible, however, the applicant must have first exhausted the remedies available in the legal system of the Contracting Party against which the application is directed and must have submitted the application within six months following the final domestic decision (Articles 34 and 35, paragraph 1). This is yet another feature which is unique in Europe, namely the fact that an individual has the power to take a Contracting Party before an international court of human rights whose judgments are legally binding.

## **1.5. The principle of subsidiarity**

The requirement that domestic remedies must first be exhausted (Article 35, paragraph 1) illustrates another feature of the Convention system, namely its subsidiary nature, which is itself a direct consequence of its international character. It means that the national authorities are responsible in the first instance for implementing the rights and freedoms safeguarded by the Convention. The Court acts only in a subsidiary capacity, i.e. to remedy any deficiencies in the application of the Convention at domestic level. In other words, the Court acts as a kind of safety net. Although subsidiary in nature, the Convention system is congested, a victim of its own success. But the situation has improved lately. While, for several decades, the Court was unable to keep up with the increase in its caseload and all its productivity gains were cancelled out and outweighed by the exponential increase in the number of applications, this has no longer been the case since the introduction of the single judge as a new formation for hearing cases (Articles 26, paragraph 1, and 27) and a new system for filtering applications. As a result, the number of applications pending before the Court, which was over 160 000 in September 2011 and 151 600 on 1 January 2012, had been reduced to 128 000 by 31 December 2012. On 30 June 2014, there were 84 850 pending applications.

The subsidiary nature of the system is also reflected in the execution of the Court's judgments. These are legally binding in respect of the parties to the proceedings in



which they were delivered (Article 46, paragraph 1), but for the most part they are declaratory. This means that, with some exceptions, they are restricted to a finding as to whether the Convention was complied with or not in a given case. Consequently, judgments are not directly enforceable in the respondent state's domestic legal system and cannot give orders to the authorities of that state, although they not infrequently contain indications as to the best way of executing them. In the event of a violation of the Convention, the respondent state is in principle free to choose the means to be employed in its domestic legal system to execute the judgment, under the supervision of the Committee of Ministers.

## 1.6. Leading judgments relating to EU law

The number of cases involving EU law brought before the Court has increased constantly over the years. Between 1 November 1998<sup>17</sup> and 30 June 2013, 90 such cases were brought, and were the opportunity for the Court to define gradually, via a series of leading judgments, the principles governing the Convention's approach to EU law. These judgments are summarised below.

### ► *Cantoni* (responsibility of member states in the transposition of directives)

#### ■ ECtHR, 15 November 1996, *Cantoni v. France*, No. 17862/91

The applicant was manager of a supermarket in Sens (Yonne). In 1988, criminal proceedings were brought against him for unlawfully selling pharmaceutical products. In his defence he maintained that the products in question were not medicinal products within the meaning of Article L. 511 of the Public Health Code and were accordingly not covered by the pharmacists' monopoly. On 30 September 1988, the Sens Criminal Court held that they were indeed medicinal products and fined the applicant 10 000 francs. On 18 May 1989, the Paris Court of Appeal upheld the judgment. Mr Cantoni appealed to the Court of Cassation, relying in particular on Article 7 of the Convention. He contended that the notion of medicinal product as defined in Article L. 511 was not sufficiently clear. The Court of Cassation dismissed the appeal on 29 May 1990.

In the proceedings before the Court, the French Government argued that Article L. 511 of the Public Health Code was based almost word for word on Council Directive 65/65/EEC of 26 January 1965. A finding that Article L. 511 was defective would therefore amount to making the same finding in respect of the directive. The Court found that this fact did not remove Article L. 511 from the ambit of Article 7 of the Convention, which, however, had not been infringed in the instant case.

### ► *Matthews* (responsibility of member states in the implementation of primary law)

#### ■ ECtHR, 18 February 1999, *Matthews v. United Kingdom*, No. 24833/94

The applicant, a British citizen resident in Gibraltar, complained to the Court that the United Kingdom authorities had not organised elections to the European

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17. This date corresponds to the entry into force of Protocol No. 11 and the establishment of the permanent Court.

Parliament in Gibraltar. The respondent government, for its part, relied on Council Decision 76/787 of 20 September 1976 and the Act Concerning the Election of the Representatives of the European Parliament by Direct Universal Suffrage of 20 September 1976 appended thereto. This Act, which had treaty status, did not provide for elections to the European Parliament in Gibraltar. In its judgment, the Court found a violation of Article 3 of Protocol No. 1 to the Convention, which enshrines the right to free elections.

After the United Kingdom had attempted unsuccessfully to have the 1976 Act amended to bring it into conformity with the *Matthews* judgment, legislation was passed in 2003 allowing the inhabitants of Gibraltar to participate in elections to the European Parliament. This legislation was contested before the CJEU by Spain, which saw it as a breach of the obligations arising from the EC Treaty (old Article 227 of the EC Treaty).

In a judgment of 12 September 2006 (C-145/04), the CJEU held that, in the light of the *Matthews* judgment, the United Kingdom could not be criticised for having enacted the legislation necessary to enable elections to the European Parliament to be organised in Gibraltar under equivalent conditions, *mutatis mutandis*, to those provided for under the legislation applicable to the United Kingdom.

► *Bosphorus* (responsibility of member states in the application of regulations leaving no discretion – the “presumption of equivalence”)

■ ECtHR, 30 June 2005, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (“Bosphorus Airways”) v. Ireland*, No. 45036/98

In May 1993, an aircraft leased by the applicant company from Yugoslav Airlines was in Ireland for maintenance when it was impounded by the Irish authorities pursuant to Regulation No. 990/93 of the Council of the European Communities implementing the sanctions regime adopted by the United Nations against the Federal Republic of Yugoslavia in the context of the war in the Balkans.

Following a preliminary reference from the Irish Supreme Court, the CJEU held that Regulation No. 990/03 was indeed applicable to the facts of the case and did not infringe the right to peaceful enjoyment of possessions and the freedom to pursue a commercial activity, relied on by the applicant company. Following this judgment, the Supreme Court confirmed the impounding of the aircraft.

In July 1997, after the lease on the aircraft had expired and the sanctions regime against the Federal Republic of Yugoslavia had been eased, the Irish authorities returned the aircraft to Yugoslav Airlines. The applicant company therefore lost the benefit of around three years of a four-year lease agreement.

In the proceedings before the Court, the applicant company alleged a violation of Article 1 of Protocol No. 1 to the Convention, which protects the right to property. After finding that the protection afforded to fundamental rights by Community law was “equivalent” to that afforded by the Convention, the Court held that this provision had not been violated.

► *Kokkelvisserij* (application of the presumption of equivalence to proceedings before the CJEU)

■ ECtHR, 5 February 2009 (dec.), ***Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. The Netherlands***, No. 13645/05

The applicant association, a co-operative of cockle fishers, complained of the unfairness of proceedings before the CJEU relating to the right which had been granted to it in the Netherlands to engage in cockle fishing in a protected area, the Wadden Sea.

The CJEU had been asked by the Council of State of the Netherlands to give a preliminary ruling in a dispute between two nature conservation organisations and the Deputy Minister of Agriculture, Nature Conservation and Fisheries. The question concerned the interpretation and application of the Netherlands' Nature Conservation Act in the light of European Community law, in particular Article 6 of Council Directive 92/43/EEC of May 1992 on the conservation of natural habitats and of wild fauna and flora (the "Habitats Directive"). In the proceedings before the CJEU, the advisory opinion of the Advocate General was read out in public. It stated the view that mechanical cockle fishing should only be authorised if the competent national authorities had made certain that the project's activity would not adversely affect the integrity of the site.

The applicant association requested leave to submit a written response to that opinion or, in the alternative, to have the oral proceedings reopened. On 28 April 2004, the CJEU refused this request. It found that the applicant association had submitted no precise information which made it appear either useful or necessary to reopen the proceedings pursuant to Rule 61 of the CJEU's Rules of Procedure. On 7 September 2004, the CJEU delivered a judgment whose reasoning essentially followed that of the Advocate General. In December 2004, the Council of State annulled the applicant association's cockle-fishing licences. Since then, mechanical cockle fishing in the Netherlands waters of the Wadden Sea has entirely ceased.

In the proceedings before the Court, the applicant association alleged that its right to adversarial proceedings had been violated in the preliminary ruling proceedings as the CJEU had refused to allow it to respond to the opinion of the Advocate General. It relied on the right to a fair trial under Article 6, paragraph 1, of the Convention.

In its decision, the Court noted first of all that insofar as the applicant association's complaint was to be understood as directed against the European Community itself, the application had to be rejected, the European Community not being a party to the Convention. On the other hand, it had to consider the responsibility of the Netherlands in view of the fact that the CJEU's intervention had been actively sought by a domestic court in proceedings before it. The Court considered, however, that the applicant association had not shown that the guarantees of procedural fairness offered to it in the instant case had been manifestly inadequate. It had therefore failed to rebut the presumption, established in the *Bosphorus* judgment, that Community law, including proceedings before the CJEU, offered equivalent guarantees to those contained in the Convention. Consequently, insofar as it was directed against the Netherlands, the application was dismissed as being manifestly unfounded.

► *M.S.S.* (responsibility of member states in the application of regulations allowing some discretion)

■ ECtHR, 21 January 2011, *M.S.S. v. Belgium and Greece*, No. 30696/09

The case concerned the deportation to Greece of an asylum seeker by the Belgian authorities under the "Dublin II Regulation".<sup>18</sup> A national of Afghanistan, the applicant left Kabul early in 2008 and, travelling via Iran and Turkey, entered the European Union through Greece. On 10 February 2009 he arrived in Belgium, where he applied for asylum. The Belgian Aliens Office asked the Greek authorities to take charge of this application under the Dublin II Regulation. At the end of May 2009, the Aliens Office ordered the applicant to leave the country for Greece. It considered that Belgium was not responsible for examining the asylum application and that there was no reason to suspect that the Greek authorities would fail to honour their obligations in asylum matters.

After his request for a stay of execution of the transfer had been refused by the Belgian courts, the applicant was deported to Greece on 15 June 2009. Upon arrival, he was immediately placed in detention in a building next to the airport, where he was locked up in a small space with 20 other detainees, had access to the toilets only at the discretion of the guards, was not allowed out into the open air, was given very little to eat and had to sleep on a dirty mattress or on the bare floor. On 18 June 2009 he was released and issued with an asylum seeker's card. From that date on, having no means of subsistence, he lived on the streets. He submitted his application to the Court in June 2009.

In its judgment, the Court found that the applicant had been a victim of violations of Articles 3 and 13 of the Convention by Greece and Belgium. It considered that the conditions of detention experienced by the applicant and his living conditions on the streets of Athens were unacceptable and constituted treatment prohibited by Article 3 of the Convention, for which Greece was responsible. Furthermore, the asylum procedure in Greece was marked by major structural deficiencies, which placed the applicant at risk of being deported back to Afghanistan without any serious consideration of the merits of his asylum application and without access to an effective remedy, in breach of Articles 13 and 3 taken together.

With regard to Belgium's responsibility, the Court found first of all that the presumption of equivalence within the meaning of its *Bosphorus* judgment did not apply in this case because the Belgian authorities had enjoyed some degree of discretion in implementing the Dublin II Regulation. It further held that the deficiencies in the Greek asylum procedure must have been known to the Belgian authorities at the time when the deportation order was issued because several international agencies and organisations had drawn up reports and other documents which all agreed as to the practical difficulties involved in the application of the "Dublin" system in Greece. Consequently, the Belgian authorities should not merely have assumed that the applicant would be treated in conformity with the safeguards of the Convention. In sending the

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18. Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national.

applicant back to Greece, the Belgian authorities had accordingly, in violation of Article 3 of the Convention, exposed the applicant to the risks arising from the deficiencies of the asylum procedure in that country and to conditions of detention and living conditions contrary to that article. The Court also found a violation of Articles 13 and 3 taken together.

On 21 December 2011, the CJEU, basing itself on the *M.S.S.* judgment, delivered a similar judgment in the *N.S. and Others case* (C-411/10 and C-493/10).

► *Michaud* (examination by the CJEU as a prerequisite for the applicability of the presumption of equivalence)

■ ECtHR, 6 December 2012, *Michaud v. France*, No. 12323/11

This case was submitted by a barrister practising in Paris. Since 1991, the European Union had adopted a series of directives aimed at preventing the use of the financial system for money laundering, which had been incorporated into French law. These texts placed lawyers under an obligation to report any suspicions they might have about their clients in this regard when assisting them in the preparation or execution of transactions relating to certain specified operations, participating in financial or real-estate transactions or acting as trustee. They were not subject to this obligation when the activity in question was related to judicial proceedings and, in principle, when they were giving legal advice.

On 12 July 2007, the National Bar Council took a decision adopting professional regulations which, among other things, reiterated this obligation and required lawyers to develop internal procedures concerning the steps to be taken when an operation appeared to warrant a “suspicion report”. Failure to comply with these regulations was liable to disciplinary sanctions.

On 10 October 2007, considering that this decision undermined lawyers’ freedom to exercise their profession and the rules regulating the profession, the applicant appealed to the Conseil d’Etat to have the decision set aside. He also asked the Conseil d’Etat to refer the matter to the CJEU for a preliminary ruling on the conformity of the obligation to report suspicions with Article 6 of the TEU and Article 8 of the Convention. In a judgment of 23 July 2010, the Conseil d’Etat rejected Mr Michaud’s appeal and refused to refer the matter to the CJEU.

In its judgment, the Court found that Article 8 had not been violated, arguing that the obligation to report suspicions only concerned activities unconnected with the lawyer’s defence role and did not apply when the activity in question was related to judicial proceedings. In its opinion, the obligation to report suspicions did not go to the very essence of the lawyer’s defence role which forms the very basis of legal professional privilege.

The Court first had to answer the respondent government’s argument as to equivalent protection of fundamental rights in EU law, based on the presumption established in the *Bosphorus* judgment. It considered that this presumption did not apply in the instant case. The CJEU had not had the opportunity to express an opinion on the fundamental rights issue brought before the Court, firstly because the Conseil d’Etat had refused to ask it for a preliminary ruling

on the question of the conformity of the obligation to report suspicions, and secondly because this question had never before been examined by the CJEU, either in a preliminary ruling delivered in another case or on the occasion of one of the actions open to the member states and institutions of the European Union. Consequently, the Conseil d'Etat had ruled without the full potential of the EU machinery for supervising fundamental rights having been deployed. In the light of that choice and the importance of what was at stake, the Court concluded that the presumption of equivalent protection did not apply.

## 2. A brief typology of EU law

### 2.1. Incorporation into national law and primacy

When EU law was still in its infancy, the CJEU held that “the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals”.<sup>19</sup> A year later, the CJEU noted that the treaty had created its own legal system which had become an integral part of the legal systems of the member states.<sup>20</sup>

A distinction is drawn between primary and secondary EU law. The former consists of all the treaties and equivalent acts establishing the European Union, while the latter comprises all the acts of EU institutions pursuant to those treaties, and in particular, by way of binding legal acts, regulations, directives and decisions (Article 288 of the TFEU). The distinction is important because it determines, among other things, the jurisdiction of the CJEU, which is unable to review the validity of primary law (Article 267 of the TFEU). It will also influence the way in which the co-respondent mechanism operates.<sup>21</sup>

To resolve possible conflicts between rules of national law and EU law resulting from the fact that the latter forms an integral part of the former, the CJEU established the principle of *primacy* according to which EU law overrides any rule of national law, including constitutional rules.<sup>22</sup> Confirmed in a long series of subsequent judgments, then in Declaration No. 17 appended to the Treaty of Lisbon, this principle means that the national authorities are obliged to leave unapplied any national rule which is incompatible with a rule of EU law, of whatever kind.

Consequently, EU law does not supplant pre-existing national law, but is superimposed on it and integrated with it. Neither does it supplant the Convention insofar as it forms part of the domestic legal systems of the EU member states. However, in the absence of EU accession to the Convention, there is at present no hierarchical relationship between these two legal systems and no primacy of one in relation

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19. CJEU, 5 February 1963, *Van Gend and Loos*, 26/62.

20. CJEU, 15 July 1964, *Costa v. E.N.E.L.*, 6/64.

21. See below II.D.2.2.a. The co-respondent mechanism.

22. CJEU, 15 July 1964, *Costa v. E.N.E.L.*, 6/64; 17 December 1970, *Internationale Handelsgesellschaft*, 11/70.

to the other, with the result that any conflict between a rule of EU law and the Convention is destined to persist unless it can be resolved by way of interpretation. The problem arises in practice when EU law is applied by a member state because, in the eyes of the Court, it then falls under the legal system of the member state and is therefore governed by the Convention. This situation arose, *inter alia*, in the *Matthews v. United Kingdom* and *M.S.S. v. Belgium and Greece* cases,<sup>23</sup> both of which resulted in a finding of a violation. Where, however, the execution of a judgment finding a violation necessarily involves a change in EU law, the fact that the EU is not a party to the Convention places the respondent state in an untenable situation because it does not have control over measures which it is legally obliged to take.<sup>24</sup>

## 2.2. Judicial protection

The Court of Justice of the European Union was set up to ensure observance of the law in the interpretation and application of the treaties. It comprises the Court of Justice (CJEU), the General Court and the Civil Service Tribunal (Article 19, paragraph 1, of the TEU). In disputes involving private natural or legal persons, two types of action may be brought before it: direct actions and requests for a preliminary ruling. The former, which are limited in number, allow private persons to refer any dispute between them and the European Union to an EU court – namely, at first instance, the General Court (Article 256, paragraph 1, of the TFEU). The most common type are actions for annulment (Article 263, paragraph 4, of the TFEU) and actions for non-contractual liability (Article 268 of the TFEU). By means of the former, a natural or legal person may, subject to certain conditions, apply for annulment of an EU act adversely affecting him or it, e.g. a fine imposed by the European Commission for violating competition law. By means of the latter, a natural or legal person may claim compensation for damage suffered as a result of an unlawful act of the European Union, for example abuse of power. The bringing of such actions is subject to very strict conditions of admissibility, with the result that, in practice, the number of direct actions brought by private persons is fairly small. They give rise to judgments on the merits, which will not be subject to review by the Court until the EU accedes to the Convention.

If the number of direct actions available to private persons is limited, that is due to the fact that, in the EU judicial system, it is primarily for the national courts to apply and enforce EU law. It is for this reason that national courts are often referred to as the “ordinary courts of EU law”. This is the translation in judicial terms of the principle that EU law is an integral part of national law in the member states, a principle which was further reinforced by the Treaty of Lisbon, which provides, in Article 19, paragraph 1, 2nd sentence, of the TEU that member states shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

In order, however, to ensure the uniformity of EU law and unity of case law in such a decentralised judicial system, the national courts may consult the CJEU by referring

23. See above I.C.1.6. Leading judgments relating to EU law.

24. CJEU, 12 September 2006, *Spain v. United Kingdom*, C-145/04.

matters for a preliminary ruling. This allows the courts in the member states to submit questions relating either to the interpretation of the treaties or to the validity or interpretation of a rule of secondary law, which only the CJEU is empowered to decide (Article 267 of the TFEU). Courts of last instance are obliged to make such an application to the CJEU when its ruling is necessary to decide a case on the merits. For other courts, this procedure is purely optional. In both cases, the opinion given by the CJEU in its preliminary ruling is binding on all courts in the member states. In such a procedure, however, the CJEU, which has no hierarchical authority over the national courts, merely provides them with the elements of interpretation of EU law which they require to decide the cases before them. It is for the national courts to decide cases on the merits in the light of the preliminary ruling, which sometimes leaves them a margin of appreciation for this purpose.

Referral for a preliminary ruling is therefore not a remedy available to the parties to proceedings before a national court. Although they may ask the national court to refer a matter to the CJEU for a preliminary ruling, the decision lies exclusively with the national court, which will also be the sole addressee of the preliminary ruling delivered by the CJEU. For this reason, referral for a preliminary ruling is not considered by the Court as a remedy to be exhausted by the applicant under Article 35, paragraph 1, of the Convention. This is an important consideration with an eye to the new mechanism permitting the prior involvement of the CJEU.<sup>25</sup> However that may be, the decision on the merits delivered by a national court in the light of a preliminary ruling by the CJEU forms part of the domestic legal system of the member state in question and thus falls within the ambit of the Convention. It may therefore be the subject of a review by the Court, which will, however, be tempered by the presumption of equivalence.<sup>26</sup>

## 2.3. Fundamental rights in EU law

### *a. Beginnings: the role of the Convention*

Over the years, the European Union has gradually developed a high degree of protection of fundamental rights in its legal system. Whereas, as already mentioned, the first founding treaties were silent on the question, fundamental rights hold a paramount position in EU law today, as shown first and foremost by Article 6 of the TEU and the Charter of Fundamental Rights of the European Union, which now ranks as primary law. The CJEU now considers that “respect for human rights is a condition of the lawfulness of Community acts ... and that measures incompatible with respect for human rights are not acceptable in the Community”.<sup>27</sup> It is precisely the “density” attained by the protection of fundamental rights in the Union which augments the risk of “collision” with the Convention and makes regulation of their mutual relations all the more necessary.

25. See below II.D.2.2.b. The prior involvement of the CJEU.

26. See below I.C.2.3.d. The presumption of equivalence.

27. CJEU, 3 September 2008, *Kadi*, C-402/05 P and C-415/05 P, paragraph 284.



Admittedly, it was not until the adoption of the European Single Act in 1986 that the first explicit reference was made to fundamental rights in primary legislation. Prior to that, however, the CJEU had already been able to enforce fundamental rights in the Union, the first relevant judgment dating back to 1969.<sup>28</sup>

A few years later, the CJEU was more explicit, specifying as sources of inspiration and yardsticks for the protection of fundamental rights “constitutional traditions common to the Member States” and “international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, [which] can supply guidelines which should be followed within the framework of Community law”.<sup>29</sup>

It was in 1975, shortly after all the member states of the then European Community had ratified the Convention that, for the first time, the CJEU referred explicitly to the Convention, noting that certain “limitations placed on the powers of Member States ... are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 and ratified by all the Member States”.<sup>30</sup>

In 1989, the CJEU confirmed the “particular significance” of the Convention in a well-known formula which would remain in effect until the Charter came into force: “The Court has consistently held that fundamental rights are an integral part of the general principles of law the observance of which the Court ensures, in accordance with constitutional traditions common to the Member States, and the international treaties on which the Member States have collaborated or of which they are signatories ... The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ... is of particular significance in that regard”.<sup>31</sup> In substance, this formula was then introduced by the Treaty of Maastricht (1992) into the Treaty on European Union, where it still appears (Article 6, paragraph 3, of the TEU). All these developments would lead several authors, former eminent members of the CJEU,<sup>32</sup> to opine that, in practice, the Convention was treated by the CJEU as if it were part of EU law, although, legally, it was not.

This is undoubtedly a relevant point. There is no doubt that, on the basis of the principles outlined above, the CJEU evolved a whole body of fundamental rights case law drawing extensively on the Convention and the case law of the Court. The Convention provisions most commonly applied in this context were Article 6 (right to a fair trial), Article 8 (right to respect for private and family life), Article 10 (right to freedom of expression) and Article 1 of Protocol No. 1 (protection of property).

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28. CJEU, 12 November 1969, *Stauder*, 29/69.

29. CJEU, 14 May 1974, *Nold*, 4/73.

30. CJEU, 28 October 1975, *Rutili*, 36/75, paragraph 32.

31. CJEU, 21 September 1989, *Hoechst*, 46/87 and 227/88, paragraph 13.

32. F. Jacobs, J. C. Pisssochet and G. C. Rodríguez Iglesias.

The CJEU judgments referring to Article 6 of the Convention concerned, for example, the length of proceedings,<sup>33</sup> conviction *in absentia*,<sup>34</sup> the admissibility of evidence,<sup>35</sup> the right to adversarial proceedings,<sup>36</sup> the right to examine witnesses,<sup>37</sup> the translation of procedural documents,<sup>38</sup> the presumption of innocence<sup>39</sup> and the right of an accused to be heard.<sup>40</sup>

The matters dealt with in judgments referring to Article 8 of the Convention include, for example, the protection of personal data,<sup>41</sup> the expulsion of aliens<sup>42</sup> and family reunification.<sup>43</sup> Issues addressed under Article 10 of the Convention include freedom of expression of civil servants<sup>44</sup> and journalists,<sup>45</sup> the right to demonstrate,<sup>46</sup> the right to receive information<sup>47</sup> and advertising.<sup>48</sup> Lastly, the CJEU referred to Article 1 of Protocol No. 1 in cases concerning, for example, the use of trade marks<sup>49</sup> and the freezing of funds as part of the fight against terrorism.<sup>50</sup>

With the coming into force of the Charter, however, the CJEU's attitude seems to have changed somewhat.

### ***b. The Charter of Fundamental Rights of the European Union***

The Charter marks a qualitative leap in the European Union's desire to protect fundamental rights and thus root its action in the legitimacy conferred by respect for fundamental rights. At the time, the Presidency of the Council of the European Union justified the start of drafting work on the Charter in the following terms: "Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy. The obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the European Court of Justice. There appears to be a need, at the present stage of the Union's development,

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33. CJEU, 17 December 1998, *Baustahlgewebe*, C-185/95 P.

34. CJEU, 28 March 2000, *Krombach*, C-7/98.

35. CJEU, 10 April 2003, *Steffensen*, C-276/01.

36. CJEU, 14 February 2008, *Varec*, C-450/06.

37. CJEU, 16 June 2005, *Pupino*, C-105/03.

38. CJEU, 8 May 2008, *Weiss und Partner*, C-14/07.

39. CJEU, 8 July 2008, *Franchet and Byk*, T-48/05.

40. CJEU, 3 September 2008, *Kadi*, C-402/05 P and C-415/05 P.

41. CJEU, 20 May 2003, *Österreichischer Rundfunk and Others*, C-465/00.

42. CJEU, 29 April 2004, *Orfanopoulos and Oliveri*, C-482/01 and C-493/01.

43. CJEU, 4 March 2010, *Chakroun*, C-578/08.

44. CJEU, 6 March 2001, *Connolly*, C-273/99 P and C-274/99 P.

45. CJEU, 2 April 2009, *Damgaard*, C-421/07.

46. CJEU, 12 June 2003, *Schmidberger*, C-112/00.

47. CJEU, 22 December 2008, *Kabel Deutschland*, C-336/07.

48. CJEU, 25 March 2004, *Karner*, C-71/02.

49. CJEU, 12 May 2005, *Regione autonoma Friuli-Venezia Giulia*, C-347/03.

50. CJEU, 3 September 2008, *Kadi*, C-402/05 P and C-415/05 P.

to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens".<sup>51</sup>

The Charter was drafted by a body set up for that specific purpose, the "Convention", consisting of a representative of each EU member state and of the European Commission, and members of the European Parliament and national parliaments. The CJEU, the Council of Europe and the Court were also represented as observers. After some nine months of work, the Charter was formally adopted, as a solemn political declaration, by the European Parliament, the Council and the Commission in Nice on 7 December 2000. So that it could be brought into force with the Treaty of Lisbon, it was adapted and then proclaimed a second time by the same institutions in Strasbourg on 12 December 2007. On 1 December 2009, with the entry into force of the Treaty of Lisbon, it acquired legal force under Article 6, paragraph 1, of the TEU, which states: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".

According to its preamble, the Charter "reaffirms ... the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights". Essentially, therefore, the aim was to bring together in one and the same text, in order to make them more visible, the fundamental rights from a range of sources which are applicable in EU law. The CJEU recently confirmed that "the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles".<sup>52</sup>

Under Article 51, paragraph 1, of the Charter, its provisions are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the member states only when they are implementing Union law. Paragraph 2 of this article specifies that the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the treaties. Consequently, the Charter cannot apply where EU law itself, in the absence of any link with the facts of the case, does not apply. Where, however, such a link exists and entails the applicability of EU law, the latter is fully governed by the Charter.<sup>53</sup>

## i. The content of the Charter

One merit of the Charter is unquestionably the fact that it brings together in one and the same text three major categories of fundamental rights which are usually

51. Conclusions of the Presidency, Cologne European Council, 3-4 June 1999.

52. CJEU, 21 December 2011, *N.S. and Others*, C-411/10 and C-493/10, paragraph 119.

53. CJEU, 26 February 2013, *Åkerberg Fransson*, C-617/10, paragraphs 19-21.

contained in separate legal instruments and subject to different legal rules: civil and political rights, economic and social rights (in the broad sense), and rights reserved for citizens of the European Union. The Charter divides them into six chapters, called “Titles”, dealing respectively with dignity, freedoms, equality, solidarity, citizens’ rights and justice, with the seventh chapter containing general provisions.

### ■ The Charter rights

Title I: Dignity (human dignity, right to life, right to the integrity of the person, prohibition of torture and inhuman or degrading treatment or punishment, prohibition of slavery and forced labour).

Title II: Freedoms (right to liberty and security, respect for private and family life, protection of personal data, right to marry and right to found a family, freedom of thought, conscience and religion, freedom of expression and information, freedom of assembly and association, freedom of the arts and sciences, right to education, freedom to choose an occupation and right to engage in work, freedom to conduct a business, right to property, right to asylum, protection in the event of removal, expulsion or extradition).

Title III: Equality (equality before the law, non-discrimination, cultural, religious and linguistic diversity, equality between women and men, the rights of the child, the rights of the elderly, integration of persons with disabilities).

Title IV: Solidarity (workers’ right to information and consultation within the enterprise, right of collective bargaining and action, right of access to placement services, protection in the event of unjustified dismissal, fair and just working conditions, prohibition of child labour and protection of young people at work, family and professional life, social security and social assistance, health care, access to services of general economic interest, environmental protection, consumer protection).

Title V: Citizens’ rights (rights to vote and to stand as a candidate at elections to the European Parliament and at municipal elections, right to good administration, right of access to documents, European Ombudsman, right to petition, freedom of movement and of residence, diplomatic and consular protection).

Title VI: Justice (right to an effective remedy and to a fair trial, presumption of innocence and right of defence, principles of legality and proportionality of criminal offences and penalties, right not to be tried or punished twice in criminal proceedings for the same criminal offence).

Title VII: General provisions.

However, these provisions do not only contain justiciable rights, in other words rights which can be relied on before, and applied as such by, a court. Some Charter provisions, mainly in the economic and social field, only set out principles (Article 52, paragraph 5, of the Charter). Articles 25 and 26, concerning respectively the “rights of the elderly” and the “integration of persons with disabilities”, can be mentioned as examples. Other provisions contain rights whose substance may vary according to the legislation or practice of the member state in which they are applied (Article 52, paragraph 6, of the Charter), which limits their effectiveness.

Yet the great majority of the civil and political rights contained in the Charter are formulated as justiciable rights. Most of them are derived from the Convention or from the Court's case law. The work on drafting the Charter in fact showed how difficult it was to extend at the European level the list of rights which are fully justiciable per se, even in a European Union which, at the time, only had 15 member states. One may even wonder whether the European Union would have been capable of adopting the core justiciable rights now contained in the Charter if the Convention and the case law based on it had not already existed.

Nevertheless, the wording of the rights borrowed from the Convention was changed considerably in order, in some cases, to update it and, in others, to add to it, but always also with a view to simplifying it. One of the main concerns of the Charter's authors was to make the provisions derived from the Convention easier to understand, the idea being to make it possible for non-lawyers to read and understand them. For this reason, most of the Convention provisions appear in the Charter in a shortened form, minus the sometimes very detailed stipulations they originally contained. Examples of this are the enumerations appearing in Articles 5 and 6 of the Convention and the provisions laying down restrictions to certain rights, such as the second paragraphs of Articles 8 to 11 of the Convention. The result is a text which, without the general references to the Convention contained in Article 52, paragraph 3, would afford an often lower standard of protection than the Convention.<sup>54</sup>

In some cases, the Charter's authors were also driven by a concern to update the provisions of the Convention, in order to adapt it to the current state of society or technology. For example, Article 7 of the Charter refers to "communications", and not merely "correspondence", which is the term used in Article 8 of the Convention. Another example is Article 21, which, unlike Article 14 of the Convention, mentions among the prohibited grounds of discrimination ethnic origins, genetic features, disability, age and sexual orientation.

In other fields, the Charter extends the scope or content of rights recognised in the Convention. This applies, for example, to Article 14, which guarantees the right of everyone to education and to have access to vocational and continuing training, including the possibility to receive free compulsory education (this should be compared with Article 2 of Protocol No. 1). These adjustments were sometimes necessitated by the characteristics of EU law or the case law of the CJEU, one example being Article 47 of the Charter, which significantly extends the scope of Article 6 of the Convention and the guarantees of Article 13. Because EU law is more limited in range than that of its member states and makes no distinction of the kind made in Article 6 between civil and criminal proceedings, it would not have made sense to reproduce it in Article 47 of the Charter.

Lastly, the Charter sometimes takes up or amplifies certain rights which are not recognised as such in the Convention but have been established, partly at least,

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54. See also below I.C.2.3.b.ii. Article 52, paragraph 3, of the Charter and its application by the CJEU.

by case law. Examples include the right to protection of personal data (Article 8), freedom and pluralism of the media (Article 11, paragraph 2), the right to freedom of association in the political field (Article 12, paragraph 1), the prohibition of expulsion to a country where there is a risk that the person would be subjected to ill-treatment (Article 19, paragraph 2), protection of children (Article 24) and the right to legal aid (Article 47, paragraph 3).

## **ii. Article 52, paragraph 3, of the Charter and its application by the CJEU**

The upshot of all this is rights whose wording offers sometimes more, sometimes less protection than the Convention. The first possibility poses no problem. It is not only fully compatible with the Convention, as shown by Article 53 thereof, but also desirable, since its effect is to raise the standard of protection guaranteed in Strasbourg. Indeed, more and more judgments of the Court draw on the Charter to support judicial solutions offering the applicants greater protection.<sup>55</sup> On the other hand, it was to eliminate the second possibility, namely protection falling short of that of the Convention, which would be both politically unacceptable and legally irreconcilable with the Convention, that the Charter's authors included among its general provisions Article 52, paragraph 3: "In so far 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".

While the application of these provisions will probably always involve some hesitation as to the respective level of the two texts, the principle is clear: the Charter establishes both the Convention as the mandatory minimum level of protection in EU law and the possibility for the latter to exceed that level. According to the explanations relating to the Charter,<sup>56</sup> which must be taken into consideration in applying it (Article 52, paragraph 7, of the Charter), numerous provisions of the Charter do indeed have the same meaning and scope as in the Convention. It can therefore be said that, to this extent, and even more so since the Charter's entry into force, the rights of the Convention have been indirectly incorporated into the law of the Union, even before its accession.

The explanations relating to Article 52, paragraph 3, further specify that "[t]he reference to the ECHR covers both the Convention and the protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union". This has since been confirmed by the CJEU.<sup>57</sup> In this connection, the importance of the case law of the Court in determining

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55. See, for example, ECtHR, 11 July 2002, *Christine Goodwin v. United Kingdom*, No. 28957/95; 17 September 2009, *Scoppola v. Italy* (No. 2), No. 10249/03.

56. *Official Journal*, No. C 303, 14 December 2007.

57. For example in CJEU, 15 November 2011, *Dereci*, C-256/11, paragraph 70.

the level of protection afforded by the Convention must indeed be emphasised. It has already been mentioned above that reference to the Convention is a key element in applying numerous provisions of the Charter, in that it defines their meaning and scope. Since the Convention came into force sixty years ago, the level of protection guaranteed by it has been regularly raised by case law. This is due to the fact that, to quote the Court, the Convention is a “living instrument which must be interpreted in the light of present-day conditions”. An example of this raising of the level of protection can be found in the *Salduz v. Turkey* judgment, which concerns a field henceforth of relevance to EU law (see Article 82, paragraph 2, of the TFEU) and in which the Court considerably reduced the scope of the exceptions to the right of an accused to be assisted by a lawyer when first questioned by the police.

■ ECtHR, 27 November 2008, *Salduz v. Turkey*, No. 36391/02

At the time of the facts, Turkish legislation provided that persons suspected of committing a criminal offence had a right of access to a lawyer from the moment they were taken into police custody unless they were accused of an offence falling within the jurisdiction of the State Security Courts. The applicant, who was still a minor, was arrested for aiding and abetting a terrorist organisation, an offence falling within the jurisdiction of the State Security Courts. Unassisted by a lawyer, he made a statement to the police in which he admitted that he had participated in an illegal demonstration and written a slogan on a banner. When subsequently questioned by the public prosecutor and the investigating judge, the applicant sought to retract his statement, saying that his confession had been extracted under duress. The investigating judge remanded him in custody and he was then allowed access to a lawyer. At the trial, the applicant continued to deny his statement, but the State Security Court held his confession to the police to be genuine and found him guilty. The applicant was sentenced to thirty months’ imprisonment.

In this case, the Court found a violation of Article 6, paragraphs 1 and 3.c of the Convention. It held that in order for the right to a fair trial enshrined in Article 6, paragraph 1, to remain sufficiently practical and effective, access to a lawyer should as a rule be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons exist, such restriction must not unduly prejudice the rights of the defence, which would be the case if incriminating statements made during police interrogation without access to a lawyer were used for a conviction.

In the instant case, the justification given for denying the applicant access to a lawyer – namely that, in the case of an offence falling within the jurisdiction of the State Security Courts, this was provided for on a systematic basis by the relevant legal provisions – was sufficient in itself to find a violation of the requirements of Article 6. Furthermore, the State Security Court had used the statement made to the police as the main evidence on which to convict the applicant, despite his denial of its accuracy. In the Court’s opinion, neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody. The applicant’s age had also been an important factor. To sum

up, although the applicant had had the opportunity to challenge the evidence against him at his trial and then in the appeal proceedings, the denial of access to a lawyer while he was in police custody had irremediably damaged his defence rights.

If the Charter is not to afford a lower level of protection, it is important, therefore, to ensure that its interpretation follows any upward trend in the case law of the Court.

#### ■ An example of impact on EU law: environmental protection

Environmental protection offers an interesting example of how developments in Strasbourg case law can have an impact on EU law via Article 52, paragraph 3, of the Charter. It is well known that, since the *López Ostra v. Spain* judgment (9 December 1994, No. 16798/90), the Court has applied Article 8 of the Convention to cases in which serious pollution severely restricts the enjoyment by private individuals of their home and their private and/or family life. In other words, on the basis of this provision the Court establishes a right for private individuals affected by this kind of nuisance to demand that the authorities take appropriate and effective action to remedy it. More recent judgments in this line of decisions include those delivered in the cases of *Tătar v. Romania* (27 January 2009, No. 67021/01) and *Di Sarno and Others v. Italy* (10 January 2012, No. 30765/08).

Now, the content of Article 8 of the Convention is reproduced, with the “same meaning and scope”, in Article 7 of the Charter. This did not escape the notice of the Advocate General of the CJEU, who drew the following inference:

“It should be noted that Article 52(3) of the Charter specifies that, in so far as the Charter contains rights which correspond to rights guaranteed by the European Convention on Human Rights (‘the Convention’), the meaning and scope of those rights are to be the same as those laid down by the Convention. According to the explanation of that provision, the meaning and scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the [European Court of Human Rights]. Article 52(3), second sentence, of the Charter provides that the first sentence of paragraph 3 is not to prevent European Union law providing more extensive protection. ... *A contrario* that prevents the European Union adopting measures affording less extensive protection.

The protection of the environment is an objective which the [Court] has integrated in its interpretation of Article 8 of the Convention, introducing it through the fundamental right to private and family life and home. ... Specifically, the case-law of the [Court] has on a number of occasions held that noise pollution forms part of the environment for the purposes of Article 8 of the Convention. ... The [Court] addressed the specific question of airport noise in its judgment in *Hatton v United Kingdom*, ... acknowledging that aircraft noise gives States grounds for taking active protective measures and, at times requires them to do so. ... In accordance with Article 53 of the Charter, that interpretation binds the European Union and must be taken into account by the Court of Justice.”<sup>58</sup>

58. Advocate General Cruz Villalón, conclusions in case C-120/10, *European Air Transport*, paragraphs 79-80.



Article 52, paragraph 3, of the Charter therefore provides the basis for a relationship between the Convention and EU law that is both harmonious and protective of legal certainty. As the meeting point between these two legal systems and the cornerstone of the European human rights edifice, it testifies to the fact that the authors of the Charter, in their wisdom, opted firmly for continuity with the Convention.

As regards, however, the practical application of this provision by the CJEU, one recent development is strange to say the least. Whereas, in its early applications of Article 52, paragraph 3, the CJEU engaged in detailed analysis of the Court's case law,<sup>59</sup> a growing number of its judgments now omit all reference to the Strasbourg case law, even where such reference is required under Article 52, paragraph 3.<sup>60</sup> The problem is not that the CJEU disregards the Convention and its case law, but that it no longer deems it necessary to explain its reasoning in this matter, thus leaving it to the litigants to guess its substance. Fortunately, and in contrast, the advocates general of the CJEU seem (for the time being) disinclined to follow this trend and continue to mention the relevant case law of the Court whenever Article 52, paragraph 3, of the Charter needs to be applied. It is paradoxical to say the least that, now that legal harmony, which was optional before the Charter, has become mandatory with its entry into force, the CJEU is starting to dispense with Strasbourg case law references, which are implicit but nonetheless necessary for the application of the Charter. We are therefore seeing the development of a parallel body of European case law on the same fundamental rights.

There is, however, a more essential dimension to this paradox. In proceeding in this way, the CJEU creates the appearance of an autonomy which has no basis either in the Charter or elsewhere in the Treaty of Lisbon. On the contrary, the Treaty seeks to establish an even stronger link between EU law and the Convention, which, in the case of the European Union, will result from its status as a Contracting Party to the Convention. The problem is that, if it were to be confirmed, this "autonomisation" – in formal but not substantive terms – of the rights which EU law borrows directly from the Convention would tend to undermine a long post-war European tradition confirmed by the Treaty of Lisbon and founded on the idea that there is a bedrock of fundamental rights *common* to all legal systems present in Europe, namely the Convention rights, the translation at European level of the idea of the universality of human rights. Why, then, remove all trace of this common bedrock in European case law? Where the same rights are involved, with the same content, why not make this clear, both for pedagogical reasons and to preserve the clarity of European fundamental rights law? We should remember that the CJEU has a particular responsibility here, which is distinct from that of the national courts, since it is the only court, along with the European Court of Human Rights, to set a protection standard on a European scale. Yet some of its recent case law tends to encourage the – legally erroneous – perception that there are now two separate categories of European

59. See, in particular, CJEU, 5 October 2010, *McB*, C-400/10 PPU; 9 November 2010, *Schecke*, C-92/09; 22 December 2010, *DEB*, C-279/09.

60. For example, in CJEU, 5 September 2012, *Y. and Z.*, C-71/11 and C-99/11; 6 September 2012, *Trade Agency*, C-619/10; 6 November 2012, *Otis and Others*, C-199/11.

fundamental rights, those of the European Union and those of the Convention. The European tradition and approach in these matters are at stake here, with the attendant risk that European fundamental rights will be relativised and weakened. Not to mention the extra caseload which might be generated by litigants who, in the absence of any indication in the judgments of the CJEU, apply to Strasbourg to verify compliance with Article 52, paragraph 3, of the Charter. That is undoubtedly another good reason for the European Union to accede to the Convention.

### iii. The Charter and EU accession to the Convention

What, then, of EU accession in this context? For a time, some circles within the European Union particularly desirous of preserving the autonomy of EU law may have believed that once the Charter came into force, it would make EU accession to the Convention superfluous, or in any event less necessary. We now know that, on the contrary, the Charter put the issue of EU accession back on the agenda. While, for a long time, the Convention was seen as an alternative to the European Union's own catalogue of fundamental rights, it has now become the logical and natural complement to it, in the same way as it complements every national catalogue of human rights.

This is how the Treaty of Lisbon settled the question: by providing in Article 6, paragraph 2 of the TEU that, by way of a complement to the Charter, now incorporated into its primary law, the European Union would accede to the Convention. Whatever the intrinsic value of a Contracting Party's own catalogue of fundamental rights, it can only ever be applied by courts belonging to the legal system which generated that catalogue and is governed by it. It cannot, therefore, replace the external supervision exercised by the Court under the Convention. The fact is that, as already mentioned above,<sup>61</sup> whatever the merits of internal supervision, it cannot replace external supervision, which brings added objectivity and impartiality. In this exercise, however, nothing can replace the Court, the only judicial body situated outside the legal systems which it supervises. This is what makes it unique and irreplaceable, even by the CJEU, which, although an international court, forms part of the legal system which it supervises. The Charter does not alter this reality. It is of course a catalogue of international scope, but it derives from a specific, autonomous legal system, that of EU law, and is applied by courts belonging to that legal system, namely the EU courts sitting in Luxembourg and the national courts sitting as ordinary courts of EU law. Consequently, the Charter and the European Union's accession to the Convention are indeed complementary to one another.

There is another reason, specific to the Charter, why it needs to be complemented by the European Union's accession to the Convention: the Charter's many borrowings from the Convention, which were referred to above. Indeed, one cannot decree, as the Charter does in Article 52, paragraph 3, that a large number of rights will have

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61. See above I.B.2. Maintaining external supervision of fundamental rights in respect of the European Union.

the same meaning and scope as in the Convention and, at the same time, not allow that sameness of meaning and scope to be verified at last instance in Strasbourg. That would be inconsistent both with the spirit of the Charter, which makes the Convention the final criterion for those rights, and with the spirit of the Convention, which empowers the Court alone to give an authoritative interpretation of it. In other words, the scrutiny exercised by the Court determines the content of Convention rights. One cannot therefore claim to faithfully borrow that content without accepting the mechanism established to determine it.

### ***c. Sector-specific instruments – the example of the directives on procedural rights in criminal proceedings***

The sources of fundamental rights in EU law are obviously not confined to the Charter and the case law of the CJEU. Some of these rights are enshrined or given concrete expression in directives and regulations, which, by definition, have a sector-specific scope which varies according to the field covered by each of these texts. This source of rights is currently seeing a resurgence with the directives on procedural rights in criminal proceedings, which are of particular interest from the standpoint of the Convention.

Some years ago, the European Union began to issue directives laying down procedural rights of which any suspect or accused may avail themselves in criminal proceedings. The aim is to harmonise, and even standardise, law in this area in order to facilitate mutual recognition by the member states of judicial decisions in criminal matters (Article 82, paragraph 1, of the TFEU). On 30 November 2009, the EU Council adopted for this purpose a “Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings”.<sup>62</sup> Since then, three directives of this type have been adopted on the basis of Article 82, paragraph 2, of the TFEU: Directive 2010/64 of 20 October 2010 on the right to interpretation and translation in criminal proceedings; Directive 2012/13 of 22 May 2012 on the right to information in criminal proceedings; and, recently, Directive 2013/48 of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. The roadmap provides for further directives, *inter alia* on legal aid.

Questions such as these are obviously at the heart of a field governed by Article 6 of the Convention – corresponding to Articles 47 and 48 of the Charter – which established the right to a fair trial and on which the Court has built up a very large body of case law. In this context, any initiative calculated to improve compliance with the right to a fair trial and the rights of the defence in Europe is to be wholeheartedly welcomed. This applies in principle to the directives in question, provided, however, they afford protection at least equal to that of Article 6 and

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62. *Official Journal*, No. C 295, 4 December 2009.

do not result ultimately in the freezing of a standard of protection which could be raised through the Court's dynamic interpretation.

With this in mind, consultations are held between the EU institutions and the Council of Europe on draft directives in preparation. Yet, while it is to be welcomed that the directives contain some definite advances on certain points and, to that extent, represent an added value in relation to Article 6, the drafts examined also reveal that, where other sensitive points are concerned, some member states seem to want to take advantage of this exercise of "rewriting" Article 6 to lower the standard of protection associated with it in the Court's case law, in particular by introducing further exceptions to the principles set forth therein. This applies in particular to the recent directive on the right of access to a lawyer. The close co-operation between the Council of Europe and the EU institutions has made it possible to avoid some major setbacks in this field, but not all. A watchful eye should therefore be kept on the directives still in preparation. Indeed, it should be borne in mind that, as of now, even before the European Union's accession, any lowering of Convention standards which is written into a directive of this kind and implemented by a member state could be challenged before the Court by persons believing themselves to be victims of it, an outcome which would generate litigation.

#### ***d. The presumption of equivalence***

In its *Bosphorus v. Ireland* judgment,<sup>63</sup> the Court held that the degree of convergence between the Convention and EU law was such that the protection afforded by the latter could be regarded as *equivalent* to that of the Convention. In this case, the Court was called upon to reconcile two potentially conflicting principles. According to the first, the Convention allows states parties to the Convention to transfer sovereign powers to an international organisation such as the European Union. However, even if such an organisation possesses legal personality, it is not liable as such under the Convention for as long as it has not acceded to it. According to the second principle, however, states parties are liable under the Convention for acts by which they discharge an obligation entered into as a member of an international organisation to which they have transferred powers. The problem is that the combined application of these two principles can lead to a situation where a state is faced with two mutually incompatible sets of obligations, where those resulting from its membership of an international organisation encroach on those deriving from the Convention.

It was to minimise this risk that the Court established a presumption whereby a measure taken by a state in execution of obligations deriving from its membership of an international organisation must be deemed compatible with the Convention provided the protection afforded to fundamental rights by that organisation is at least *equivalent* to that offered by the Convention. Accordingly, where equivalence has been established in respect of the organisation concerned, the national courts are dispensed from considering whether any actions of the state dictated

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63. See above I.C.1.6. Leading judgments relating to EU law – the *Bosphorus* judgment.

by its membership of that organisation are compatible with the Convention, since compatibility can be presumed. Consequently, it is not actually the equivalence of the protection offered by the organisation in question which is presumed. On the contrary, this equivalence must be established on the basis of a general assessment. If it is established, what can be presumed is the compatibility of a national implementing measure with the Convention. So it is not entirely accurate to talk about a “presumption of equivalence” in this context, even if this terminological shorthand has become accepted. In any event, it is a simple presumption which can be rebutted in individual cases if it is found that the protection afforded to an applicant’s fundamental rights was “manifestly deficient”.

At issue in the *Bosphorus* case was the protection afforded to fundamental rights by Community law, in the sense given to that notion before the Treaty of Lisbon came into force (the former “first pillar”). The Court therefore examined the legislative and judicial mechanisms for the protection of fundamental rights under Community law and found this protection to be “equivalent” to that offered by the Convention. Since, in the case in question, Ireland had merely discharged its Community obligations, in the absence of any manifest deficiency, the Court found that there had been no violation of Article 1 of Protocol No. 1. Since the *Bosphorus* judgment, the Court has regularly applied the presumption of equivalence in cases relating to EU law.

It has, however, placed three limits on it. These concern the rebuttable nature of the presumption, national discretion and the effective involvement of the CJEU.

### **i. The rebuttable nature of the presumption of equivalence**

A presumption is rebuttable if it can be refuted where there is evidence to the contrary. Unlike the presumption of conformity established by the German Constitutional Court in its well-known *Solange II*<sup>64</sup> and *Solange III*<sup>65</sup> judgments, the rebuttal of a presumption of the *Bosphorus* type does not require evidence of a *structural* deficiency in EU law. On the contrary, it is sufficient for the Court to find a “manifest deficiency” in a specific case. It is actually quite difficult to determine the exact scope of this concept as the Court has not yet had occasion to find a “manifest deficiency”. The question is whether, in this context, the adjective “manifest” means only “clear” or “obvious”, or also “serious”. Any serious deficiency is certainly manifest, but is any manifest deficiency necessarily serious? In other words, as well as being “manifest”, must the deficiency also present a certain degree of seriousness?

There would seem to be two opposing schools of thought here. Whereas the signatories of the first concurring opinion attached to the *Bosphorus* judgment, led by judge Rozakis, incline more towards the second alternative, seeing the criterion of manifest deficiency as a “relatively low threshold, which is in marked contrast to

64. Bundesverfassungsgericht (BVerfGE) (Federal Constitutional Court), 73, 339.

65. BVerfGE, 102, 147.

the supervision generally carried out under the European Convention on Human Rights”, judge Ress seems to favour the first alternative when he writes as follows in his personal concurring opinion: “One would conclude that the protection of the Convention right would be manifestly deficient if, in deciding the key question in a case, the [CJEU] were to depart from the interpretation or the application of the Convention or the Protocols that had already been the subject of well-established ... case-law [of the Strasbourg Court]”.

However that may be, we are faced here with another paradox which is summed up very well in the opinion of judge Rozakis and his colleagues and which stems from the fact that it “seems all the more difficult to accept that Community law could be authorised, in the name of ‘equivalent protection’, to apply standards that are less stringent than those of the European Convention on Human Rights when we consider that the latter were formally drawn on in the Charter of Fundamental Rights of the European Union, itself an integral part of the Union’s Treaty establishing a Constitution for Europe. Although these texts have not (yet) come into force, Article II-112(3) of the Treaty<sup>66</sup> contains a rule whose moral weight would already appear to be binding on any future legislative or judicial developments in European Union law”. The Charter now ranks as primary law. Consequently, if, as the authors of this opinion fear, “manifest deficiency” represented a “relatively low” stringency threshold in relation to that of the Convention, EU law would now find itself endowed by the Court with the very latitude that it is striving to eliminate via the Charter and the case law of the CJEU!

## ii. National discretion

A second limit on the effects of the presumption of equivalence stems from the fact that, according to the Court, “a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations”. In other words, the exercise by a member state of discretion in implementing EU law is, in principle, not covered by the presumption of equivalence and must therefore satisfy all the requirements of the Convention. The logic behind this is clear: the presumption of equivalence, with the accompanying tolerance, applies to EU law in order not to hinder international co-operation and European integration. By definition, however, the specifically national content given by member states to measures for the implementation of EU law has no international scope. Exceptions being a matter of strict interpretation, there is accordingly no reason to extend the exception reserved for EU law to these national elements. By way of an example, the Court held in the *M.S.S.* judgment<sup>67</sup> that there were no grounds for applying the presumption of equivalence to the decision by the Belgian authorities to transfer the applicant to Greece in accordance with the Dublin II Regulation, as this regulation allowed them to deal with his asylum application themselves.

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66. Now Article 52, paragraph 3, of the Charter.

67. See above I.C.1.6. Leading judgments relating to EU law.

### iii. The effective involvement of the CJEU

Lastly, the Court stated in its *Bosphorus* judgment (paragraph 72) that it concerned only provisions coming under what, at the time, was called the “first pillar” of the European Union, in other words Community law in the strict sense. This limit can be explained by the fact that the Court attaches great importance to the role of the CJEU in maintaining equivalent protection of fundamental rights in EU law and that, at the time, the CJEU enjoyed full powers in this matter only under the first pillar, whereas its powers were much more limited under the second (foreign policy and common security) and third (police and judicial co-operation in criminal matters) pillars. The pillar structure has since been abolished by the Treaty of Lisbon and the powers of the CJEU have been extended to the whole of EU law with the exception of external policy and common security. Should it be concluded from this that the scope of the presumption of equivalence has been similarly extended?

In fact, the answer to this question lies today in the recent *Michaud* judgment.<sup>68</sup> In this case, the Court was called upon to assess the compatibility with Article 8 of the Convention of the obligation placed on lawyers by the EU anti-money-laundering directives to report suspicions. The CJEU had already dealt with these directives in another case, but from the angle of the right to a fair trial within the meaning of Article 6 of the Convention. The Court held that the issues arising under each of these provisions were different, one concerning litigants’ rights (Article 6) and the other those of lawyers (Article 8). The presumption of equivalent protection was accordingly inapplicable in respect of the complaint under Article 8 because “the full potential of the relevant international machinery for supervising fundamental rights – in principle equivalent to that of the Convention – [had not] been deployed” in respect of this complaint. It follows from this case law that even where the CJEU has jurisdiction, the presumption of equivalence does not apply if, in the case at issue or another similar case, the CJEU has not already effectively examined the specific human rights issue brought before the national court or the European Court of Human Rights.

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68. See above I.C.1.6. Leading judgments relating to EU law.

## Chapter II

# Means of accession

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### A. Pre-condition: the legal basis

**T**he European Union cannot accede to the Convention unless EU law and the Convention itself authorise it to do so. In both cases, this authorisation forms the subject of specific provisions, namely Articles 59, paragraph 2, of the Convention and 6, paragraph 2, of the TEU.

#### 1. Article 59, paragraph 2, of the Convention

The Convention was originally intended to be binding only on sovereign states and therefore made no provision for accession by an international organisation, although it did not exclude this possibility either. Furthermore, the terminology of the Convention refers extensively to the characteristics of states rather than to those of international organisations. It was therefore legitimate to entertain certain doubts as to the possibility of an international organisation acceding to the Convention. Without claiming to give a blanket response to this question, the states parties to the Convention sought nevertheless to resolve it, where the European Union was concerned, by inserting into the Convention, by way of Protocol No. 14, a new Article 59, paragraph 2, according to which “[t]he European Union may accede to this Convention”.

#### 2. Article 6, paragraph 2, of the TEU

As early as 4 April 1979, the European Commission had submitted a memorandum proposing that the European Community accede to the Convention, but no further action had been taken. Several years later, on 19 November 1990, the European Commission sought a mandate from the Council of Ministers to negotiate the arrangements for such accession. This initiative prompted the member states to submit a request for an opinion to the CJEU in which it was asked to give a ruling on the compatibility of accession with the Treaty establishing the European Community. In its Opinion No. 2/94 of 28 March 1996, the CJEU gave a negative reply, saying that, under the treaties as they stood, the European Community had no competence to accede to the Convention and that such accession therefore required prior amendment of the treaties.



■ **Opinion 2/94, paragraphs 34-36**

“Respect for human rights is ... a condition of the lawfulness of Community acts. Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.

Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment.

It must therefore be held that, as Community law now stands, the Community has no competence to accede to the Convention.”

It was not until the Treaty of Lisbon and the new Article 6, paragraph 2, of the TEU that the European Union acquired the competence to accede to the Convention.

■ **Article 6, paragraph 2, of the TEU**

“The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.”

This provision goes beyond the mere creation of a legal basis as it does not simply *permit* the Union to accede to the Convention, but *requires* it to do so. It will be recalled in this connection that the initial versions of this article in the draft constitutional treaty<sup>69</sup> stated that “[t]he Union may accede to the European Convention ...”. The authors of the Treaty of Lisbon were clearly anxious to head off any further debate on the desirability of EU accession to the Convention and settled the matter themselves. Since there was a political consensus in favour of accession, it would have been unfortunate had it been called into question by fresh discussions, which would have further delayed a process already on hold for thirty years!

## **B. Negotiations**

The first step in the negotiations leading up to the accession treaty discussed below was taken on 26 May 2010 when, following the entry into force of the Treaty of Lisbon, the Committee of Ministers of the Council of Europe mandated its Steering Committee for Human Rights (CDDH) to draft, together with the European Union, the legal instrument required for the European Union to accede to the Convention. On 4 June 2010, the European Commission was mandated by the “Justice and Home Affairs” Council of the European Union to negotiate accession on the Union’s behalf.

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69. Treaty establishing a Constitution for Europe, *Official Journal*, No. C 310, 16 December 2004.

An informal working group (CDDH-UE) consisting of 14 experts from Council of Europe member states (seven EU member and seven EU non-member states) was then set up to discuss and draft the legal instruments for accession in collaboration with the European Commission. Between July 2010 and June 2011, this informal group, chaired by Ms Tonje Meinich (Norway) and assisted by observers from the Registry of the Court and the Committee of Legal Advisers on Public International Law (CAHDI), held a total of eight meetings with the European Commission at which a draft accession treaty and an explanatory report were drafted. On 14 October 2011, the CDDH submitted a report to the Committee of Ministers on the work done by the CDDH-UE group, to which draft legal instruments were appended. It then emerged that some member states still had reservations about the proposed text.

On 27 April 2012, the “Justice and Home Affairs” Council of the European Union expressed the wish that negotiations be resumed “without delay”, noting in this connection that the Stockholm programme described EU accession as being “of key importance” and called for “rapid” accession. On 13 June 2012, the Committee of Ministers gave the CDDH new terms of reference to continue the negotiations with the European Union within a group consisting this time of representatives of the 47 Council of Europe member states and the European Commission (“47 + 1”). Like the CDDH-UE group, it was chaired by Ms Tonje Meinich and assisted by observers from the Registry of the Court and CAHDI. It had three exchanges of views with representatives of civil society, who regularly submitted comments on the working documents. After five negotiation meetings, the members of the “47 + 1” group reached agreement on 5 April 2013 on the draft treaty of accession which forms the subject of this study.

On 4 July 2013, the European Commission sought the opinion of the CJEU, under Article 218, paragraph 11, of the TFEU, on whether this draft was compatible with the treaties.<sup>70</sup>

## C. Stipulations

The drafters of the accession treaty took a number of stipulations into account in their work. Some were binding because they derived from binding legal sources such as the Treaty of Lisbon and the Council decision authorising the start of negotiations. Others, while not binding, were nonetheless highly authoritative because they originated from the European Commission, the European Parliament and both European Courts. The drafters also had two preliminary studies on which to base themselves.

### 1. The Treaty of Lisbon

As well as empowering the European Union to accede to the Convention, the Treaty of Lisbon laid down the principles governing the accession procedure. These principles are to be found in Protocol No. 8 and Declaration No. 2 relating both to Article 6, paragraph 2, of the TEU.

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<sup>70</sup>. Opinion 2/13.

## ■ Protocol No. 8 relating to Article 6, paragraph 2, of the TEU

### *Article 1*

The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the 'European Convention') provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:

- (a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention;
- (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

### *Article 2*

The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.

### *Article 3*

Nothing in the agreement referred to in Article 1 shall affect Article 292 of the Treaty on the Functioning of the European Union.

## ■ Declaration (No. 2) on Article 6, paragraph 2, of the TEU

The Conference agrees that the Union's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms should be arranged in such a way as to preserve the specific features of Union law. In this connection, the Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced when the Union accedes to that Convention.

These texts have two main thrusts. First, accession must be arranged in such a way as to preserve the specific features of the Union and its legal order. By way of an indication, two areas are identified in which those specific features are at stake. The first of these is EU participation in the Convention's supervisory bodies, namely the Court and the Committee of Ministers of the Council of Europe. EU participation in the Committee of Ministers is governed by Article 7 of the accession treaty. As regards the EU judge at the Court, he or she is not the subject of a specific provision in the accession treaty since his or her situation will be no different from that of the other judges and is therefore governed by the principle of equality.<sup>71</sup> On the other hand, the procedure for appointing the three candidates for the post of judge

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71. See below II.D.2.2.c. EU participation in the Convention machinery.

in respect of the European Union (Article 22 of the Convention) will be governed by the internal rules envisaged in the mandate from the Council of the Union.<sup>72</sup>

Next, Protocol No. 8 mentions, as another requirement deriving from the specific features of EU law, proper identification of the respondents responsible for the violations alleged in applications challenging that law: the member states and/or the Union, as the case may be. This is a concern stemming from a fundamental characteristic of EU law, already dealt with above, namely that while being a legal order in its own right, EU law is nevertheless integrated with the legal systems of the member states, which may lead to a division of the functions of adoption and application of the same rule between the European Union and a member state. It was precisely in order to make allowance for this fact that the co-respondent mechanism, governed by Article 3 of the accession treaty, was devised.

In passing, it will also be noted with interest that the authors of the Treaty of Lisbon call for an intensification of dialogue between the two European Courts in order, *inter alia*, to ensure respect for the specific features of EU law once the Union has acceded to the Convention. It is well known that relations between the two European Courts are marked by a long tradition of dialogue and exchange, reflected in particular in regular meetings in either Luxembourg or Strasbourg. These could no doubt provide an appropriate setting for discussing the specific features of EU law which will need to be taken into account in applying the Convention.

Secondly, the Treaty of Lisbon states that accession may modify neither the distribution of competences between the Union and its member states nor the powers of its institutions. Where this point is concerned, Protocol No. 8 merely repeats the rule already enshrined in Article 6, paragraph 2, of the TEU, which is itself not unrelated to Article 51, paragraph 2, of the Charter, according to which “[t]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”. In the accession treaty, the same concern is found in Article 1, paragraph 3, which provides, *inter alia*: “Nothing in the Convention or the protocols thereto shall require the European Union to perform an act or adopt a measure for which it has no competence under European Union law”. Protocol No. 8 further provides that accession may not affect the situation of member states in relation to the Convention, and in particular in relation to the protocols and reservations thereto. This is a logical consequence of the obvious principle according to which the Union accedes within the limits of its competences,<sup>73</sup> a principle which is given concrete expression in Article 1, paragraph 3, of the accession treaty. The explanatory report to the accession treaty states in this connection that “the existing rights and obligations of the States Parties to the Convention, whether or not members of the EU, should be unaffected by the accession, and ... the distribution of competences between the EU and its member States and between the EU institutions shall be respected” (paragraph 7; see also paragraph 22).

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72. Ibid.

73. A principle stated in the 2002 study (see below), paragraph 26.

Lastly, the Treaty of Lisbon also defines the procedure governing the European Union's accession to the Convention. Laid down in Article 218 of the TFEU, this procedure provides in substance for negotiations to be conducted on behalf of the European Union by the European Commission following a unanimous Council decision authorising it to do so. The Council's authorisation is also required for the accession treaty to be signed by the European Commission once the negotiations have been concluded. Next comes the Council decision concluding the accession treaty, which, in order to enter into force, also requires the approval of all the member states in accordance with their respective constitutional rules. Before that, the European Parliament must approve the agreement. Lastly, the CJEU may be consulted by a member state, the European Parliament, the Council or the Commission on the compatibility of the accession treaty with the treaties. The Commission has already sought such an opinion from the CJEU.

This procedure is undoubtedly extremely unwieldy. It is largely accounted for by the exceptional significance of accession for the European Union, described by the CJEU in its Opinion 2/94 as "constitutional".<sup>74</sup> Added to this procedure will be that required for the ratification of the treaty by each of the 47 Council of Europe member states. From a legal standpoint, therefore, the 28 states which are members of both the European Union and the Council of Europe will ultimately be required to give their consent to the accession treaty twice: first as members of the European Union, to enable the agreement to be effective in respect of the Union, this being the equivalent of ratification at EU level; and then as members of the Council of Europe, to ensure the entry into force of the accession treaty, which will itself amend *ipso facto* the Convention. In practice, however, it will be possible to carry out these operations at the same time.

## 2. The recommendation of the European Commission to the EU Council

In accordance with Article 218, paragraph 3, of the TFEU, the European Commission submitted a recommendation to the EU Council on 17 March 2010 seeking authorisation to negotiate the agreement on accession to the Convention.<sup>75</sup> In the explanatory memorandum accompanying this recommendation, the Commission sets out five "basic principles governing the accession" which largely served to guide the negotiations, quite simply because they are dictated by common sense and correspond to long-standing positions held by the Council of Europe.

The first of these principles is *neutrality regarding Union powers*, according to which "no new powers should be conferred on the institutions and bodies of the Union". Next comes the principle of *neutrality regarding member states' obligations*, according to which "accession should not affect the obligations of Member States under the Convention and the protocols thereto".

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<sup>74</sup> See above II.A.2. Opinion 2/94.

<sup>75</sup> Doc. SEC(2010)305.

The third principle is that of *autonomous interpretation of Union law*. This means that “the [Council of Europe] bodies applying the ECHR, namely the Strasbourg Court and the Committee of Ministers should not be called upon to interpret – even implicitly or incidentally – Union law and in particular its rules regarding the powers of the institutions and bodies of the Union and regarding the content and scope of Member States’ obligations under Union law”.

Next comes the principle of *equal footing* under which “the Union should be allowed to participate in the Strasbourg Court as well as in the other [Council of Europe] bodies – to the extent that their activities are linked to the mission of the Strasbourg Court – on an equal footing with other Contracting Parties to the ECHR”. Lastly we have the principle of *preservation of the Convention system*, which means that “the substantive and procedural features of the system of the ECHR should be preserved also with respect to the Union to the largest extent possible compatible with the principles referred to under a) - d)”.

### 3. The mandate from the EU Council

In response to the European Commission’s recommendation, the EU’s “Justice and Home Affairs” Council, meeting on 4 June 2010 under the Spanish presidency, authorised the European Commission to negotiate the agreement on EU accession to the Convention and issued negotiating directives for this purpose,<sup>76</sup> based on the Commission’s recommendation. The Council also decided on the drawing up of internal rules which will determine with binding effect the respective responsibilities of the Union and its member states in proceedings before the Court, including the implementation of the co-respondent mechanism.

### 4. The European Parliament resolution

On 19 May 2010, the European Parliament adopted a resolution on “the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms”. Among the many relevant considerations contained therein, particular attention is drawn to the following:

The European Parliament ...

5. Stresses that, as the accession of the EU to the ECHR is an accession of a non-State Party to a legal instrument created for States, it should be completed without altering the features of the ECHR and modifications to its judicial system should be kept to a minimum; considers it important, in the interests of those in both the Union and third countries who are seeking justice, to give preference to accession arrangements that will have the least impact on the workload of the European Court of Human Rights; ...

12. Considers it appropriate that, in the interests of the proper administration of justice and without prejudice to Article 36(2) of the ECHR, in any case brought

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76. Doc. 10817/10 (8 June 2010).

against a Member State before the European Court of Human Rights which may raise an issue concerning the law of the Union, the Union may be permitted to intervene as a co-defendant, and that in any case brought against the Union subject to the same conditions any Member State may be permitted to intervene as a co-defendant; this possibility must be defined in the provisions of the accession treaty in a manner which is both clear and sufficiently broad;

13. Considers that the adoption of the institution of co-defendant does not impede other indirect options provided by the ECHR (Article 36, I), such as the right of the Union to intervene as a third party in any application by an EU citizen;

16. Is clearly aware of the fact that the European Court of Human Rights may find a violation in a case that has already been decided by the Court of Justice of the European Union and stresses that this would in no way cast a doubt on the credibility of the Court of Justice of the European Union as an ultimate umpire in the EU judicial system.

## 5. The contributions of the European courts

In a very rare occurrence in the history of the Court and the CJEU, the two European courts adopted, in the context of the negotiations on the accession treaty, converging positions on an issue of common interest, namely the preservation of the subsidiary nature of the Convention mechanism with regard to EU law. A central focus of the positions adopted was the CJEU's concern to ensure that EU accession to the Convention preserved its role of supreme court in the EU legal system and especially its exclusive jurisdiction for interpreting EU law (Article 19, paragraph 1, of the TEU and Article 267 of the TFEU).

In the Convention system, respect for the role and jurisdiction of national courts, and in particular supreme courts, is generally speaking provided for by means of the principle of subsidiarity and its corollary in procedural matters, the rule that all domestic remedies must be exhausted (Article 35, paragraph 1, of the Convention). In line with this principle, any application which has not previously been brought before the competent national court to hear the case as a final court of appeal will be declared inadmissible in Strasbourg. In this way, the role of the supreme courts is preserved. However, this principle does not work in the same way with regard to EU law and therefore requires a number of adaptations.

This is the context, namely the discussions on how to ensure the subsidiary nature of the Court's action in connection with EU law, to which the contributions of the two European courts relate. The first comes from the CJEU and the second is a joint communication by the presidents of the two courts.

### ■ Discussion document of the Court of Justice of the European Union

On 5 May 2010, the CJEU published a "Discussion document ... on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms", which stated:

"In the judicial system of the European Union, as established by the Treaties,

the Court of Justice has the task of ensuring that in the interpretation and application of the Treaties the law is observed, and it alone has jurisdiction, as a result of its function of reviewing the lawfulness of the acts of the institutions, to declare if appropriate that an act of the Union is invalid. It is settled case-law that all national courts have jurisdiction to consider the validity of acts adopted by institutions of the Union, but national courts, whether or not there is a judicial remedy against their decisions in national law, do not have jurisdiction themselves to declare such acts invalid. To maintain uniformity in the application of European Union law and to guarantee the necessary coherence of the Union's system of judicial protection, it is therefore for the Court of Justice alone, in an appropriate case, to declare an act of the Union invalid. That prerogative is an integral part of the competence of the Court of Justice, and hence of the 'powers' of the institutions of the Union, which, in accordance with Protocol No 8, must not be affected by accession.

In order to preserve this characteristic of the Union's system of judicial protection, the possibility must be avoided of the European Court of Human Rights being called on to decide on the conformity of an act of the Union with the Convention without the Court of Justice first having had an opportunity to give a definitive ruling on the point.

With respect more particularly to the preliminary ruling procedure provided for in Article 267 TFEU, it may be pointed out in this connection that its method of operation, as a result of its decentralised nature which means that the national courts have general jurisdiction in respect of European Union law, has given altogether satisfactory results for more than half a century, even though the Union now consists of 27<sup>77</sup> Member States. However, it is not certain that a reference for a preliminary ruling will be made to the Court of Justice in every case in which the conformity of European Union action with fundamental rights could be challenged. While national courts may, and some of them must, make a reference to the Court of Justice for a preliminary ruling, for it to rule on the interpretation and, if need be, the validity of acts of the Union, it is not possible for the parties to set this procedure in motion. Moreover, it would be difficult to regard this procedure as a remedy which must be made use of as a necessary preliminary to bringing a case before the European Court of Human Rights in accordance with the rule of exhaustion of domestic remedies.

It is true that the system established by the Convention does not lay down, as a condition of admissibility of an application to the European Court of Human Rights, that in every case a court of supreme jurisdiction must first have been asked to rule on the alleged violation of fundamental rights by the act in question. However, what is at stake in the situation referred to is not the involvement of the Court of Justice as the supreme court of the European Union, but the arrangement of the judicial system of the Union in such a way that, where an act of the Union is challenged, it is a court of the Union before which proceedings can be brought in order to carry out an internal review before the external review takes place.

Consequently, in order to observe the principle of subsidiarity which is inherent in the Convention and at the same time to ensure the proper functioning of the

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77. With the accession of Croatia on 1 July 2013, there are now 28 EU member states.



judicial system of the Union, a mechanism must be available which is capable of ensuring that the question of the validity of a Union act can be brought effectively before the Court of Justice before the European Court of Human Rights rules on the compatibility of that act with the Convention.”

■ **Joint communication from Presidents Costa and Skouris**

On 17 January 2011, as part of the regular meetings between the two European courts, a delegation from the Court visited the CJEU. At the end of their discussions, President Costa of the Court and President Skouris of the CJEU issued a joint communication in which they stated the following:

“The accession of the EU to the Convention constitutes a major step in the development of the protection of fundamental rights in Europe. The Member States of the EU have enshrined the principle of that accession in the Treaty of Lisbon. As regards the Council of Europe, Protocol No 14, which entered into force on 1 June 2010, amends Article 59 of the Convention in order that the EU may accede to it. As a result of that accession, the acts of the EU will be subject, like those of the other High Contracting Parties, to the review exercised by the [European Court of Human Rights] in the light of the rights guaranteed under the Convention.

In the context of this review of consistency with the Convention, a distinction can be drawn between direct actions and indirect actions, namely, on the one hand, individual applications directed against measures adopted by EU institutions subsequent to the accession of the EU to the Convention and, on the other, applications against acts adopted by the authorities of the Member States of the EU for the application or implementation of EU law. In the first case, the condition relating to exhaustion of domestic remedies, imposed under Article 35(1) of the Convention, will oblige applicants wishing to apply to the [European Court of Human Rights] to refer the matter first to the EU Courts, in accordance with the conditions laid down by EU law. Accordingly, it is guaranteed that the review exercised by the [European Court of Human Rights] will be preceded by the internal review carried out by the CJEU and that subsidiarity will be respected.

By contrast, in the second case, the situation is more complex. The applicant will have, first, to refer the matter to the courts of the Member State concerned, which, in accordance with Article 267 TFEU, may or, in certain cases, must refer a question to the CJEU for a preliminary ruling on the interpretation and/or validity of the provisions of EU law at issue. However, if, for whatever reason, such a reference for a preliminary ruling were not made, the [European Court of Human Rights] would be required to adjudicate on an application calling into question provisions of EU law without the CJEU having the opportunity to review the consistency of that law with the fundamental rights guaranteed by the Charter.

In all probability, that situation should not arise often. The fact remains, however, that it is foreseeable that such a situation might arise because the preliminary ruling procedure may be launched only by national courts and tribunals, to the exclusion of the parties, who are admittedly in a position to suggest a reference for a preliminary ruling, but do not have the power to require it. That means that the reference for a preliminary ruling is normally not a legal remedy to be exhausted by the applicant before referring the matter to the [European Court of Human Rights].

In order that the principle of subsidiarity may be respected also in that situation, a procedure should be put in place, in connection with the accession of the EU to the Convention, which is flexible and would ensure that the CJEU may carry out an internal review before the [European Court of Human Rights] carries out an external review. The implementation of such a procedure, which does not require an amendment to the Convention, should take account of the characteristics of the judicial review which are specific to the two courts. In that regard, it is important that the types of cases which may be brought before the CJEU are clearly defined. Similarly, the examination of the consistency of the act at issue with the Convention should not resume before the interested parties have had the opportunity properly to assess the possible consequences of the position adopted by the CJEU and, where appropriate, to submit observations in that regard to the [European Court of Human Rights], within a time-limit to be prescribed for that purpose in accordance with the provisions governing procedure before the [European Court of Human Rights]. In order to prevent proceedings before the [European Court of Human Rights] being postponed unreasonably, the CJEU might be led to give a ruling under an accelerated procedure.

The two courts take the view that the results of their discussion can usefully be made known in the context of the negotiations on accession ongoing between the Council of Europe and the EU. They are determined to continue their dialogue on these questions which are of considerable importance for the quality and coherence of the case-law on the protection of fundamental rights in Europe.”

As the explanatory report (paragraph 14) indicates, this joint communication of the presidents had a decisive impact in the negotiations in that it helped to lead to an agreement on the need to provide for the possibility of referring to the CJEU a complaint already submitted to the Court, in cases where Article 267 of the TFEU has not been respected.<sup>78</sup>

## 6. Preliminary studies

The authors of the accession treaty were also able to draw on two preliminary studies. The first, entitled “Study of technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights”, was carried out by the Council of Europe’s CDDH (Steering Committee for Human Rights), which had been instructed by the Ministers’ Deputies of the Council of Europe on 28 March 2001 to undertake that study. Adopted by the CDDH on 28 June 2002,<sup>79</sup> it addresses the majority of the legal and technical issues raised by EU accession, putting forward a number of practical responses on which the authors of the accession treaty drew considerably.

This study was also a source of inspiration for a working group set up at the time by the “European Convention on the Future of Europe” which drew up the aborted draft Treaty establishing a Constitution for Europe.<sup>80</sup> This working group (“Working Group II”), whose terms of reference related to the “incorporation of the Charter and

78. See below II.D.2.2.b. The prior involvement of the CJEU.

79. DG-II(2002)006.

80. *Official Journal*, No. C 310, 16 December 2004.

accession to the ECHR”, heard numerous renowned experts on these issues and, on 22 October 2002, submitted a final report in which it reiterated a large number of proposals that had appeared in the CDDH report and dismissed various objections to accession based on the specific nature of EU law.<sup>81</sup>

## D. Choices made

It was in the light of all these preliminary deliberations that the accession treaty negotiators made their choices in order to take into account, simultaneously and in a balanced way, the specific features of both legal systems – that of the Convention and that of the EU. The accession treaty is the result of those deliberations. Its main components are presented and commented on below.

### 1. Form

Article 59, paragraph 1, of the Convention provides that Council of Europe member states shall become parties to the Convention following signature and then ratification. However, it very quickly became apparent that this procedure could not be applied to the EU. As the explanatory report to the accession treaty explains, “[t]he Convention, as amended by Protocols Nos. 11 ... and 14, was drafted to apply only to Contracting Parties who are also member States of the Council of Europe. As the EU is neither a State nor a member of the Council of Europe, and has its own specific legal system, its accession requires certain adaptations to the Convention system” (paragraph 3).

It also had to be decided what type of legal instrument should contain these adaptations – an amending protocol to the Convention or an accession treaty? Although an amending protocol is the traditional method, preference was given to an accession treaty, as moreover appeared to be called for in the Treaty of Lisbon, which spoke of an accession “agreement”. An accession treaty has numerous advantages. In this connection, it should be pointed out first of all that accession requires more than a change to certain provisions in the Convention itself. In addition, there have to be supplementary interpretative provisions, adaptations to the procedure before the Court and the Committee of Ministers of the Council of Europe and provisions relating to administrative and technical questions not directly pertaining to the text of the Convention (explanatory report, paragraph 3). An accession treaty makes it possible to include most of these changes in a single instrument and allow them to enter into force simultaneously. Moreover, it also avoids having to proceed in two stages as would be the case with an amending protocol, which would first of all presuppose the entry into force of the protocol negotiated among the “old” Contracting Parties, followed by the European Union’s declaration of consent to be bound by the Convention thus amended. At the same time, it enabled the EU to be more closely involved in the negotiations regarding the conditions of accession, in accordance

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81. CONV 354/02.

with the provisions of Article 218 of the TFEU. Accordingly, the explanatory report (paragraph 17) states the following: “It was decided that, upon its entry into force, the Accession Agreement would simultaneously amend the Convention and include the EU among its Parties, without the EU needing to deposit a further instrument of accession. This would also be the case for the EU’s accession to the Protocol ... and to Protocol No. 6 ... to the Convention. Subsequent accession by the EU to Protocols No. 4, 7, 12 and 13 would require the deposit of separate accession instruments”.

Importantly, the new Article 59, paragraph 2.b, of the Convention provides that the accession treaty constitutes an “integral part” of the Convention. As the explanatory report states (paragraph 21), this will make it possible to limit the amendments made to the Convention – by including certain more technical provisions, containing, for example, attribution and interpretation clauses, in the accession treaty – while ensuring that the accession treaty will also be subject to the interpretation of the Court.

## **2. Substance: the main characteristics of accession**

It is not possible to cover here all the substantive solutions set out in the accession treaty. Accordingly, an emphasis will be placed hereunder on the most important ones, those determining the main characteristics of EU accession. They relate to the scope and modalities of accession.

### **2.1. The scope of accession**

Accession, as provided for in the agreement, reflects a clear commitment to take into account as far as possible the nature and particular features of the two legal systems concerned, by ensuring compliance with the Convention as well as respect for existing competences, for the situation of states vis-à-vis the Convention and for the autonomy of EU law.

#### ***a. Compliance with the Convention***

While it is clear that EU accession cannot succeed without a number of adjustments to the Convention designed to take account of the particular nature of the Union, the adjustments in question must be limited to the absolute minimum so as to maintain as far as possible the overall balance in key areas of the Convention, constituting its basic architecture and, ultimately, giving it its very “soul”.

The principles underpinning these key areas of balance include first and foremost procedural equality between Contracting Parties, which dictates that the EU must be treated as far as possible on an equal footing with the other Contracting Parties, in other words without being given any privileges but also without being put at a disadvantage on account of its particular situation. In acceding to the Convention, the EU undertakes to be subject to the same external supervision as states, so as to ensure that its action enjoys the same credibility as that conferred by the supervision of the Court on the actions of the states which are subject to it. In this regard, therefore, it is important to preserve the same type of supervision when exercised

vis-à-vis the Union and avoid anything which could be construed as favouritism. This is what the agreement negotiators addressed. It follows from this, moreover, that the agreement will be interpreted and applied in line with the principle whereby the maintaining of the Convention in its current state is the rule and adjustments the exception. Consequently, the provisions of the Convention not modified by the accession treaty will be applied as they stand to the EU. This is the case, for example, of those concerning the role of the EU judge.

### ***b. Respect for the competences of the European Union***

Accession must also ensure respect for the competences of the Union, as required by Article 6, paragraph 2, of the TEU and Article 2 of Protocol No. 8 to the Treaty of Lisbon, which state that EU accession must not affect the Union's competences or the powers of its institutions. This, however, is not a new requirement. In point of fact, it was clearly established before the Treaty of Lisbon, in particular in the work of the CDDH,<sup>82</sup> that the Union would accede within the limits of its competences. This desire not to see fundamental rights extend the scope of the Union's competences is also to be seen, *mutatis mutandis*, in Article 51, paragraph 2, of the Charter of Fundamental Rights, which provides that the latter "does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties".

It was in response to this concern that the agreement provides for the introduction into the Convention of a new Article 59, paragraph 3, worded as follows: "Accession to the Convention and the protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf. Nothing in the Convention or the protocols thereto shall require the European Union to perform an act or adopt a measure for which it has no competence under European Union law." This provision is of particular importance in the light of the Court's case law on positive obligations, in other words the obligation to act in a given way, which the Court occasionally imposes on Contracting Parties.<sup>83</sup> Such obligations could therefore not be placed on the Union if the Treaties did not assign it competence to take action in that field.

For its part, the explanatory report states that, upon its accession to the Convention, "the distribution of competences between the EU and its member States and between the EU institutions shall be respected" (paragraph 7). One of the main consequences of accession is that the EU will become subject to the jurisdiction of the Court. In such a context, respecting the distribution of competences in the Union, which falls exclusively to the jurisdiction of the CJEU, presupposes that the Court would not itself have to rule on this distribution in disputes referred to it. The co-respondent mechanism, described below, is intended to address this concern. At this point, however, it should be noted that the features of the mechanism designed to avoid

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82. See above II.C.6. Preliminary studies.

83. See below II.D.2.2.a. iv. The conditions under which the mechanism may be applied.

the Court's interference in the competences of the EU include the principles whereby (a) a potential co-respondent cannot be forced by the Court to take part in the proceedings; (b) the Court would carry out only a summary examination of any request to assign co-respondent status; and (c) the respondent and co-respondent would, in principle, be jointly responsible for any violation found by the Court.

### ***c. Respect for the situation of states vis-à-vis the Convention***

Article 2 of Protocol No. 8 to the Treaty of Lisbon requires the accession agreement to ensure “that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof”.

Admittedly, a Contracting Party may, as a result of the additional protocols it decides to ratify and the reservations and derogations it declares – provided, of course that the latter are validated by the Court – to a limited degree “personalise” the scope and extent of the obligations to which it subscribes in respect of the Convention. The above provision is intended to ensure that the EU's accession does not put an end to this personalisation by automatically aligning the obligations of EU member states with those of the Union. The explanatory report reflects this, stipulating that “[i]t is also understood that the existing rights and obligations of the States Parties to the Convention, whether or not members of the EU, should be unaffected by the accession” (paragraph 7).

With regard first of all to the additional protocols which, it is true, could apply to the competences to be carried out jointly by the Union and member states (Article 4 of the TFEU), the agreement provides that the Union shall limit its accession to the two protocols which are in force in respect of all member states, namely the Protocol to the Convention and Protocol No. 6. Accession to the other protocols – those by which not all member states are bound – could in effect give rise to obligations on the part of the Union which it would find difficult to fulfil, especially if this required action by member states not bound by those obligations.

As for reservations and derogations, the response to the concerns expressed in Protocol No. 8 to the Treaty of Lisbon is to be found, once again, in the rule referred to above that the EU may accede only within the limits of its competences. In so doing therefore, it cannot encroach on those competences exercised exclusively by the member states where they have made reservations and derogations. Nonetheless, these are very few in number. In its final report, Working Group II of the Convention on the Future of Europe<sup>84</sup> concluded along similar lines on this question:

The Member States' individual reservations made in respect of the [Convention] and additional protocols, as well as their right to make specific derogations

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<sup>84</sup>. See above II.C.6. Preliminary studies.

(Article 15 ...), would in any event remain unaffected by accession since they concern the respective national law, whereas accession by the Union would have legal effect only insofar as Union law is concerned.

#### ***d. Respect for the autonomy of EU law***

##### **i. Reservations regarding the autonomy of EU law**

The prospect of EU accession to the Convention gave rise in the past to a number of reservations regarding respect for the autonomy of EU law and the exclusive jurisdiction of the CJEU, with a fear that the latter could in practice be adversely affected by the Court's exercise of its own jurisdiction vis-à-vis the Union. In its discussion paper, the CJEU points out that its jurisdiction is an integral part of the "powers" of the institutions of the Union which the accession treaty must respect, in accordance with Protocol No. 8.<sup>85</sup>

In this connection, the explanatory report to the accession treaty states that "the competence of the Court to assess the conformity of EU law with the provisions of the Convention will not prejudice the principle of the autonomous interpretation of EU law" (paragraph 5). What is the basis for this statement?

##### **ii. The responses of the Convention**

First of all, it should be underlined that the competences of the Court are such that they respect to a large extent the autonomy of respondent states in arranging their respective legal orders. This is a consequence of where the Court stands legally, i.e. outside the legal orders it supervises, and of the subsidiary nature of its action. In practice, this is reflected in a series of approaches which, at various levels, enable the Court to respect the choices and decisions taken by the national authorities.

These include, first and foremost, the common sense rule whereby the Court relies on the interpretation of domestic law provided by the national courts of the respondent state.<sup>86</sup> This also applies to EU law, as confirmed by the Court in paragraph 143 of its *Bosphorus* judgment.<sup>87</sup> Next, in many fields, the Court grants states a margin of appreciation, which amounts to allowing them a degree of autonomy in the application of the Convention to individual cases. Lastly, it should be pointed out that the Court's judgments are essentially declaratory. This means that where the Court finds a violation, the respondent state is, in principle, free to choose the means – legislative, judicial or other – it intends to use in its legal system in order to execute the judgment.<sup>88</sup> Clearly, on occasion, the Court reserves the right to stipulate the

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85. See above II.C.1. The Treaty of Lisbon.

86. See, for example, ECtHR, 18 February 1999, *Waite and Kennedy v. Germany*, No. 26083/94, paragraph 54.

87. See above I.C.1.6. Leading judgments relating to EU law – the *Bosphorus* judgment.

88. ECtHR, 30 June 2009, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (No. 2), No. 32772/02, paragraph 88.

action to be taken in response to a judgment, but such cases are very rare and hardly likely to apply to the European Union.

In short, with regard to the domestic law of Contracting Parties, and consequently to EU law, the Court can merely find that an interpretation is or is not compatible with the Convention, but cannot impose a different interpretation. If it is found to be incompatible, it is for the national authorities alone – i.e. parliament or the domestic courts concerned – to amend it so as to bring it into line with the Convention. Such approaches show considerable regard for the domestic law of states and, by extension, the Union. It was therefore not surprising to see the following in the final report of Working Group II of the Convention on the Future of Europe:

The Group has looked in depth into the possible impact of accession to the [Convention] on the principle of autonomy of Community (or Union) law including the position and authority of the European Court of Justice. It has emerged from the Group's discussion and expert hearings that the principle of autonomy does not place any legal obstacle to accession by the Union to the [Convention]. After accession, the Court of Justice would remain the sole supreme arbiter of questions of Union law and of the validity of Union acts; the European Court of Human Rights could not be regarded as a superior Court but rather as a specialised court exercising external control over the international law obligations of the Union resulting from accession to the [Convention]. The position of the Court of Justice would be analogous to that of national constitutional or supreme courts in relation to the Strasbourg Court at present.

There is, however, one area where, by virtue of Article 52, paragraph 3, of the Charter of Fundamental Rights, EU law itself has limited the scope of its autonomy to the benefit of the Convention. This concerns those rights which the Charter has taken directly from the Convention. Insofar as, in pursuance of this provision, the Charter refers to the Convention in determining the minimum level of protection of a right enshrined therein, EU law agrees not to interpret this right completely autonomously and, in contrast, relies indirectly on the Court. As has already been stated, this is a further argument in favour of EU accession to the Convention.

### **iii. The responses of the accession treaty**

In addition to these general considerations relating to the nature of the supervision exercised by the Court, there are the particular solutions provided by the accession treaty in response to the concern expressed in Protocol No. 8 to the Treaty of Lisbon to ensure that the specific features of EU law would be respected. These solutions include, first of all, the co-respondent mechanism, which will enable the Court to comply with the distribution of competences between the EU and its member states. Next is the mechanism allowing for the prior involvement of the CJEU. Even though its primary aim is to ensure the subsidiary nature of the action taken by the Court, it will also help ensure respect for the autonomy of EU law insofar as it will enable the CJEU to rule prior to the Court on the compatibility of an EU norm with



the fundamental rights protected by the Union, which presupposes that on that occasion the CJEU will give an authoritative interpretation of the norm in question. Clearly, the Court will not be bound by the CJEU's opinion on the compatibility of the norm with fundamental rights, but it will have at its disposal the CJEU's authoritative interpretation.

On the other hand, it goes without saying that following accession, at which time the Convention will become an integral part of EU law,<sup>89</sup> the autonomy of EU law will not be able to trespass on the prerogatives of the Court in interpreting the Convention and applying it to individual cases. In this regard, however, the situation of the Union will be entirely comparable to that of the other Contracting Parties, as pointed out at the time by judge Skouris, today President of the CJEU, to Working Group II of the Convention on the Future of Europe:

[W]ith respect to the matters covered by the [Convention], accession will represent a limitation to the autonomy of Community law. Regarding the Court of Justice in particular, it will effectively lose its sole right to deliver a final ruling on the legality of Community acts where a violation of a right guaranteed by the [Convention] is at issue. In my view, there is nothing shocking in this: the position is the same when the constitutional courts or supreme courts of Member States test the constitutionality or legality of acts within their domestic legal systems.<sup>90</sup>

## 2.2. The modalities of accession

Although the starting point for the negotiations on the accession treaty was to maintain, as far as possible, the Convention as it was in order to preserve the nature of the supervision exercised by the Court, several adjustments proved nonetheless to be necessary to take account of certain specific features associated with the unique nature of the EU and, accordingly, to satisfy the requirements of Protocol No. 8 to the Treaty of Lisbon. Relating respectively to the co-respondent mechanism and to EU participation in the Convention machinery, these adjustments are designed to adapt the Convention to the legal and institutional realities created by EU law. Thanks to these adjustments, the whole Convention system is being modernised, showing itself capable of addressing phenomena that were still unknown at the time it was first drafted. Another means of ensuring coherence will therefore come into effect with the accession of the EU, which will adjust the Convention protection mechanism to contemporary European law. Does the Court not say that the Convention is a living instrument which must be interpreted in the light of present-day conditions?<sup>91</sup> For this to be the case, it is also essential to be able to adapt the Convention mechanisms so that they remain in sync with developments in the European legal architecture. We shall now look at this in closer detail.

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89. See below III. A. The Convention in EU law.

90. The European Convention, Working Group II "Incorporation of the Charter/Accession to the ECHR", working document 19, 20 September 2002, p. 6.

91. See, for example, ECtHR, 23 February 2012, *Hirsi Jamaa and Others v. Italy*, No. 27765/09, paragraph 175.

## a. The co-respondent mechanism

### i. The aim of the mechanism

The introduction of the “co-respondent mechanism” is undoubtedly the most important adjustment to the Convention system in the accession treaty. It is designed to adapt the Convention to this unprecedented situation in today’s Europe which was unknown at the time the Convention was drafted: the existence of a unique international organisation which gives rise to a legal order that is both autonomous and at the same time integrated into the legal systems of its member states. In practice this integration is frequently reflected in a distribution of the functions of adopting and executing applicable rules between the Union and its member states, which in most cases results in member states having to execute an EU legal rule which they themselves have not created, at least not individually. Examples can be found in the *Cantoni*, *Matthews*, *Bosphorus*, *M.S.S.* and *Michaud* cases already dealt with by the Court.<sup>92</sup>

This frequently results in situations of joint or shared responsibility between a member state and the Union, a situation which the Convention was not designed to cater for. To date, the Convention has dealt only with states as respondents, with the result that in the event of a violation of the Convention because of the application by a member state of EU law, the Court has no alternative other than to assign responsibility for this violation exclusively to the respondent member state, even where it simply executed an EU legal rule and where any modification thereof would in principle require the involvement of the Union itself. A problem of this nature was at issue in the *Matthews* case.<sup>93</sup>

Put simply, co-respondent is the status created to enable the *author of the rule at issue* in a given case to take part *as a party* in the proceedings before the Court. The aim is to ensure, if a violation were to be found, the enforceability of the Court’s judgment vis-à-vis the co-respondent and, accordingly, to oblige the latter legally to become involved, within the limit of the co-respondent’s competences, in the execution of the judgment, i.e. by amending the rule held to be the cause of the violation found by the Court.

In this regard, the explanatory report states:

This mechanism was considered necessary to accommodate the specific situation of the EU as a non-State entity with an autonomous legal system that is becoming a Party to the Convention alongside its own member States. It is a special feature of the EU legal system that acts adopted by its institutions may be implemented by its member States and, conversely, that provisions of the EU founding treaties agreed upon by its member States may be implemented

92. See above I.C.1.6. Leading judgments relating to EU law – the *Cantoni*, *Matthews*, *Bosphorus*, *M.S.S.* and *Michaud* judgments.

93. See above I.C.1.6. Leading judgments relating to EU law – the *Matthews* judgment.

by institutions, bodies, offices or agencies of the EU. With the accession of the EU, there could arise the unique situation in the Convention system in which a legal act is enacted by one High Contracting Party and implemented by another.

The newly introduced Article 36, paragraph 4, of the Convention provides that a co-respondent has the status of a party to the case. If the Court finds a violation of the Convention, the co-respondent will be bound by the obligations under Article 46 of the Convention. The co-respondent mechanism is therefore not a procedural privilege for the EU or its member States, but a way to avoid gaps in participation, accountability and enforceability in the Convention system. This corresponds to the very purpose of EU accession and serves the proper administration of justice. (paragraphs 38-39)

The idea of co-respondent, moreover, was not an innovation of the negotiators of the accession treaty. It was first put forward in 2002 by the Council of Europe's Steering Committee for Human Rights,<sup>94</sup> then endorsed by Working Group II of the Convention on the Future of Europe,<sup>95</sup> and then by the Treaty of Lisbon, Protocol No. 8 of which stipulates that the accession agreement must make provision for "the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate". Nonetheless, it was still necessary to draw up and clarify the practicalities of these mechanisms. This was done in the accession treaty.

## ii. The main characteristics of the mechanism

The accession treaty provides that the co-respondent mechanism should be inserted into a new Article 36, paragraph 4, of the Convention, worded as follows:

The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.

This provision stipulates that the co-respondent will be a "party to the case", in other words, a party to the proceedings before the Court. Bearing in mind that this is also the case for the respondent, this raises the question of what distinguishes the co-respondent from the respondent. In practice, the difference will be found primarily at two different levels: first, the examination of the admissibility of the application and second, the judgment itself.

With regard, first of all, to the admissibility of the application, it must be borne in mind that the co-respondent will be party to the proceedings solely in the capacity of *author of the rule at issue* in a given case. Unlike the respondent, the co-respondent will not itself have acted vis-à-vis the applicant, and the latter will therefore not be

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94. See above II.C.6. Preliminary studies.

95. Ibid.

able to claim to be the victim of the alleged violation (Article 34 of the Convention) in respect of the co-respondent. It was therefore logical to provide that the conditions of admissibility to be satisfied by any application – notably victim status, exhaustion of all domestic remedies and compliance with the six-month time limit (Article 35, paragraph 1, of the Convention) – are to be satisfied by the applicant solely in respect of the respondent and not the co-respondent. This is why the last sentence of the new paragraph 4 of Article 36 provides that “[t]he admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings”. On this question, the explanatory report states:

As regards the position of the applicant, the newly introduced Article 36, paragraph 4, of the Convention states that the admissibility of an application shall be assessed without regard to the participation of the co-respondent in the proceedings. This provision thus ensures that an application will not be declared inadmissible as a result of the participation of the co-respondent, notably with regard to the exhaustion of domestic remedies within the meaning of Article 35, paragraph 1, of the Convention. (paragraph 40)

Second, the participation of a co-respondent will have an effect on the conduct of the proceedings, and in particular on the judgment to be delivered by the Court. Generally, when an application is directed against several respondent states, those states participate individually in the proceedings and the Court determines and individualises their respective responsibilities in the judgment. In contrast, Article 3, paragraph 7, of the accession treaty makes provision for a different system where a co-respondent takes part, stipulating that:

[i]f the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.

This joint responsibility is not the result of strategic considerations but of EU law which joins them together in proceedings before the Court in the light of their different but complementary responsibilities, one for the rule and the other for its application. As a result, the Court will examine jointly – and not individually – the responsibility of the respondent and the co-respondent and it is for them, in the event of the finding of a violation, to determine subsequently between themselves the respective responsibilities and competences in order to execute the judgment, including the payment of just satisfaction. In this way, the Court does not itself have to address this issue, which relates to the distribution of competences between the European Union and its member states and which, as such, falls within the exclusive jurisdiction of the CJEU. In this regard, the explanatory report states:

[I]t is a special feature of the EU legal system that acts adopted by its institutions may be implemented by its member States and, conversely, that provisions of the EU founding treaties established by its member States may be implemented by institutions, bodies, offices or agencies of the EU. Therefore, the respondent and the co-respondent(s) are normally held jointly responsible for any

alleged violation in respect of which a High Contracting Party has become a co-respondent. The Court may, however, hold only the respondent or the co-respondent(s) responsible for a given violation on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant. Apportioning responsibility separately to the respondent and the co-respondent(s) on any other basis would entail the risk that the Court would assess the distribution of competences between the EU and its member States. It should also be recalled that the Court in its judgments rules on whether there has been a violation of the Convention and not on the validity of an act of a High Contracting Party or of the legal provisions underlying the act or omission that was the subject of the complaint. (paragraph 62)

### **iii. The situations in which the mechanism may be applied**

The accession treaty makes a distinction between three different situations in which the co-respondent mechanism may be applied. These situations are triggered, respectively, by an application directed against one or more member states of the European Union, by an application directed against the European Union alone, and by an application directed against both the European Union and one or more member states.

The first situation is provided for in Article 3, paragraph 2, which stipulates:

Where an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of European Union law, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union, notably where that violation could have been avoided only by disregarding an obligation under European Union law.

This is no doubt the situation which will be the most frequent, i.e. where an applicant brings a case against a member state for having applied in his or her connection an EU legal provision, which by definition falls outside the exclusive control of the respondent state. One such example is to be found in the *Bosphorus* case, cited above. In such cases, the Union, as the author of the provision in question, could be called upon to be a party to the proceedings as co-respondent. It should, however, be noted that in such cases, the provision at issue could derive from secondary law as much as from primary law, as confirmed in paragraph 48 of the explanatory report.

The second situation concerns an application directed against the European Union alone. On this question, Article 3, paragraph 3, of the accession treaty provides:

Where an application is directed against the European Union, the European Union member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the

Convention or in the protocols to which the European Union has acceded of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments.

This would relate to cases where an EU institution had applied a provision of primary law vis-à-vis an applicant. This would include, for example, individual decisions taken by the European Commission or the CJEU with regard to private persons or undertakings on the basis of treaty provisions. In the event of a violation of the Convention resulting directly from the provision applied, the latter could not be modified by the Union, only by all member states, in their capacity as principal parties to the treaties. It is therefore for the member states to participate in proceedings as co-respondents. In referring to “the” member states, Article 3, paragraph 3, refers to all of them. In practice, however, there is nothing to prevent them from delegating one of their number to represent them all in the proceedings before the Court, as has already been the case in the past in different circumstances. It also follows, therefore, that every time that an EU institution has acted on the basis of a provision of secondary law, there would be no need to apply the co-respondent mechanism since in such cases, the Union itself would have the authority to modify the provision in question.

Lastly, the third situation is one in which the application is directed against both the Union and one or more member states. This is referred to in Article 3, paragraph 4, of the accession treaty, which states:

Where an application is directed against and notified to both the European Union and one or more of its member States, the status of any respondent may be changed to that of a co-respondent if the conditions in paragraph 2 or paragraph 3 of this article are met.

In this regard, the explanatory report has the following to say:

Where an application is directed against both the EU and an EU member State, the mechanism would also be applied if the EU or the member State was not the party that acted or omitted to act in respect of the applicant, but was instead the party that provided the legal basis for that act or omission. In this case, the co-respondent mechanism would allow the application not to be declared inadmissible in respect of that party on the basis that it is incompatible *ratione personae*. (paragraph 43)

In other words, in this case it would be a matter of verifying, in the light of the facts at issue, whether in actual fact this equated to one of the two previous situations, where either a member state had acted and the Union was merely the author of the impugned provision, or the opposite. In both cases, co-respondent status would need to be given to the author of the norm. In contrast, if an applicant is mistaken and directs the application *only* against a potential co-respondent, without at the same time directing it against the respondent that has acted in respect of him or her and in relation to which he or she has victim status, the application would have to be declared inadmissible as the Court does not have the authority to extend, of its own motion, an application against respondents not mentioned therein.

#### iv. The conditions under which the mechanism may be applied

Article 3, paragraphs 2 and 3, of the accession treaty contain an important stipulation: for the co-respondent mechanism to come into play, the alleged violation must call into question the *compatibility* of the provision that has been applied with the Convention rights which it is claimed have been infringed. It is only when a provision, as such, is incompatible with the Convention that there will be a need to abrogate or amend it in order to execute the Court judgment, which in such cases must be a finding of a violation. Hence, it is only in these situations that it will be necessary to legally ensure the participation of the author of the provision at issue, making the latter a co-respondent in the proceedings and bound by the judgment. According to the accession treaty, the compatibility of an EU legal provision will be at issue particularly where the respondent could have avoided a violation of the Convention only by disregarding an obligation under primary or secondary EU law. In order to summon a co-respondent to the proceedings, it is therefore not sufficient that the respondent had applied EU law. It requires in addition that the Union had *obliged* the respondent to act as it did in respect of the applicant. In this connection, the explanatory report states:

In the case of applications notified to one or more member States of the EU, but not to the EU itself (paragraph 2), the test is fulfilled if it appears that the alleged violation notified by the Court calls into question the compatibility of a provision of (primary or secondary) EU law, including decisions taken under the TEU and the TFEU, with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded. This would be the case, for instance, if an alleged violation could only have been avoided by a member State disregarding an obligation under EU law (for example, when an EU law provision leaves no discretion to a member State as to its implementation at the national level).

In the case of applications notified to the EU, but not to one or more of its member States (paragraph 3), the EU member States may become co-respondents if it appears that the alleged violation as notified by the Court calls into question the compatibility of a provision of the primary law of the EU with the Convention rights at issue. (paragraphs 48-49)

The explanatory report adds: “The fact that the alleged violation may arise from a positive obligation deriving from the Convention would not affect the application of these tests” (paragraph 47). This is a helpful clarification in the light of the growing magnitude of the Court’s case law with regard to positive obligations, which in certain circumstances oblige states to act so as to enable individuals to enjoy in practice their rights under the Convention. In the context of accession, this clarification in the explanatory report means that failure to act on the part of a member state or the Union could also derive directly from primary or secondary EU law, justifying recourse to the co-respondent mechanism.

##### ■ Positive obligations

In line with now established Court case law, respect in practice for the rights enshrined in the Convention may require a state not only to refrain from any interference in the enjoyment of those rights, but also to take practical action to

protect or facilitate such enjoyment. Thus, in addition to the so-called “negative” obligations incumbent on states, there are also “positive” obligations. There may be various forms of action which these obligations require states to take. At times, the state will have to criminalise acts which interfere with the private life of individuals, in order to protect their private sphere (ECtHR, 26 March 1985, *X. and Y. v. The Netherlands*, No. 8978/80). At others, states will have to take all necessary precautions to protect the population against certain dangers, such as atmospheric pollution (ECtHR, 9 December 1994, *López Ostra v. Spain*, No. 16798/90) or risks of explosion (ECtHR, 30 November 2004, *Öneryildiz v. Turkey*, No. 48939/99); and at yet others carry out an appropriate and effective investigation in order to identify and punish those responsible for conduct prohibited under Articles 2 and 3 of the Convention (ECtHR, 19 February 1998, *Kaya v. Turkey*, No. 22729/93). These are just a few typical examples of constantly evolving case law.

However, on the basis of this compatibility criterion which, all in all, is fairly restrictive, it is to be expected that the number of cases requiring the application of this co-respondent mechanism will be very small in practice. Examples of cases which would come under Article 3, paragraphs 2 and 3, of the accession treaty are the *Bosphorus* and *Matthews* cases, respectively,<sup>96</sup> since in neither of these cases did the respondent state have any margin for manoeuvre in the application of EU law. In all other types of cases involving EU law, participation of the Union in the proceedings before the Court will have to be done through a third party intervention. On this subject, the explanatory report states:

The co-respondent mechanism differs from third party interventions under Article 36, paragraph 2, of the Convention. The latter only gives the third party (be it a High Contracting Party to the Convention or, for example, another subject of international law or a non-governmental organisation) the opportunity to submit written comments and participate in the hearing in a case before the Court, but it does not become a party to the case and is not bound by the judgment. A co-respondent becomes, on the contrary, a full party to the case and will therefore be bound by the judgment. The introduction of the co-respondent mechanism should thus not be seen as precluding the EU from participating in the proceedings as a third party intervener, where the conditions for becoming a co-respondent are not met.

It is understood that a third party intervention may often be the most appropriate way to involve the EU in a case. (paragraphs 45-46)

It might legitimately be asked whether it would have been expedient to extend the scope of the co-respondent mechanism beyond what was strictly necessary, i.e. situations raising problems of compatibility between EU law and the Convention. However, it should be borne in mind that this restrictive approach was prompted, as explained above, by the wish to maintain as far as possible the architecture and mechanisms of the Convention, limiting the exceptions to a minimum. Furthermore, at their hearings by the negotiators of the accession treaty, several non-governmental organisations were emphatic that the co-respondent mechanism should have a limited scope so as to restrict the number of cases in which an applicant was faced with two respondents rather than just one.

96. See above I.C.1.6. Leading judgments relating to EU law – the *Bosphorus* and *Matthews* judgments.



Accordingly, there is no doubt that even after the accession of the European Union, third party intervention will remain a valuable procedural instrument, especially whenever the handling of a case requires awareness of the authoritative interpretation of an EU legal provision, without, however, it raising a problem of compatibility which would open the door for the possibility of the participation of the EU as co-respondent. By way of example, reference may be made here to Articles 8, 9, 10 and 11 of the Convention, the application of which always presupposes verification that any interference was “prescribed by law”. It is also true, however, that insofar as there will be an authoritative interpretation because it has already been provided by the CJEU in a previous case, the parties to the proceedings – and in particular the respondent state, by definition a member of the EU – can also provide it.

Lastly, third party intervention will be the only way in which the EU can take part in proceedings in cases directed against a state which is not a member of the EU but which is linked with a part of the EU legal order through a separate international agreement (for example the Schengen or Dublin Agreements, or the Agreement on the European Economic Area), when the case concerns obligations arising from such agreements (explanatory report, paragraph 46).

## **v. The procedure**

With regard to the procedure to be followed for the attribution of co-respondent status, Article 3, paragraph 5, of the accession treaty provides that:

A High Contracting Party shall become a co-respondent either by accepting an invitation from the Court or by decision of the Court upon the request of that High Contracting Party. When inviting a High Contracting Party to become co-respondent, and when deciding upon a request to that effect, the Court shall seek the views of all parties to the proceedings. When deciding upon such a request, the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met.

Consequently, the Court has exclusive authority to assign co-respondent status, but it may do so only on request from a Contracting Party or following acceptance by the latter of an invitation from the Court to that effect. The Court may not therefore impose this status, nor may it oblige any Contracting Party not specified in an application to become a respondent in proceedings.

Whether there is an invitation from the Court or a request from a Contracting Party, in both cases the examination by the Court will be limited to verification of “plausibility”, i.e. verification to see whether the legal conditions for attribution of co-respondent status have been fulfilled *prima facie*, in other words, whether there would appear, at first sight, to be a problem of compatibility between EU law and the Convention. It is a question here of ensuring that the Court, in carrying out this examination, does not rule, even indirectly, on matters relating to the interpretation of EU law.

At the same time, authorising the Court to invite the Contracting Party it believes likely to become a co-respondent in the proceedings solves, at least in part, the problem that might arise if the Contracting Party took no action. However, it is planned that the EU will adopt internal rules<sup>97</sup> which will ensure that whenever the conditions for assigning co-respondent status have been fulfilled, the Contracting Party or Parties concerned will submit a request to this effect to the Court (see paragraph 21 of the explanatory report).

In any event, it must be borne in mind that at the early stages of the proceedings when the question of the participation of a co-respondent will be raised, there will not, at that time, be any certainty over the outcome of the proceedings or over the consequences in terms of execution of the judgment. Any decision on the expediency or indeed the necessity of intervening as co-respondent will of course therefore be a subject of greater or lesser speculation, depending on the case. In such circumstances, what is important is undoubtedly that Contracting Parties should opt to become involved rather than refrain. It would, in effect, be easier to withdraw co-respondent status prematurely than to assign it “retroactively”. As the explanatory report states:

The Court may, at any stage of the proceedings, decide to terminate the participation of the co-respondent, particularly if it should receive a joint representation by the respondent and the co-respondent that the criteria for becoming a co-respondent are not (or no longer) met. In the absence of any such decision, the respondent and the co-respondent continue to participate jointly in the case until the proceedings end. (paragraph 59)

With regard to the procedure for conferring co-respondent status, the explanatory report provides the following clarifications:

The co-respondent mechanism will not alter the current practice under which the Court makes a preliminary assessment of an application, with the result that many manifestly ill-founded or otherwise inadmissible applications are not communicated. Therefore, the co-respondent mechanism should only be applied to cases which have been notified to a High Contracting Party. Article 3, paragraph 5, of the Accession Agreement outlines the procedure and the conditions for applying the co-respondent mechanism, whereby a High Contracting Party becomes a co-respondent either by accepting an invitation by the Court or by decision of the Court upon the request of that High Contracting Party. The following paragraphs are understood as merely illustrating this provision. For those cases selected by the Court for notification, the procedure initially follows the information indicated by the applicant in the application form.

*A. Applications directed against one or more member States of the European Union, but not against the European Union itself (or vice versa)*

In cases in which the application is directed against one (or more) member State(s) of the EU, but not against the EU itself, the latter may, if it considers that the criteria set out in Article 3, paragraph 2, of the Accession Agreement are

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<sup>97</sup>. See above II.C.3. The mandate from the EU Council.

fulfilled, request to join the proceedings as co-respondent. Where the application is directed against the EU, but not against one (or more) of its member States, the EU member States may, if they consider that the criteria set out in Article 3, paragraph 3, of the Accession Agreement are fulfilled, request to join the proceedings as co-respondents. Any such request should be reasoned. In order to enable the potential co-respondent to make such requests, it is important that the relevant information on applications, including the date of their notification to the respondent, is rapidly made public. The Court's system of publication of communicated cases should ensure the dissemination of such information.

Moreover, the Court may, when notifying an alleged violation or at a later stage of the proceedings, invite a High Contracting Party to participate in the proceedings as a co-respondent if it considers that the criteria set out in Article 3, paragraphs 2 or 3, as appropriate, are met. In such case, the acceptance of the invitation by that High Contracting Party would be a necessary condition for the latter to become co-respondent. No High Contracting Party may be compelled to become a co-respondent. This reflects the fact that the initial application was not addressed against the potential co-respondent, and that no High Contracting Party can be forced to become a party to a case where it was not named in the original application.

The Court will inform both the applicant and the respondent about the invitation or the request, and set a short time limit for comments.

In the event of a request to join the proceedings as a co-respondent made by a High Contracting Party, the Court will decide, having considered the reasons stated in its request as well as any submissions by the applicant and the respondent, whether to admit the co-respondent to the proceedings, and will inform the requester and the parties to the case of its decision. When taking such a decision, the Court will limit itself to assessing whether the reasons stated by the High Contracting Party (or Parties) making the request are plausible in the light of the criteria set out in Article 3, paragraphs 2 or 3, as appropriate, without prejudice to its assessment of the merits of the case. The decision of the Court to join a High Contracting Party to a case as a co-respondent may include specific conditions (for example, the provision of legal aid in order to protect the interest of the applicant) if considered necessary in the interests of the proper administration of justice.

#### *B. Applications directed against both the EU and one or more of its member States*

In a case which has been directed against and notified to both the EU and one or more of its member States in respect of at least one alleged violation, either of these respondents may, if it considers that the conditions relating to the nature of the alleged violation set out in Article 3, paragraphs 2 or 3, are met, ask the Court to change its status to that of co-respondent. As in the case described under A above, the Court may invite a respondent to change its status, but the acceptance by the concerned respondent would be a necessary condition for such a change. The High Contracting Party (or Parties) becoming co-respondent(s) would be the Party (or Parties) which is (or are) not responsible for the act or omission which allegedly caused the violation, but only for the legal basis of such an act or omission.

The Court will inform both the applicant and the other respondent about the invitation or the request, and set a short time limit for comments.

In the event of a request for a change of status made by a respondent, the Court will decide whether to make the change of status, having considered the reasons stated in the request, as well as any submissions by the applicant and the other respondent. The Court will inform the parties to the case of its decision. When taking such a decision, the Court will limit itself to assessing whether the reasons stated by the High Contracting Party (or Parties) making the request are plausible in the light of the criteria set out in Article 3, paragraph 2 or 3, as appropriate, of the Accession Agreement, without prejudice to its assessment of the merits of the case. (paragraphs 51 to 58)

## ***b. The prior involvement of the CJEU***

### **i. The aim of prior involvement**

As indicated above, the Convention protection system is subsidiary in nature. In line with this, on a procedural level, before submitting their applications to the Court, applicants must have exhausted all domestic remedies within the meaning of Article 35, paragraph 1, of the Convention, failing which the application will be declared inadmissible. This enables the domestic courts themselves, before any action is taken by the Court, to verify whether the impugned act complies with the Convention, providing applicants with the opportunity to obtain satisfaction more speedily than if they had to turn to Strasbourg. Where applicants do not obtain satisfaction before the domestic courts, the Court will then in any event rule in the light of the interpretation of domestic law given by those courts, which is essential for the credibility and authority of the Court's judgments.

Following EU accession, the same will apply, *mutatis mutandis*, in respect of any dispute *on the merits* between an individual and the European Union. If that individual has the possibility of a direct appeal to the CJEU (on the basis, for example, of Article 263, paragraph 4, of the TFEU), that remedy must be exhausted before applying to the Court, and that remedy will ensure that the Court has at its disposal the CJEU's interpretation of EU law. The situation is, however, different where the CJEU gives a preliminary ruling. The decision to request a preliminary ruling from the CJEU is one for the national courts alone to take, which must examine whether the conditions set out in Article 267 of the TFEU have been met. Clearly, a party to the dispute may submit a request to that effect to the national courts, but has no control over this remedy. Furthermore, the preliminary ruling delivered by the CJEU is binding on the national courts, not the parties to the dispute. This is why a reference for a preliminary ruling is not regarded as a remedy to be exhausted by an applicant within the meaning of Article 35, paragraph 1, of the Convention (explanatory report, paragraph 65).

However, as the CJEU indicated in its discussion document, it may happen that the national courts do not request a preliminary ruling from the CJEU, which in itself does not entail a violation of Article 6 of the Convention, unless the refusal to do so proves to be arbitrary.<sup>98</sup> If, in such cases, the matter was subsequently brought before

98. ECtHR, 20 September 2011, *Ullens de Schooten and Rezabek v. Belgium*, Nos. 3989/07 and 38353/07.

the Court, the latter would have to rule without the CJEU, the supreme court of the EU, having had the opportunity to do so beforehand. The Court would therefore be required to rule without any authoritative indication of the correct interpretation and/or application of the provisions of EU law in question. In other words, in cases where the CJEU has competence to give preliminary rulings, the rule that all domestic remedies must be exhausted is powerless to ensure the subsidiary nature of the Court's action as the decision to refer a question to the CJEU belongs not to the applicant but exclusively to the national courts. It is to redress this shortcoming and ensure the subsidiary nature of the Court's action in such cases that the accession treaty provides for a mechanism enabling the CJEU to intervene before the case is dealt with by the Court. This "prior" involvement is consequently also a form of "remedial" involvement.<sup>99</sup>

## ii. The practicalities of prior involvement

The principle of CJEU involvement is laid down in Article 3, paragraph 6, of the accession treaty, which provides:

In proceedings to which the European Union is a co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of the provision of European Union law as under paragraph 2 of this article, sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court.

With regard to the practicalities of prior involvement, the explanatory report states:

Even though this situation is expected to arise rarely, it was considered desirable that an internal EU procedure be put in place to ensure that the CJEU has the opportunity to assess the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of the provision of EU law which has triggered the participation of the EU as a co-respondent. Assessing the compatibility with the Convention shall mean to rule on the validity of a legal provision contained in acts of the EU institutions, bodies, offices or agencies, or on the interpretation of a provision of the TEU, the TFEU or of any other provision having the same legal value pursuant to those instruments. Such assessment should take place before the Court decides on the merits of the application. This procedure, which is inspired by the principle of subsidiarity, only applies in cases in which the EU has the status of a co-respondent. It is understood that the parties involved – including the applicant,

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<sup>99</sup> On this subject, see Pascal Dourneau-Josette, "La nécessité d'une redéfinition de la condition d'épuisement des voies de recours internes?" in Caroline Picheral and Laurent Coutron (eds.), *Charte des droits fondamentaux de l'Union européenne et Convention européenne des droits de l'homme*, Bruylant, Brussels, 2012, p. 133.

who will be given the possibility to obtain legal aid – will have the opportunity to make observations in the procedure before the CJEU.

The CJEU will not assess the act or omission complained of by the applicant, but the EU legal basis for it.

The prior involvement of the CJEU will not affect the powers and jurisdiction of the Court. The assessment of the CJEU will not bind the Court.

The examination of the merits of the application by the Court should not resume before the parties and any third party interveners have had the opportunity to assess properly the consequences of the ruling of the CJEU. In order not to delay unduly the proceedings before the Court, the EU shall ensure that the ruling is delivered quickly. In this regard, it is noted that an accelerated procedure before the CJEU already exists and that the CJEU has been able to give rulings under that procedure within six to eight months. (paragraphs 66 to 69)

It will be noted that the accession treaty provides for the possibility of prior CJEU involvement only in cases in which the EU is a co-respondent (Article 3, paragraph 6), which restricts significantly the potential scope of such involvement. Accordingly, the only question on which the CJEU could be called upon under this mechanism is the very one which would justify the EU's involvement as a co-respondent, namely that concerning the *compatibility* of an EU legal provision with the Convention, bearing in mind that this concept will cover both the *validity* of a secondary law provision and the *interpretation* of a primary law provision. The involvement of the CJEU, therefore, will not be intended to compensate for *all* failures by the domestic courts to refer a question for preliminary ruling, which may, as far as secondary law is concerned, relate both to the validity and the interpretation thereof (see Article 267 of the TFEU).

By modelling the scope of CJEU prior involvement on the somewhat restricted scope of Article 3, paragraph 2, of the draft accession treaty, the authors sought, here too, to limit as far as possible the exceptions to the principles governing the Convention system and deviations from the normal course of proceedings before the Court. However, it would be wrong to infer that the absence of a referral to the CJEU to *interpret* a secondary law rule would invariably be without consequences in proceedings before the Court. In point of fact, the Court is regularly asked to deal with applications challenging EU law and which, as such, require the availability of the authoritative interpretation of the rules in question, without this raising a problem of compatibility necessitating the intervention of a co-respondent. The *M.S.S. v. Belgium and Greece* case provides a recent example. Accordingly, there is no doubt that even with the possibility of the prior involvement of the CJEU, the referral of a question for a preliminary ruling provided for in Article 267 of the TFEU remains the principal way of ensuring both the autonomous interpretation of EU law, respect for the interpretive monopoly of the CJEU and the subsidiary nature of the Convention mechanism vis-à-vis the Union. It is therefore to be hoped that the national courts will comply scrupulously with Article 267 of the TFEU, and especially following EU accession to the Convention.

The precise form of the mechanism is not specified in the accession treaty and is still under discussion in the European Union. This is a purely internal matter for the EU insofar as the procedures envisaged will take place outside the Convention system. Furthermore, as is stipulated in Article 3, paragraph 6, ultimately the powers of the Court will not be affected. The only procedural consequence as far as the Convention is concerned will be the obligation placed on the Court to afford sufficient time, first to the CJEU to assess the compatibility of the rule in question, and then to the parties to formulate their observations in the light of the CJEU's conclusions. Depending on those conclusions and their consequences for the domestic law of the respondent member state, a number of possible situations could arise. If the CJEU concludes that the rule is incompatible with the fundamental rights protected by EU law, which will comprise those of the Convention, the EU could offer the applicant party a friendly settlement (Article 39 of the Convention) or make a unilateral declaration (Rule 62A of the Rules of Court). Where such is not the case, the procedure in Strasbourg will follow its course and in so doing, the Court will not be bound by the conclusions of the CJEU.

### ***c. EU participation in the Convention machinery***

Once it has acceded, the EU will take part in the Convention machinery on an equal footing with the other Contracting Parties. There are three different levels to this participation: the procedure for the election of judges by the Parliamentary Assembly of the Council of Europe, the participation of the judge elected in respect of the European Union in the work of the Court, and the participation of the EU in the Committee of Ministers of the Council of Europe.

As will be seen below, for each of these levels, the proposed solutions in the accession treaty seek to reconcile both the architecture and philosophy of the Convention protection system, including the principle of equality between Contracting Parties, with the requirement, enshrined in Protocol No. 8 to the Treaty of Lisbon, that due account be taken of the specific characteristics of EU law.

#### **i. Participation in the election of judges**

Article 22 of the Convention provides that the judges of the Court shall be elected, with respect to each Contracting Party, by the Parliamentary Assembly of the Council of Europe. EU participation in this election procedure is regulated by Article 6 of the accession treaty, paragraph 1 of which provides that a delegation of the European Parliament shall be entitled to participate, with the right to vote, in the sittings of the Parliamentary Assembly of the Council of Europe whenever the Assembly exercises its functions relating to the election of judges in accordance with Article 22 of the Convention. The delegation of the European Parliament shall have the same number of representatives as the delegation of the state which is entitled to the highest number of representatives under Article 26 of the Statute of the Council of Europe. Paragraph 2 provides that the modalities of the participation of representatives of the European Parliament in the sittings of the Parliamentary Assembly of the Council of Europe and its relevant bodies shall be defined by the Parliamentary Assembly of the Council of Europe, in co-operation with the European Parliament. Internal EU

rules will define the modalities for the selection of the list of candidates in respect of the EU (explanatory report, paragraph 76).

To this end, a joint informal body was set up by the Parliamentary Assembly and the European Parliament. On 15 June 2011, following a meeting of this body held in Paris, its co-chairs, Christos Pourgourides, Chair of the Parliamentary Assembly's Committee on Legal Affairs and Human Rights, and Carlo Casini, Chair of the European Parliament's Committee on Constitutional Affairs, issued the following statement:

There was agreement that, following accession of the European Union to the European Convention on Human Rights, the European Parliament will be entitled to participate in the sittings of the Parliamentary Assembly of the Council of Europe and its relevant bodies when the latter exercises its functions related to the election of judges to the European Court of Human Rights, under Article 22 of the Convention.

There was further agreement that a European Parliament delegation, of a size equal to that of the biggest national parliamentary delegations, will participate in the election of judges by the Parliamentary Assembly. In particular, agreement has been reached as to the manner in which representatives of the European Parliament will take part and vote within the Assembly's different bodies in the election process.

These arrangements must now be approved by the Parliamentary Assembly and the European Parliament, in accordance with their respective procedures.

The practical arrangements for the European Parliament's participation in the Parliamentary Assembly's bodies are set out in the synopsis of the meeting held on 15 June 2011.<sup>100</sup>

## ii. The judge in respect of the European Union

The explanatory report states that the judge elected in respect of the European Union "shall participate equally with the other judges in the work of the Court and have the same status and duties" (paragraph 77). Given that the position of this judge within the Court will be the same as that of his or her colleagues elected in respect of the Contracting Parties, there is no need to amend the Convention to arrange for this to be the case.

In practice, this means that the judge elected in respect of the European Union will, like his or her colleagues, have a "general" competence which will be unaffected by the fact that the Union's competences are limited. Consequently, he or she will be able to sit as judge in all cases, including those having no link with EU law. In short, he or she will not be a judge whose jurisdiction is limited to EU law. Conversely, judges elected in respect of EU non-member states can already sit as judges in cases involving EU law.

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100. AS/Bur/AH EP PACE (2011) 04, 17 June 2011. See also Andrew Drzemczewski, "Election of EU Judge onto the Strasbourg Court", in Vicky Kosta, Nikos Skoutaris and Vassilis Tzevelekos (eds.), *The EU Accession to the ECHR*, Oxford, 2014, p. 65.



The question of the competences of the judge in respect of the EU had been raised in the work leading to the adoption of the 2002 study.<sup>101</sup> Four different options had been proposed: (i) no judge in respect of the EU; (ii) the appointment of an EU judge on an ad hoc basis; (iii) a full-time EU judge with participation limited to cases involving EU law; and, lastly, (iv) an EU judge having equal status to his or her colleagues.

In its report (paragraph 67), the CDDH states:

This principle of one judge in respect of each Contracting Party is based on the following main considerations and advantages: representation of each legal system in the Court; expertise on each legal system in the Court, participation of each Contracting Party in the system of collective enforcement set up by the Convention which entail[s] duties but also certain prerogatives; it contributes to the legitimacy of the decisions taken by the Court.

Regarding the judge elected in respect of the EU, the CDDH continues (paragraphs 73-74):

Most arguments could be made for a fourth option, which would be the presence of a full-time EC/EU judge participating on an equal footing with other judges. This solution would fully meet the main considerations mentioned ... above, and be most in line with the spirit of the Convention system. Judges do not "represent" any country or area: they are impartial and independent. Providing for special rules in the Convention in respect of the EC/EU judge might carry with it the unfortunate suggestion that that judge might be less impartial and independent. It is true that this solution would not reflect the features that distinguish the EC/EU from States Parties to the Convention, notably its more limited competence. However, as stated above, some of the current Parties to the Convention (the EU member States) no longer possess full competence in matters governed by the Convention. Making a distinction between the EC/EU judge and the other judges based on the limited and attributed competence of the EC would be problematic also because the division of competence between the EC/EU and its member States is constantly evolving.

It could be considered that, ultimately, the manner in which the Court would organise the participation of judges, including that of an EC/EU judge, in its judicial decision-making is a matter that is more appropriately left to the Court itself. The same would apply to the question of whether a "special chamber" should be set up within the Court in order to deal with cases against the EC/EU or involving EC/EU law. However, it should be noted that a chamber composed exclusively of judges elected in respect of the EC/EU and its member States would run counter to the philosophy of the Convention system.

It should be added that the application of the co-respondent mechanism will under normal circumstances entail the presence of two "national judges" (Article 26, paragraph 4 of the Convention) in the Chamber dealing with the case, which would not be an innovation in the functioning of the Court, since this is already the case where there are several respondent states and in inter-state cases. Where the EU is a co-respondent (Article 3, paragraph 2, of the accession treaty), these judges

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101. See above II.C.6. Preliminary studies.

would be the EU judge and the judge of the respondent member state. Where the EU member states as a whole are co-respondents (Article 3, paragraph 3, of the accession treaty), a “common-interest judge” (Rule 30 of the Rules of Court) could sit on behalf of all member states, alongside the EU judge.

### **iii. Participation in the Committee of Ministers of the Council of Europe**

The Committee of Ministers of the Council of Europe has a number of roles in the Convention system. The most important is undoubtedly the role it fulfils as the body responsible for overseeing the execution of the Court’s judgments (Article 46, paragraphs 2 to 5, of the Convention) and the friendly settlements reached under the Convention (Article 39, paragraph 4). In addition, the Committee of Ministers may, under certain conditions, reduce the number of judges of the Chambers (Article 26, paragraph 2) and request an advisory opinion from the Court (Article 47). In accordance with its general powers as the decision-making body of the Council of Europe, the Committee of Ministers may (Article 15 of the Statute of the Council of Europe) also adopt and open for signature by member states protocols which amend or supplement the Convention. Furthermore, it may adopt other legal texts and instruments – recommendations, resolutions or declarations, as the case may be – directly related to the functioning of the Convention and addressed to States Parties, the Court or, where appropriate, other relevant bodies.

In application of the principle of equality between Contracting Parties, the EU will be entitled to participate, with the right to vote, in the meetings of the Committee of Ministers when the latter takes decisions in the above matters. This is provided for in Article 7, paragraph 2, of the accession treaty. However, a problem could arise insofar as the European Union and its member states may be obliged under EU law to express positions and vote in a co-ordinated manner. This will be the case in particular with regard to the supervision of the execution of judgments and friendly settlements (Articles 39 and 46 of the Convention), whenever the Committee of Ministers is required to assess EU compliance with its obligations, either individually or jointly with one or more member states. In such cases, the EU and its members would express a common position and vote in the same way. Bearing in mind, however, that the European Union today has 28 member states and the Council of Europe 47, the fact that out of a total of 48 votes (member states + European Union), 29 votes could be cast as block votes particularly when assessing the conduct of the Union, this could upset the balance of procedures within the Committee of Ministers, a prime feature of which is individualised voting.

It is true, as the explanatory report (paragraph 83) points out, that the established practice of the Committee of Ministers is to adopt its decisions by consensus, with formal votes only being taken in exceptional cases. Nonetheless, it was necessary for the authors of the accession treaty to provide a response to the legitimate concern of those states which are not members of the EU to avoid a situation in which a co-ordinated vote by the Union and its members in the Committee of Ministers could have a paralysing effect on the latter’s supervision vis-à-vis the EU. In addition

to constituting a break with the principle of equality which underlies the Convention, it would give rise to a serious malfunction of the system with regard to the execution of judgments. It is with this in mind that the first sentence of Article 7, paragraph 4, of the accession treaty provides:

The exercise of the right to vote by the European Union and its member States shall not prejudice the effective exercise by the Committee of Ministers of its supervisory functions under Articles 39 and 46 of the Convention.

In practice, this “effective exercise” will be preserved by means of special voting rules to be added, as Rule 18, to the Rules of the Committee of Ministers with regard to supervision of the execution of judgments and the terms of friendly settlements. These special rules will apply solely to cases in which the EU is a party, either singly or together with one or more member states. They do not form part of the accession treaty but will be submitted to the Committee of Ministers for adoption. They may therefore be amended if necessary at a later stage by the Committee itself, with the consensus of all the High Contracting Parties (explanatory report, paragraph 90).

Because of their complexity, it would be inappropriate to describe in detail here the provisions contained in draft Rule 18 which are appended to the accession treaty. This complexity derives from the fact that they are the result of a compromise reached following tough negotiations between the EU and non-member states of the Union. Suffice it to note here that their rationale is to provide for so-called hyper-majorities and hyper-minorities – depending on whether the decision at issue is favourable to the EU or not – thus preserving the impact of the vote of non-member states in relation to the total number of votes expressed.

By way of example, if there is a vote, the adoption of a final resolution finding that the European Union has fully executed a judgment against it will require a four-fifths majority of the representatives taking part in the vote and a two-thirds majority of those entitled to sit on the Committee of Ministers (as opposed to a two-thirds majority and half, respectively, in the general regime set out in Article 20.d of the Statute of the Council of Europe). In a system with 48 Contracting Parties, that means that at least 32 votes will be required for the resolution to be adopted, but depending on the number of members taking part the number of votes required could vary between 32 and 39. However, the practical relevance of all these considerations remains relative since, even after accession, voting in the Committee of Ministers will continue to be the exception, in accordance with the principle of retaining as far as possible the philosophy and mechanisms of the Convention in the context of accession by the European Union.

## Chapter III

# Effects of accession

**W**e shall now look at the effects of accession by the EU on the legal orders involved, that of the Convention and that of the European Union. These effects will relate to the position of the Convention in EU law, the cases brought before the Court, the presumption of equivalence and legal harmony between the Convention and EU law.

### A. The Convention in EU law

It should first of all be noted that the question of the position of the Convention in EU law is one entirely for EU law itself to clarify. As such, the Convention does not claim any particular position in the domestic legal order of Contracting Parties, or any precise ranking in the hierarchy of their norms. Nor does it demand to be incorporated into the domestic legal order of Contracting Parties, even though, as the Court has already pointed out,<sup>102</sup> the fact that the Convention is an integral part of domestic law considerably facilitates its application and, therefore, its effectiveness, since it enables the national courts to apply it directly. This is what has prompted states, over the years, to incorporate the Convention into their domestic legal order, with the result that today it is an integral part of the domestic law of each Contracting Party.

With the entry into force of the accession treaty, it will also be the case for the EU, by virtue of Article 216, paragraph 2, of the TFEU. However, given the complexity of the question of the hierarchy of norms in EU law, it would be wrong here to engage in conjecture about the precise position of the Convention in that hierarchy, particularly since, as already stated, the position of the Convention in the domestic legal order of a Contracting Party is of minor importance from the point of view of the Convention, as this position falls within the means for which each Contracting Party has freedom of choice. The Convention places on Contracting Parties obligations of result and not obligations of means, which leaves them free to choose the means they intend to employ, provided that this results in the desired outcome, namely full compliance with the Convention and the case law of the Court.<sup>103</sup> In other words, each Contracting Party is free to assign to the Convention the status it believes is the most appropriate to ensure its effectiveness, without being bound by the choices made by other Contracting Parties. For example, a minority of states have attributed constitutional status to the Convention.

102. ECtHR, 29 March 2006, *Scordino v. Italy* (No. 1), No. 36813/97, paragraph 191.

103. See, for example, ECtHR, 7 February 2013, *Fabris v. France*, No. 16574/08.

Conversely, the fact that the Convention occupies a status below the constitution in a given legal order is no barrier to the fact that enforcement of a Court judgment might require a change of a constitutional nature to legislation or case law, as was the case, for example, in the *Paksas v. Lithuania* case. This is a consequence of the rule whereby it is with respect to their jurisdiction as a whole, within the meaning of Article 1 of the Convention, that Contracting Parties are called upon to show compliance with the Convention. The type of rule or measure at issue, even if constitutional, is unimportant. Once a Contracting Party has acceded to the Convention, its whole legal order, without exception, is subject to the Convention and the assessment of the Court, without prejudice, however, to the application of Article 57 concerning reservations. Nonetheless this does not confer constitutional status on the Convention in the legal order concerned.

■ ECtHR, 6 January 2011, *Paksas v. Lithuania*, No. 34932/04

The applicant had been elected President of the Republic of Lithuania on 5 January 2003. Following impeachment proceedings against him, he was removed from office on 6 April 2004 by the Seimas (the Lithuanian Parliament) for committing a gross violation of the constitution and breaching the constitutional oath. The Constitutional Court found that, while in office as President, the applicant had, unlawfully and for his own personal ends, granted Lithuanian citizenship to a Russian businessman, disclosed a state secret to the latter by informing him that he was under investigation by the secret services, and exploited his own status to exert undue influence on a private company for the benefit of close acquaintances. On 22 April 2004 the Central Electoral Committee (CEC) found that there was nothing to prevent the applicant from standing in the presidential election called as a result of his removal from office. However, on 4 May 2004 the Seimas amended the Presidential Elections Act by inserting a provision to the effect that a person who had been removed from office in impeachment proceedings could not be elected President until a period of five years had expired (as a result of which the CEC ultimately refused to register the applicant as a candidate). The matter was referred by members of parliament to the Constitutional Court, which ruled on 25 May 2004 that such a disqualification was compatible with the constitution, but that subjecting it to a time limit was unconstitutional. On 15 July 2004 the Seimas passed an amendment to the Seimas Elections Act, to the effect that anyone who had been removed from office following impeachment proceedings was disqualified from being a member of parliament.

In its judgment, the Court held that the restrictions imposed on the applicant depriving him of any possibility of running as a parliamentary candidate were excessive and therefore violated Article 3 of the Protocol to the Convention. While not wishing either to underplay the seriousness of the applicant's alleged conduct in relation to his constitutional obligations or to question the principle of his removal from office as President, the interference had, in the Court's view, extensive consequences, barring the applicant not only from being a member of parliament but also from holding any other office for which it was necessary to take an oath in accordance with the constitution. In assessing the proportionality of such a measure, decisive weight should be attached to the existence of a time limit and the possibility of reviewing the measure in question. However, in this case, not only was the restriction in question not subject to any time limit, but the rule on which it was based was also set in

constitutional stone, with the result that the applicant's disqualification from standing for election carried a connotation of immutability that was hard to reconcile with Article 3 of Protocol No. 1.

The fact that there may be no domestic remedies, or that they are ineffective, does not preclude application of this rule; the Court has already ruled that in such a situation, the fact that no domestic court has jurisdiction or is available to deal with a dispute concerning compliance with the Convention did not prevent it from hearing the case itself.<sup>104</sup> Applied to the European Union, this means that the Court would have jurisdiction to deal with cases directed against the EU even in matters in which the EU courts have no jurisdiction. Fortunately, the Treaty of Lisbon has significantly extended the competences of the CJEU, especially in the area of freedom, security and justice. Furthermore, it obliges member states to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law" (Article 19, paragraph 1, second sub-paragraph, of the TEU). In this way, the existence of a situation in which an individual had no "domestic" remedy to be exhausted against the European Union before submitting an application to the Court has become much less probable since the entry into force of the Treaty of Lisbon.

Admittedly, the CJEU's competences in respect of the common foreign and security policy (CFSP) remain very limited (Article 24 of the TEU and Article 275 of the TFEU). However, by virtue of Article 1, paragraph 4, of the accession treaty, the acts of member states in execution of a decision relating to the CFSP will be attributed to the state concerned and not to the EU (explanatory report, paragraph 23). Consequently, in such cases, individuals wishing to claim a violation before the Court as a result of those acts must first exhaust remedies not against the European Union but against the member states that have taken action within their territory.

## **B. New type of case falling within the jurisdiction of the Court**

With EU accession to the Convention, a new type of case will be subject to the jurisdiction of the Court: cases which may be brought directly before one of the CJEU courts (Article 19 of the TEU) by any individual or organisation satisfying the conditions laid down in Article 34 of the Convention. Such cases are limited and do not cover those applications which may be submitted only by the EU institutions or member states. In essence, such cases would be applications for judicial review (Article 263, paragraph 4, of the TFEU), actions for damages on the basis of non-contractual liability (Article 268 of the TFEU) and disputes involving the European Civil Service (Article 270 of the TFEU). In other words, natural and legal persons having brought an action of this type to obtain a decision on the merits by an EU court could submit the decision issued for examination by the Court, provided of course that all internal remedies under EU law have been exhausted (Article 35, paragraph 1, of the Convention). From the point of view of individuals and undertakings, this is the major benefit of accession by the EU.

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104. ECtHR, 16 September 1996, *Akdivar and Others v. Turkey*, No. 21893/93.

On the other hand, requests for preliminary rulings before the CJEU (Article 267 of the TFEU) will not be added to the new type of case that could be brought before the Strasbourg Court as a result of EU accession, as preliminary rulings delivered by the CJEU do not directly affect individuals, who therefore could not apply to the Court. This type of case is designed to enable the CJEU to state its opinion on the interpretation or validity of EU law applicable to a dispute. For this reason, it is initiated not by the parties to the dispute, but by the judge dealing with the case, and preliminary rulings are binding only on the domestic courts, not on individuals. Nonetheless, this type of case does not entirely fall outside the jurisdiction of the Court since, even now, any judgment on the merits delivered at last instance by a domestic court implementing a preliminary ruling by the CJEU may be subject to the supervision of the Court, with account being taken of the presumption of equivalence instituted by the *Bosphorus* judgment.

Accordingly, not all cases falling under the jurisdiction of the CJEU will, as a result of accession by the EU, make their way to the Court. Nonetheless, the cases which will qualify cover such important fields as competition (Article 105 of the TFEU) and the European Civil Service (Article 270 of the TFEU).

### C. The presumption of equivalence

Accession by the EU will also bring with it the question of how to deal with the presumption of equivalence instituted in the *Bosphorus* judgment. In this connection, it will be recalled that in its final report, Working Group II had held that if the European Union were to become party to the Convention, the position of the CJEU would be analogous to that of national supreme courts. These, however, do not enjoy such a presumption of equivalence. Accordingly, one may wonder about the impact of accession: will it maintain equivalence as the standard applicable to EU law or will it entail an increase in the requirements at the level applicable to states? Two aspects have to be considered here.

First, it would be fairly surprising to see the Court disavow what it said in the *Bosphorus* judgment (paragraph 150) – and confirmed in the *Michaud* judgment (paragraph 104) – regarding the necessities of European integration and co-operation, which may justify acceptance of a merely equivalent standard. These necessities will not have disappeared as a result of accession. Second, the Convention requires Contracting Parties to be treated on an equal footing, as pointed out by judge Rozakis and his colleagues in their concurring opinion appended to the *Bosphorus* judgment. This too is one of the cardinal principles which served as a guiding thread in the accession treaty negotiations. This therefore raises the question whether, once the EU is a Contracting Party to the Convention, the Court will continue to be able to refrain from intervening where the protection of rights is not “manifestly” deficient.

Ultimately, the question can be decided only by the Court, in a case it has to deal with following accession. It could however be that its task will be facilitated by the fact that, since the *Bosphorus* judgment, the Charter entered into force on

1 December 2009. Under Article 52, paragraph 3, the Charter stipulates that the level of protection guaranteed by the Convention, as interpreted by the Court, shall be the minimum level of protection applicable in EU law. Clearly, this is not the reduced level resulting from the presumption of equivalence, but the level currently applicable to States Parties to the Convention. Accordingly, what sense would there be in granting EU law a downward margin of latitude which it prohibits itself from applying? With regard to the usefulness of the presumption of equivalence for the courts in the member states of the EU, which consequently would almost no longer have to concern themselves with the compatibility of the EU law they had to apply with the Convention, one would not be too mistaken in taking the view that those courts today have the same assurances in Article 52, paragraph 3, of the Charter and in its application by the CJEU.

### **D. Harmony between the Convention and EU law: from the substance to the effects of rights**

Lastly, we need perhaps to look at the extent of the harmony sought between the fundamental rights of the Convention and those of the Union. It has already been said in this connection that EU accession to the Convention will ensure greater coherence in terms of the substance of the fundamental rights which the EU shares with the Convention, insofar as it will enable the Court to exercise its supervision over all EU acts, including the judgments delivered by the EU courts which, thus far, have escaped such supervision. All the same, this does not mean ensuring uniformity between the Convention and EU law. Uniformity is not the goal of the Convention, as evidenced by the margin of appreciation left to Contracting Parties and by Article 53 of the Convention, which allows Contracting Parties, in their own legal orders, to go beyond the level of protection afforded by the Convention. Consequently, it is only where the Union may fall below this level that the Court could intervene in respect of the Union following its accession.

There have, it is true, been fortunately very few examples of such instances of falling below this level in the past, even though there are still some areas of divergence. It is also true that Article 52, paragraph 3, of the Charter now prohibits such instances of a lower level of protection in EU law, while at the same time providing the opportunity to afford more extensive protection than is guaranteed by the Convention. The probability of seeing the EU afford a lower level of protection than is to be found in the Convention therefore diminishes accordingly.

However, upholding fundamental rights is clearly not just a matter of *substance*. It also presupposes ensuring the *effects* they are meant to achieve. What distinguishes “fundamental” rights from “ordinary” rights, if not that they have a series of characteristics in common, conferring upon them a fundamental nature and consequently a fundamental scope? If, as is suggested moreover by Article 52, paragraph 3, of the Charter, we look at the Convention in this regard, we see that the fundamental scope common to the rights enshrined in the Convention is made up of at least three factors. First, the rights guaranteed by the Convention apply to the whole legal order of each



Contracting Party and to everyone coming under their jurisdiction. Second, they prevail over any other provision in domestic law, even a provision in the constitution. Third, the enjoyment of these rights must be guaranteed without discrimination.

Generality, priority and non-discrimination: these are powerful requirements, but there is nothing surprising in this given that we are dealing with fundamental rights. While the Convention reflects these requirements, it did not “invent” them, as they are unequivocally inherent in the very concept of a fundamental right. For if the fundamental nature of a right did not entail the obligation to secure its priority over any other “ordinary” right and to ensure that as many people as possible can enjoy that right without discrimination, then the words would be meaningless. Either what is protected by a right is sufficiently important to qualify it as fundamental, and therefore the requisite consequences must be drawn as to its effects; or it is not sufficiently important, in which case we should no longer refer to it as fundamental, otherwise we would be creating false appearances and, what is worse, unfulfilled expectations.

Seen from this perspective, the application of the Convention, for the European Union, would not mean simply giving the rights enshrined in the Convention a certain *substance*. They must also be given, in the legal order of the Union, the *effects* that are inherent in their fundamental nature, as they are given by the Convention and the case law of the Court in the legal order of the member states. As stated by the CJEU, it is a matter of ensuring that the rights recognised by the Charter genuinely constitute a “foundation of the Union”, in the same way as such rights constitute a foundation of the member states. Ultimately, it is indeed inconceivable that the fundamental rights recognised by a legal order could not constitute the very foundation of that legal order. The words themselves here confirm the reality.

In the case of the European Union, however, this requirement falls within a unique legal order, characterised by a specific project, limited competences, a high level of autonomy and, at least until the recent entry into force of the Charter, a degree of diversity in the sources of fundamental rights, at times to be found in primary law, at other times in secondary law and at yet others in case law. Even though, in principle, the Charter merely reiterates existing law, its incorporation, as a new component of EU primary law, in such a somewhat disparate environment, cannot fail to raise (once again) the question of the effects of the fundamental rights in EU law, particularly with regard to their general, priority and non-discriminatory application. This, then, is another aspect of the coherence called for by fundamental rights, and especially those of the Convention, namely coherence between the *nature* of fundamental rights and their *effects*.

Admittedly, as has recently been stated, fundamental rights within the Union must be protected within the framework of its structure and objectives. It follows that the weighing of the different fundamental rights at stake does not necessarily call for the same response at national or EU level.<sup>105</sup> Furthermore, most fundamental rights, even

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105. Opinion of Advocate General Bot, C-283/11, *Sky Österreich*, paragraph 80.

those enshrined in the Convention, are not absolute and can be subject to restrictions. What is important, however, is that they should be applied without changing the nature of or “defundamentalising” the fundamental rights in question, in other words, without depriving them of the effects which are inherent in their very nature.

To clarify this point, here are three examples illustrating the issues at stake for EU law. The first refers to the requirement of general application of fundamental rights. It concerns the *ne bis in idem* principle enshrined in Article 4 of Protocol No. 7 to the Convention and in Article 50 of the Charter, but the substance of which, in EU law, differs depending on whether it is applied in the field of competition law, in the area of freedom, security and justice or in disputes concerning the civil service. Quite rightly, Advocate General Kokott stated, in this connection, that “[t]he crucial importance of the *ne bis in idem* principle as a founding principle of EU law which enjoys the status of a fundamental right means that its content must not be substantially different depending on which area of law is concerned. For the purposes of determining the scope of the guarantee provided by the *ne bis in idem* principle, as now codified in Article 50 of the Charter of Fundamental Rights, the same criteria should apply in all areas of EU law”.<sup>106</sup>

The second example concerns the non-discriminatory application of fundamental rights. It derives from the right to the protection of family life and the delicate relationship it has with citizenship of the Union (Article 20 of the TFEU). Recent CJEU case law has tended to adopt different approaches to the protection of the family life of a citizen of the Union, depending on whether the citizen has or has not exercised his or her right to free movement, thereby making a distinction between “mobile” and “sedentary” citizens.<sup>107</sup> In this connection, Advocate General Mengozzi recently noted, not without regret, that “in order to be able actually to enjoy a family life within the territory of the Union, the Union citizens concerned have to exercise one of the freedoms of movement laid down in the TFEU”, which deprives “sedentary” citizens – those remaining in the member state whose nationality they hold – of the protection of family life under EU law. Even though this was motivated by a desire not to use fundamental rights as a means of extending the powers of the Union (Article 51, paragraph 2, of the Charter), it nonetheless constitutes a serious paradox liable to give rise to a problem of discrimination within EU law itself. So much so that Advocate General Sharpston observed, with regard to the fact that European citizenship was destined to become the fundamental status of nationals of the member states: “Such a status sits ill with the notion that fundamental rights protection is partial and fragmented; that it is dependent upon whether some relevant substantive provision has direct effect or whether the Council and the European Parliament have exercised legislative powers. In the long run, only seamless protection of fundamental rights under EU law in all areas of exclusive or shared EU competence matches the concept of EU citizenship”.<sup>108</sup>

106. Opinion of Advocate General Kokott, C-17/10, *Toshiba*, paragraph 117.

107. For example, CJEU, 15 November 2011, C-256/11, *Dereci and Others*.

108. Opinion of Advocate General Sharpston, C-34/09, *Zambrano*, paragraph 170.

As an illustration of the problem of the priority that should be given to fundamental rights, the third example concerns the effects of Article 8 of the Convention in the field of international child abduction, especially where this gives rise to application of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and/or Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (“Brussels II bis”), which establish the principle of the immediate return of the abducted child. Several recent Court judgments have underlined the need for courts called on to apply one of these texts to do so in compliance with Article 8, quite simply because application of those instruments does not exclude the applicability of the latter. A typical situation that poses a problem here is where, because of the culpable behaviour of the child’s parents or of the authorities, the enforcement of the child’s return is delayed. If, in such cases, there are compelling reasons for the court in the requested state to think that the child’s return would entail a serious risk for him or her, Article 8 requires the court to verify this risk and not to authorise the return if the danger proves to be real. Even though such a solution must remain the exception, Article 8 of the Convention here counters a kind of quasi-irrefutable presumption that a child’s return would invariably and by necessity be in his or her interest, irrespective of the circumstances of time and place surrounding the case in question. To quote the Court, the child’s return must not be ordered “automatically or mechanically”.<sup>109</sup> Yet, this does not appear to be the approach followed by the CJEU, whose case law, to date, allows for no exceptions to the automatic return of the child, with the evaluation of the child’s interest being left exclusively to the court in the child’s former country of residence – as if the court in the requested state was not also required to comply with Article 8 of the Convention and Article 7 of the Charter when the circumstances so demanded.

In her conclusions cited above, Advocate General Sharpston called on the CJEU to consider whether the Union was now on the cusp of constitutional change regarding its perception and application of fundamental rights. Here too, the external supervision of the Court could make a valuable contribution towards harmonising EU law with the nature, role and effects of the fundamental rights which the Union has, in the Charter, made the subject of primary law. It is occasionally said that EU accession to the Convention could make the protection of fundamental rights in Europe even more complex. It is, on the contrary, highly likely that accession will help reduce the complexity that prevails in this field by contributing, through external supervision, to the introduction of greater coherence, greater co-ordination and therefore greater clarity in the still disparate and changing landscape of fundamental rights in the Union.

In any event, EU accession to the Convention entails a considerable challenge in terms of coherence. A large part of Europe’s political, moral and legal credibility is at stake here. In the face of a legal landscape of fundamental rights threatened by

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109. ECtHR, 26 November 2013, *X. v. Latvia*, No. 27853/09, paragraph 98.

fragmentation and division, this endeavour is an invitation to Europe to be coherent with itself and with its ethical and legal traditions, asserting unity beyond diversity and convergence in response to centrifugal forces.

Following the fall of the Berlin Wall, standing at the Brandenburg Gate, former German Chancellor Willy Brandt, who had always believed in reunification of the two Germanys said “What belongs together is now growing together.”<sup>110</sup> *Mutatis mutandis*, for the Europe of fundamental rights, this is also largely true of EU accession to the Convention.

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110. “Jetzt wächst zusammen, was zusammen gehört.”



## Appendix

# Draft agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms

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### **Preamble**

The High Contracting Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5), signed at Rome on 4 November 1950 (hereinafter referred to as “the Convention”), being member States of the Council of Europe, and the European Union,

Having regard to Article 59, paragraph 2, of the Convention;

Considering that the European Union is founded on the respect for human rights and fundamental freedoms;

Considering that the accession of the European Union to the Convention will enhance coherence in human rights protection in Europe;

Considering, in particular, that any person, non-governmental organisation or group of individuals should have the right to submit the acts, measures or omissions of the European Union to the external control of the European Court of Human Rights (hereinafter referred to as “the Court”);

Considering that, having regard to the specific legal order of the European Union, which is not a State, its accession requires certain adjustments to the Convention system to be made by common agreement,

Have agreed as follows:

## **Article 1 – Scope of the accession and amendments to Article 59 of the Convention**

1. The European Union hereby accedes to the Convention, to the Protocol to the Convention and to Protocol No. 6 to the Convention.
2. Article 59, paragraph 2, of the Convention shall be amended to read as follows:

“2.a. The European Union may accede to this Convention and the protocols thereto. Accession of the European Union to the protocols shall be governed, *mutatis mutandis*, by Article 6 of the Protocol, Article 7 of Protocol No. 4, Articles 7 to 9 of Protocol No. 6, Articles 8 to 10 of Protocol No. 7, Articles 4 to 6 of Protocol No. 12 and Articles 6 to 8 of Protocol No. 13.

b. The Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms constitutes an integral part of this Convention.”
3. Accession to the Convention and the protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf. Nothing in the Convention or the protocols thereto shall require the European Union to perform an act or adopt a measure for which it has no competence under European Union law.
4. For the purposes of the Convention, of the protocols thereto and of this Agreement, an act, measure or omission of organs of a member State of the European Union or of persons acting on its behalf shall be attributed to that State, even if such act, measure or omission occurs when the State implements the law of the European Union, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union. This shall not preclude the European Union from being responsible as a co-respondent for a violation resulting from such an act, measure or omission, in accordance with Article 36, paragraph 4, of the Convention and Article 3 of this Agreement.
5. Where any of the terms:
  - “State”, “States”, or “States Parties” appear in Article 10 (paragraph 1) and 17 of the Convention, as well as in Articles 1 and 2 of the Protocol, in Article 6 of Protocol No. 6, in Articles 3, 4 (paragraphs 1 and 2), 5 and 7 of Protocol No. 7, in Article 3 of Protocol No. 12 and in Article 5 of Protocol No. 13, they shall be understood as referring also to the European Union as a non-state Party to the Convention;
  - “national law”, “administration of the State”, “national laws”, “national authority”, or “domestic” appear in Articles 7 (paragraph 1), 11 (paragraph 2), 12, 13 and

- 35 (paragraph 1) of the Convention, they shall be understood as relating also, *mutatis mutandis*, to the internal legal order of the European Union as a non-state Party to the Convention and to its institutions, bodies, offices or agencies;
- “national security”, “economic well-being of the country”, “territorial integrity”, or “life of the nation” appear in Articles 6 (paragraph 1), 8 (paragraph 2), 10 (paragraph 2), 11 (paragraph 2), and 15 (paragraph 1) of the Convention, as well as in Article 2 (paragraph 3) of Protocol No. 4 and in Article 1 (paragraph 2) of Protocol No. 7, they shall be considered, in proceedings brought against the European Union or to which the European Union is a co-respondent, with regard to situations relating to the member States of the European Union, as the case may be, individually or collectively.

6. Insofar as the expression “everyone within their jurisdiction” appearing in Article 1 of the Convention refers to persons within the territory of a High Contracting Party, it shall be understood, with regard to the European Union, as referring to persons within the territories of the member States of the European Union to which the Treaty on European Union and the Treaty on the Functioning of the European Union apply. Insofar as this expression refers to persons outside the territory of a High Contracting Party, it shall be understood, with regard to the European Union, as referring to persons who, if the alleged violation in question had been attributable to a High Contracting Party which is a State, would have been within the jurisdiction of that High Contracting Party.

7. With regard to the European Union, the term “country” appearing in Article 5 (paragraph 1) of the Convention and in Article 2 (paragraph 2) of Protocol No. 4 and the term “territory of a State” appearing in Article 2 (paragraph 1) of Protocol No. 4 and in Article 1 (paragraph 1) of Protocol No. 7 shall mean each of the territories of the member States of the European Union to which the Treaty on European Union and the Treaty on the Functioning of the European Union apply.

8. Article 59, paragraph 5, of the Convention shall be amended to read as follows:

“5. The Secretary General of the Council of Europe shall notify all the Council of Europe member States and the European Union of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it or acceded to it, and the deposit of all instruments of ratification or accession which may be effected subsequently.”

## Article 2 – Reservations to the Convention and its protocols

1. The European Union may, when signing or expressing its consent to be bound by the provisions of this Agreement in accordance with Article 10, make reservations to the Convention and to the Protocol in accordance with Article 57 of the Convention.



2. Article 57, paragraph 1, of the Convention shall be amended to read as follows:

“1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. The European Union may, when acceding to this Convention, make a reservation in respect of any particular provision of the Convention to the extent that any law of the European Union then in force is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.”

### **Article 3 – Co-respondent mechanism**

1. Article 36 of the Convention shall be amended as follows:

a. the heading of Article 36 of the Convention shall be amended to read as follows:

“Third party intervention and co-respondent”;

b. a new paragraph 4 shall be added at the end of Article 36 of the Convention, which shall read as follows:

“4. The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.”

2. Where an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of European Union law, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union, notably where that violation could have been avoided only by disregarding an obligation under European Union law.

3. Where an application is directed against the European Union, the European Union member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value

pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments.

4. Where an application is directed against and notified to both the European Union and one or more of its member States, the status of any respondent may be changed to that of a co-respondent if the conditions in paragraph 2 or paragraph 3 of this article are met.
5. A High Contracting Party shall become a co-respondent either by accepting an invitation from the Court or by decision of the Court upon the request of that High Contracting Party. When inviting a High Contracting Party to become a co-respondent, and when deciding upon a request to that effect, the Court shall seek the views of all parties to the proceedings. When deciding upon such a request, the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met.
6. In proceedings to which the European Union is a co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of the provision of European Union law as under paragraph 2 of this article, sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court.
7. If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.
8. This article shall apply to applications submitted from the date of entry into force of this Agreement.

## **Article 4 – Inter-Party cases**

1. The first sentence of Article 29, paragraph 2, of the Convention shall be amended to read as follows:  
  
“A Chamber shall decide on the admissibility and merits of inter-Party applications submitted under Article 33”.
2. The heading of Article 33 of the Convention shall be amended to read as follows:  
“Inter-Party cases”.

## **Article 5 – Interpretation of Articles 35 and 55 of the Convention**

Proceedings before the Court of Justice of the European Union shall be understood as constituting neither procedures of international investigation or settlement within the meaning of Article 35, paragraph 2.b, of the Convention, nor means of dispute settlement within the meaning of Article 55 of the Convention.

## **Article 6 – Election of judges**

1. A delegation of the European Parliament shall be entitled to participate, with the right to vote, in the sittings of the Parliamentary Assembly of the Council of Europe whenever the Assembly exercises its functions related to the election of judges in accordance with Article 22 of the Convention. The delegation of the European Parliament shall have the same number of representatives as the delegation of the State which is entitled to the highest number of representatives under Article 26 of the Statute of the Council of Europe.
2. The modalities of the participation of representatives of the European Parliament in the sittings of the Parliamentary Assembly of the Council of Europe and its relevant bodies shall be defined by the Parliamentary Assembly of the Council of Europe, in co-operation with the European Parliament.

## **Article 7 – Participation of the European Union in the meetings of the Committee of Ministers of the Council of Europe**

1. Article 54 of the Convention shall be amended to read as follows:

“Article 54 – Powers of the Committee of Ministers

1. Protocols to this Convention are adopted by the Committee of Ministers.
  2. Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.”
2. The European Union shall be entitled to participate in the meetings of the Committee of Ministers, with the right to vote, when the latter takes decisions under Articles 26 ( paragraph 2), 39 (paragraph 4), 46 (paragraphs 2 to 5), 47 and 54 (paragraph 1) of the Convention.
  3. Before the adoption of any other instrument or text:
    - relating to the Convention or to any protocol to the Convention to which the European Union is a party and addressed to the Court or to all High Contracting Parties to the Convention or to the protocol concerned;

- relating to decisions by the Committee of Ministers under the provisions referred to in paragraph 2 of this article; or
- relating to the selection of candidates for election of judges by the Parliamentary Assembly of the Council of Europe under Article 22 of the Convention,

the European Union shall be consulted within the Committee of Ministers. The latter shall take due account of the position expressed by the European Union.

4. The exercise of the right to vote by the European Union and its member States shall not prejudice the effective exercise by the Committee of Ministers of its supervisory functions under Articles 39 and 46 of the Convention. In particular, the following shall apply:

*a.* in relation to cases where the Committee of Ministers supervises the fulfilment of obligations either by the European Union alone, or by the European Union and one or more of its member States jointly, it derives from the European Union treaties that the European Union and its member States express positions and vote in a co-ordinated manner. The Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements shall be adapted to ensure that the Committee of Ministers effectively exercises its functions in those circumstances.

*b.* where the Committee of Ministers otherwise supervises the fulfilment of obligations by a High Contracting Party other than the European Union, the member States of the European Union are free under the European Union treaties to express their own position and exercise their right to vote.

## **Article 8 – Participation of the European Union in the expenditure related to the Convention**

1. The European Union shall pay an annual contribution dedicated to the expenditure related to the functioning of the Convention. This annual contribution shall be in addition to contributions made by the other High Contracting Parties. Its amount shall be equal to 34% of the highest amount contributed in the previous year by any State to the Ordinary Budget of the Council of Europe.

2 *a.* If the amount dedicated within the Ordinary Budget of the Council of Europe to the expenditure related to the functioning of the Convention, expressed as a proportion of the Ordinary Budget itself, deviates in each of two consecutive years by more than 2.5 percentage points from the percentage indicated in paragraph 1, the Council of Europe and the European Union shall, by agreement, amend the percentage in paragraph 1 to reflect this new proportion.

*b.* For the purpose of this paragraph, no account shall be taken of a decrease in absolute terms of the amount dedicated within the Ordinary Budget of

the Council of Europe to the expenditure related to the functioning of the Convention as compared to the year preceding that in which the European Union becomes a Party to the Convention.

c. The percentage that results from an amendment under paragraph 2.a may itself later be amended in accordance with this paragraph.

3. For the purpose of this article, the expression “expenditure related to the functioning of the Convention” refers to the total expenditure on:

a. the Court;

b. the supervision of the execution of judgments of the Court; and

c. the functioning, when performing functions under the Convention, of the Committee of Ministers, the Parliamentary Assembly and the Secretary General of the Council of Europe,

increased by 15% to reflect related administrative overhead costs.

4. Practical arrangements for the implementation of this article may be determined by agreement between the Council of Europe and the European Union.

## **Article 9 – Relations with other agreements**

1. The European Union shall, within the limits of its competences, respect the provisions of:

a. Articles 1 to 6 of the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights of 5 March 1996 (ETS No. 161);

b. Articles 1 to 19 of the General Agreement on Privileges and Immunities of the Council of Europe of 2 September 1949 (ETS No. 2) and Articles 2 to 6 of its Protocol of 6 November 1952 (ETS No. 10), in so far as they are relevant to the operation of the Convention; and

c. Articles 1 to 6 of the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe of 5 March 1996 (ETS No. 162).

2. For the purpose of the application of the agreements and protocols referred to in paragraph 1, the Contracting Parties to each of them shall treat the European Union as if it were a Contracting Party to that agreement or protocol.

3. The European Union shall be consulted before any agreement or protocol referred to in paragraph 1 is amended.

4. With respect to the agreements and protocols referred to in paragraph 1, the Secretary General of the Council of Europe shall notify the European Union of:

- a.* any signature;
- b.* the deposit of any instrument of ratification, acceptance, approval or accession;
- c.* any date of entry into force in accordance with the relevant provisions of those agreements and protocols; and
- d.* any other act, notification or communication relating to those agreements and protocols.

## **Article 10 – Signature and entry into force**

1. The High Contracting Parties to the Convention at the date of the opening for signature of this Agreement and the European Union may express their consent to be bound by:

- a.* signature without reservation as to ratification, acceptance or approval; or
- b.* signature with reservation as to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Agreement shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all High Contracting Parties to the Convention mentioned in paragraph 1 and the European Union have expressed their consent to be bound by the Agreement in accordance with the provisions of the preceding paragraphs.

4. The European Union shall become a Party to the Convention, to the Protocol to the Convention and to Protocol No. 6 to the Convention at the date of entry into force of this Agreement.

## **Article 11 – Reservations**

No reservation may be made in respect of the provisions of this Agreement.

## Article 12 – Notifications

The Secretary General of the Council of Europe shall notify the European Union and the member States of the Council of Europe of:

- a.* any signature without reservation in respect of ratification, acceptance or approval;
- b.* any signature with reservation in respect of ratification, acceptance or approval;
- c.* the deposit of any instrument of ratification, acceptance or approval;
- d.* the date of entry into force of this Agreement in accordance with Article 10;
- e.* any other act, notification or communication relating to this Agreement.

In witness whereof the undersigned, being duly authorised thereto, have signed this Agreement.

Done at ..... the ....., in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to the European Union.

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Provided for under the Treaty of Lisbon, the accession of the European Union to the European Convention on Human Rights is destined to be a landmark in European legal history because it will finally make it possible for individuals and undertakings to apply to the European Court of Human Rights for review of the acts of European Union institutions, which unquestionably play an increasingly important role in our daily lives. After nearly three years of negotiations, a draft agreement on European Union accession was adopted on 5 April 2013. In the light of the draft agreement, this publication offers a concise analysis of the reasons for European Union accession to the Convention, the means by which this is to be achieved and the effects it will have.



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