The EU Accession to the European Convention on Human Rights

What’s at Stake for the EU Institutions?

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LIST OF ABBREVIATIONS

CDDH       Steering Committee for Human Rights (Council of Europe)
CFSP       Common Foreign and Security Policy
CJEU       Court of Justice of the European Union
EC         European Communities
ECHR       European Convention of Human Rights
ECJ        European Court of Justice
ECSC       European Coal and Steel Community
ECtHR      European Court of Human Rights
EEA        European Economic Area
EEC        European Economic Community
ENP        European Neighbourhood Policy
EU         European Union
OJ         Official Journal of the European Union
TEU        Treaty on the European Union
TFEU       Treaty on the Functioning of the European Union

NB. For sake of clarity, references made in the present contribution to the ‘EU’ shall be understood as encompassing situations previously related to the EEC and the EC.
INTRODUCTION

Since the entry into force of the Lisbon Treaty in 2009, the European Union has the obligation, under Article 6(2) of the Treaty on the EU (TEU), to accede to the European Convention on Human Rights (the Convention, or ECHR). In fact, this accession has been a subject of discussion among academics for decades. It was suggested by the European Commission for the first time in 1979, as it would contribute to the coherence of the human rights protection in Europe, and more specifically in the EU.¹

Significant steps have been taken since then, in particular in the last five years with the formal opening of negotiations between the Council of Europe and the EU on the accession. A Draft Accession Agreement² (hereinafter also referred to as ‘Draft Agreement’) has been finalised in June 2013, but there are still numerous obstacles that must be overcome before the EU will be formally bound by the Convention.

This contribution addresses some of the major issues at stake in this context, in particular concerning the necessity of this accession and the impact it will have on the legal system and the institutions of the EU. Each of these topics is generally tackled first by describing the issue in question, and then by analysing the possible answers provided by the 2013 Draft Accession Agreement in this regard.

The first part of the paper will introduce the context surrounding the EU’s accession to the ECHR (I), more specifically the reasons supporting the need for accession as well as the accession process so far. The question of the incorporation of the ECHR within the EU legal order will then be examined (II), as well as the role of the EU in the proceedings before the European Court of Human Rights (ECtHR or Strasbourg Court), the judicial body of the Convention (III). The fourth and last part discusses the issues surrounding the participation of the EU institutions in the bodies of the Convention framework and more globally in the Council of Europe (IV).

I. **THE (LONG) PATH TO ACCESSION**

Before tackling the essential issues related to the accession of the EU to the ECHR, it is worthwhile having a look at the historical premises of the notion of accession, in the wider context of the European integration process. The respective roles of the Council of Europe and the EU, as well as their mutual relations in the field of human rights will be first briefly introduced (A). In the second place, the reasons supporting this accession will be examined, as well as its institutional process so far (B).

A. **The European Union and the Council of Europe: The Two Europes of Human Rights**

In the aftermath of the Second World War, several international organisations were progressively established at European level. Among these organisations, the EU (at the time ECSC, then EEC) and the Council of Europe are obviously of greatest importance. The purpose of this paper is not to examine the development of these two institutions in depth; nevertheless, it is necessary to recall some points on the ever growing importance of the Council of Europe and the EU in the field of human rights.

The Council of Europe was established in 1949 and currently comprises 47 European States. The ECHR was then adopted in 1950 within the framework of the Council of Europe. This Convention is the core document of the Council of Europe; each of the 47 Member States is party to the ECHR. The European Court of Human Rights, as the judicial body of the ECHR, was established initially in 1959, and permanently in 1998 (succeeding to the European Commission on Human Rights). The particularity of this institutional model is that whilst the Council of Europe can be considered as a typical intergovernmental organisation, the ECHR system looks more like a supranational system: through the principle of individual petition, individual applicants can bring a case directly before the ECtHR against any of the States that are party to the ECHR.

In the meantime, the economic integration of the countries of the ‘Little Europe’ (by opposition to the ‘Greater Europe, i.e. the Council of Europe) was launched. The Treaty of Paris establishing the European Coal and Steel Community (ECSC) was signed in

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1951, and the Treaty of Rome establishing the European Economic Community (EEC and future EU) was then adopted in 1957.

At first sight, it might seem rather surprising that within less than a year, the ECHR and the ECSC Treaty were successively adopted without any of these instruments in place to provide a formal link between them. No institutional relation between the two organisations was envisaged, nor did the ECSC Treaty refer to the provisions of the ECHR. However, despite their common historical background\(^5\), the contrary would actually have been abnormal, considering the totally different purposes of the ECHR and the ECSC/EEC Treaties at the time. Since the primary purpose of the ECSC and EEC was economic integration, whereas the domain tackled by the Council of Europe was – and still is – almost exclusively related to human rights and democracy, ‘nobody expected that these regulated areas would ever come into conflict’\(^6\) with each other. Another explanation lies in the fact that not all EU Member States were bound by the ECHR\(^7\) in the first place.

This impermeable ‘separation of tasks’\(^8\) between economic integration and human rights protection would not last indefinitely. Although no reference to human rights was initially provided in the Rome Treaties\(^9\), the EU was gradually confronted with human rights protection issues as its competences were continuously extended\(^10\). The European Court of Justice (ECJ or Luxembourg Court), today also known as the Court of Justice of the EU (CJEU), first seemed reluctant to take human rights into account in its case law\(^11\), in the absence of explicit Treaty provision. Such a view provoked negative reactions by the Member States’ courts, in particular by the German\(^12\) and Italian supreme courts, which stated they would ‘reject the primacy of an [EU] law which did not include the principle of respect for fundamental rights’\(^13\). This resistance from national courts progressively led the ECJ to recognise the importance of fundamental

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\(^6\) Rosmarie Doblhoff-Dier and Sandra Kusmierekzyk, ‘Present and Future Relations between the ECJ and the ECHR’ (2013) 7 ICLJ 349, 351.

\(^7\) Among the six ECSC/EEC founding Member States, France ratified the ECHR only in 1974.

\(^8\) Doblhoff-Dier and Kusmierekzyk (n 6) 351.


\(^11\) See e.g. Case 1/58 Stork v High Authority [1959] ECR 17.

\(^12\) See note 51.

rights in its application and interpretation of EU law.\textsuperscript{14} Human rights were integrated in the EU legal order as ‘general principles of EU law’, coming from national constitutions as well as from international human rights instruments ratified by Member States. With respect to the latter, the ECJ started to refer to the provisions of the ECHR in the mid-seventies.\textsuperscript{15} The first general reference to the Convention can be found in the \textit{Nold} case\textsuperscript{16} of 1973. As soon as all Member States ratified the Convention\textsuperscript{17}, the Luxembourg Court then made explicit references to provisions of the ECHR in its reasoning. It first appeared in 1975 in the \textit{Rutili} decision\textsuperscript{18}, and was further confirmed in \textit{Johnston}\textsuperscript{19} and \textit{Heylens}\textsuperscript{20}. The importance attached to fundamental rights by the ECJ was continuously reiterated in its case law, in particular through the balance that must be made between these fundamental rights and EU’s fundamental freedoms.\textsuperscript{21}

In the first place, the emergence and development of human rights protection in the Union must thus be attributed to a large extent to the ECJ’s ‘activist’ case law, and to its gradual judicial dialogue with the ECH\textsuperscript{22}. It was only in the late eighties\textsuperscript{23} that EU Member States started considering the insertion of human rights provision in EU primary law. The first attempt in this regard can be found in the Spinelli project\textsuperscript{24} (1984), which was never adopted. The Single European Act (1986) contained a reference to human rights (and to the ECHR), at least in its preamble\textsuperscript{25}. It was, however, not before the Maastricht Treaty (1992) that the protection of human rights was explicitly included in the core text of the EU Treaties, with a special reference to the ECHR. The Amsterdam Treaty (1997) then referred to respect for human rights as one

\textsuperscript{14} The two key cases in this regard are: Case 29/69, \textit{Stauder v Ulm} [1969] ECR 4119; Case 11/70, \textit{Internationale Handelsgesellschaft v Einfuhrund Vorratsstelle Getreide} [1970] ECR 1125.


\textsuperscript{17} See note 7.

\textsuperscript{18} Case 36/75, \textit{Rutili} [1975] ECR 1219, para 32.

\textsuperscript{19} Case 222/84, \textit{Johnston} [1986] ECR 1651.


\textsuperscript{22} Harpaz (n 5) 108. See also page 32 of this contribution.

\textsuperscript{23} It must however be noted that the Draft Treaty of the European Political Community in the early fifties (never entered into force) contained several references to human rights and to the ECHR (see n 92). For a large contribution on this topic, see Grainne de Burca, ‘The Road Not Taken: The European Union as a Global Human Rights Actor’ (2011) 105 Am J Int’l L 649.


of the principles on which the Union is founded. In 2000, the EU adopted its own comprehensive catalogue of human rights – the ‘Charter of Fundamental Rights of the EU’. Nevertheless, one had to wait until the Lisbon Treaty, entered into force in 2009, before the Charter was finally recognised as formally binding and as part of EU primary law.

The late and gradual development of fundamental rights protection in EU law did not mean that the question of its relations with the ECHR was extinguished. As Jacqué correctly notes, ‘the problem of relations between the ECHR and European integration is almost as old as integration itself’. Even with the Charter providing an internal legal basis for the protection of human rights in the application of EU competences, the debate on the role of the ECHR in EU law, and more specifically, on the possible accession of the EU to the Convention, has actually intensified throughout the EU integration process.

B. On the Way to Accession

Since the entry into force of the Treaty of Lisbon, the EU accession to the ECHR is not only a possibility, but it has become an explicit legal obligation for the EU. Notwithstanding this fact, it is in any case necessary to mention the reasons that led to this choice for accession (1°), as well as the possible alternatives that were imagined (2°). It will then be examined what progress has been made by the EU and the Council of Europe on this accession goal so far (3°).

1° The Need for Accession

The first question that may be raised about the Union’s accession to the ECHR is whether this accession is actually needed, given that the EU is already indirectly bound by the ECHR. Indeed, the ECJ’s case law on human rights as general principles of EU law includes the ECHR as one of the sources of these principles. The TEU also explicitly refers to the Convention since the Maastricht Treaty. Moreover, some

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27 On the relations between the Charter and the ECHR, see page 24.
scholars also consider that the EU is actually formally bound by the Convention through the ‘substitution effect’ theory, as a manifestation of the ‘succession effect’ principle of international law: by the transfer of powers from its Member States, the EU would be the substitute of each Member State’s legal personality, and must therefore ‘exercise its powers in accordance with the constraints arising from the ECHR’. Accession would then be a ‘false problem’. In this regard, one can point out the initial opinion of the European Commission in its 1976 report, considering accession as ‘not necessary’ since fundamental rights laid down in the ECHR ‘are recognised as generally binding in the context of [EU] law’. More recently, the adoption of the Charter in 2000 – legally binding since 2009 – also raised some scepticism about the need for accession.

Despite all these assumptions, the need for EU’s accession is truly based on the existence of several shortcomings in the judicial protection of human rights within the EU. These shortcomings are both substantive and procedural. As described below, the only way this gap could be effectively bridged is through a formal accession to the Convention.

i. No Individual Challenge of EU Law before the ECtHR

The first – and probably foremost – reason for accession lies in the fact that individuals cannot, in the present situation, file a complaint directly against the EU before the ECtHR in case of violation of one of the rights contained in the ECHR. As the EU is not a party to the Convention, complaints directed against the EU are considered today as inadmissible ratione personae by the ECtHR. This principle of inadmissibility was clearly stated by the European Commission of Human Rights for the first time in CFDT v Commission, and has since been constantly reaffirmed by the ECtHR. At first
sight, this failing might appear to be not too problematic, since the ECJ can also potentially assess the validity of EU acts with respect to fundamental rights contained in the ECHR. The problem is that, under EU law, the conditions of admissibility for direct applications by individuals against an EU act before the ECJ are very restrictive, so that individuals can, in practice, only challenge EU decisions or legislation under very limited circumstances.\textsuperscript{40} The combination of these two elements contributes to a certain insufficiency regarding the availability of direct judicial remedies for individual applicants against a possible infringement of the ECHR by the EU.

\textit{ii. Responsibility Endorsed by Member States for Incompatibilities of EU Law with the Convention}

The second element justifying the need for accession relates to the responsibility potentially endorsed by Member States for violations of the ECHR having their origin in EU law. Indeed, the inadmissibility \textit{ratione personae} of claims raised against the EU before the ECtHR does not mean that the incompatibility of EU acts with the Convention has no consequence in terms of responsibility. Member States can actually be held responsible by the ECtHR for infringements of the Convention coming from EU law. This longstanding principle was first established by the European Commission of Human Rights in the \textit{X v Germany} decision from 1958: ‘if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty it will be answerable for any resulting breach of its obligations under the earlier treaty’\textsuperscript{41}. This statement combines the principle of the relativity of treaties, as a general principle of international law, with the highly debated question of the responsibility of international organisations’ acts.\textsuperscript{42}

With respect to the specific situation of the EU and its Member States, the ECtHR confirmed this principle of the relativity of treaties. Therefore, in the absence of Union’s


\textsuperscript{41} \textit{X v Federal Republic of Germany} App No 235/56 (ECtHR, 10 June 1958), para 300. On this decision, see Paul De Hert and Fisnik Korenica, ‘The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights’ (2012) 13 German L J 874, 877-878. See also \textit{Waite & Kennedy v Germany} App No 26083/94 (ECtHR, 18 February 1999).

accession, the ECtHR does a priori not exclude the possibility of holding a Member State responsible for a violation of the ECHR having its origin in EU law.\textsuperscript{43} In fact, in view of the specific character of the EU in comparison with other international organisations\textsuperscript{44}, four hypotheses are to be distinguished regarding the question of the responsibility.

The first situation relates to the infringement of the ECHR solely by an EU measure, without any involvement of a Member State measure; in this situation, the ECtHR has no power of scrutiny, since no Member State is linked to the situation, and as the EU is not party to the Convention.\textsuperscript{45}

Secondly, in the case where the compatibility of EU primary law with the ECHR is at stake, the ECtHR considered in Matthews\textsuperscript{46} that a Member State – the UK in casu – could be held responsible for the violation of the Convention. The ECtHR took into account the fact that there is always an explicit decision by the EU Member State to agree to be bound by the Treaty provision at stake.\textsuperscript{47} Moreover, the ECtHR noticed that no challenge of EU primary law before the ECJ is possible with regard to its compatibility with the ECHR.\textsuperscript{48}

The third situation concerns the national implementation of an EU measure, where a certain margin of appreciation is left to Member States. Here, the ECtHR also considers that the Member State potentially endorses the responsibility of the violation, given the discretion available to this Member State to avoid the incompatibility with the Convention.\textsuperscript{49}

\textsuperscript{43} Antoine Bailleux, Sébastien Van Droogenbroeck and Xavier Delgrange, ‘La Charte des droits fondamentaux : invocabilité, interprétation, application et relations avec la Convention européenne des droits de l’homme’, in Nicolas de Sadeleer et al. (eds), \textit{Les innovations du traité de Lisbonne – Incidences pour le praticien} (Bruylant 2011) 316.

\textsuperscript{44} By the importance of powers transferred to the EU, its autonomous legal order and the primacy of EU law, the Union is to be considered as a \textit{sui generis} organisation in international law. See Antonio Bultrini, ‘La responsabilité des Etats membres de l’Union européenne pour les violations de la Convention européenne des droits de l’homme imputables au système communautaire’ (2002) Rev Trim DH 5, 32-35; Benoît-Rohmer (n 39) 832; De Hert and Korenica (n 41) 877.

\textsuperscript{45} This was the situation at stake in Connolly App No 73274/01 (ECtHR, 9 December 2008). With regard to this case, see Paul Gragl, ‘Strasbourg’s External Review after the EU’s Accession to the European Convention on Human Rights: A Subordination of the Luxembourg Court?’ (2012) 17 Tilburg L Rev 32, 41-42.

\textsuperscript{46} Matthews v UK App No 24833/94 (ECtHR, 18 February 1999). For a comment of this decision, see Olivier De Schutter and Olivier L’Hoest, ‘La Cour européenne des droits de l’homme juge du droit communautaire : Gibraltar, l’Union européenne et la Convention européenne des droits de l’homme’ (2000) CDE 141.


\textsuperscript{48} Bultrini (n 44) 22.

\textsuperscript{49} See e.g. Cantoni v France App No 17862/91 (ECtHR, 11 November 1996). For a comment of this decision, see Kathrin Kuhnert, ‘Bosphorus – Double standards in European human rights protection?’
The fourth – and most sensitive – hypothesis concerns the Member State’s responsibility before the ECtHR for its implementation of EU law without margin of appreciation. In *M & Co*[^50], the ECtHR ruled that the complaint directed against Germany for its implementation of EU law was inadmissible *ratione materiae*, given that the Member State had no margin of appreciation in its application of EU law, and also considering that the EU grants an ‘equivalent protection’ to fundamental rights as the ECHR. The introduction of this ‘equivalent protection’ doctrine in 1990[^51] left many unanswered questions[^52] before the landmark *Bosphorus*[^53] decision of 2005. In this judgment, the ECtHR reasserted the position it upheld in *M & Co*; yet it declared the request admissible. The ‘equivalent protection’ is, according to the ECtHR, a ‘presumption’ that, if verified, can lead the Court to consider that the EU measure at stake is not incompatible with the Convention. It is a way for the ECtHR to preserve the particular characteristics of the EU legal system, while not granting it a complete immunity with respect to the provisions of the ECHR. This presumption must be based on substantive and procedural guarantees[^54] and must be reassessed in the light of any change in the protection of human rights by the EU. Therefore, the presumption can be rebutted ‘if, in the circumstances of a particular case, it is considered that the protection of Convention rights was ’manifestly deficient’[^55]. Some scholars have considered this mechanism as a reasonable accommodation granted to the EU in the absence of any formal accession to the ECtHR[^56], but many have also been very critical about what they


[^51]: This doctrine is certainly inspired from the landmark *Solange* (‘as long as’) case of the German Supreme Court (*Bundesverfassungsgericht*) where the German judges reserved the right to review the compatibility of EU law with the German Constitution, *as long as* it did not provide a human rights protection equivalent to the protection established in the German Constitution. See: Bultrini (n 44) 15; Benoît-Rohmer (n 39) 840; Costello (n 47) 104; Leonard F. M. Besselink, ‘The EU and the European Convention on Human Rights after Lisbon: From “Bosphorus” Sovereign Immunity to Full Scrutiny?’ (2008) <http://ssrn.com/abstract=1132788> accessed 18 July 2014, 9-10.

[^52]: Benoît-Rohmer (n 39) 841. For an example of these ‘missed opportunities’ to clarify the ‘equivalent protection’ concept, see e.g.: *Senator Lines* App No 56672/00 (ECtHR, 10 March 2004); *Emesa Sugar SA v Netherlands* App No 62023/00 (ECtHR, 13 January 2005).

[^53]: *Bosphorus v Ireland* App No 45036/98 (ECtHR, 31 June 2005).

[^54]: Costello (n 47) 107; Besselink (51) 6.

[^55]: *Bosphorus* (n 53) para 156 (emphasis added). This ‘manifest deficiency’ criteria has been widely criticised for its imprecision and vagueness: see e.g. Benoît-Rohmer (n 39) 847; Kuhnert (n 49) 185; De Hert and Korenica (n 41) 886-8; Paris (n 49) 12.

deemed as a clear privilege granted to EU Member States in comparison with other ECHR parties. In any case, this special treatment has clearly revived the debate on EU accession to the Convention. In the meantime, the ECtHR has also had the opportunity to refine its position on the ‘equivalent protection’ doctrine in several similar cases, including a decision where the presumption was rebutted by the Court.

iii. Absence of External Review of EU Law with regard to Human Rights

The third argument in favour of accession relates to the current lack of external review of EU law with respect to human rights standards, in particular with ECHR standards. It might indeed seem abnormal that the EU is the only ‘legal space’ in Europe which is not subject to the external scrutiny of the ECtHR. The necessity of an external review does not mean that the efficiency of the internal human rights protection, as provided by the EU institutions and as monitored by the ECJ, is put into question, but there is undoubtedly an added value to the external review of EU law by a specialised human rights court such as the ECtHR. It would also contribute to the consistency of the EU global legal system, as it would put the EU on the same footing as its Member States in this regard.

Moreover, it must be noted that EU law is, in a certain way, already subject to external review by the ECtHR: as mentioned in the previous section, EU law can be indirectly examined by the Strasbourg Court through its implementation by a Member State. The issue here is that an EU measure could be declared incompatible with the Convention without any possibility for the EU to defend itself before the ECtHR. Similarly, the EU currently has no possibility to participate in personam – within the Committee of

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57 Benoît-Rohmer (n 39) 846; Kuhnert (n 49) 186; De Hert and Korenica (n 41) 889. See also the concurring opinions of judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki on the first hand, and of judge Ress on the other.
58 Cooperatieve Producentenorganisatie van de Nederlandsse Kokkelvisserij v Netherlands App No 13645/05 (ECtHR, 20 January 2009); M.S.S. v Belgium and Greece App No 30696/09 (ECtHR, 21 January 2011); Ullens de Schooten and Rezabek v Belgium App No 3989/07 and 38353/07 (ECtHR, 20 September 2011).
59 Michaud v France App No 12323/11 (ECtHR, 6 December 2012).
63 Odermatt (n 40) 12; Dean Spielmann, Speech at the Conference on ‘EU accession to the ECHR’, Ecole Nationale d’Administration (Strasbourg), 10 April 2014.
64 European Commission (n 33) para 12.
Ministers of the Council of Europe – in the supervision of the execution of an ECtHR judgment that would have indirectly ruled on the invalidity of an EU measure.\footnote{Jean-Paul Jacqué, ‘The Convention and the European Communities’, in Ronald Macdonald, Franz Matscher and Herbert Petzold (eds), The European System for The Protection of Human Rights (Nijhoff 1993) 894.}

iv. \textit{The Need for More Coherence in the Protection of Human Rights at European Level and on the International Scene.}

The last essential element that supports the EU accession is that this could globally contribute to a higher degree of consistency in the human rights protection framework in Europe.\footnote{Gérard Cohen-Jonathan, ‘La problématique de l’adhésion des Communautés européennes à la Convention européennes des droits de l’homme’, in Pierre-Henri Teitgen, Etudes de droit des communautés européennes : mélanges offerts à Pierre-Henri Teitgen (Pedone 1984) 96.} Firstly, from a substantive point of view, the accession could bring more coherence in the parallel existence of the Charter and the ECHR as human rights standards in the EU.\footnote{On the relation between the Charter and the ECHR after the accession, see page 27.} A better coordination of the way both the Luxembourg and the Strasbourg Court interpret the human rights contained in the ECHR is also to be taken into account.\footnote{On the relation between the ECJ and the ECtHR, see page 32.} Secondly, from a procedural point of view, the accession would lead to the suppression of this ‘schizophrenic situation’\footnote{Claire Salignat, ‘The Impact of the Emergence of the European Union as a Human Rights Actor on the Council of Europe’ (2004) 4 BYIL 55, 72.} between the EU and its Member States concerning the attribution of responsibility before the ECtHR, whereby a Member State is potentially held responsible for a violation of the ECHR rooted in EU law.\footnote{See page 7 concerning the situation before accession, and page 45 regarding the attribution of responsibility after the accession.}

Furthermore, the EU membership in the ECHR framework would have a clear significance on the international scene, with regard to the credibility of the EU in its external action and its relations with respect to human rights.\footnote{See page 28.}

\section*{2° No Alternative to Accession}

Before the accession process to the ECHR was effectively launched, and before the Lisbon Treaty made this accession a genuine obligation, several other reforms were envisaged by academics and European institutions. However, none of these provided a comprehensive solution to the shortcomings described above, in the same way that the formal accession to the ECtHR does.
Originally, the codification of human rights in the EU legal order was conceived as an alternative to the EU accession to the ECtHR\textsuperscript{72}, as it would solve the issue of the lack of a formal legal basis for the protection of human rights within the EU. This was the initial view of the European Commission in 1976 before it opted for the accession three years later\textsuperscript{73}. Yet this option did not provide any answer to the problem of the absence of the external review of EU law, or to the limited possibility of individual complaints for a breach of human rights. Another proposal was to incorporate the content of the ECHR into the EU legal order.\textsuperscript{74} This option, however, had the same failings as the first one, along with the risk of multiple divergences of interpretation of the Convention between the ECJ and the ECtHR.

Some scholars have also suggested that a simple coordination of the ECJ’s and ECtHR’s respective case law on human rights could be a satisfactory solution to EU’s shortages with respect to human rights.\textsuperscript{75} This coordination could operate on an informal basis\textsuperscript{76} or through the introduction of a preliminary reference mechanism by the ECJ to the ECtHR when the ECJ is confronted with a question of interpretation of the ECHR\textsuperscript{77}. Again, these solutions would not tackle the issue of the limited \textit{locus standi} of individuals before the ECJ, and would not include the domains over which the ECJ has no jurisdiction under EU law.

Consequently, the accession to the ECHR is the only option for the EU to provide a complete and effective answer to the above-mentioned shortcomings with regard to its human rights protection and its relation with the ECHR system.\textsuperscript{78} First and foremost, it


\textsuperscript{73} See note 33.

\textsuperscript{74} Henry G. Schermers, ‘The Communities under the European Convention on Human Rights’ (1978) 5(1) Legal Issues of Economic Integration 1, 3.


provides a right to individual petition before the ECtHR against the EU. Secondly, the EU is granted the possibility to defend itself before the ECtHR, to correctly endorse responsibility for a violation of the ECHR rooted in EU law, and to be duly represented in the institutional framework of the Convention. Thirdly, it makes the EU human rights protection regime subject to external review by a ‘ready-made and advanced regime with which it can address the weaknesses of its own human rights policy and jurisprudence’.

Fourthly, the ECHR will also become a directly binding source of law within the EU legal order.

Nonetheless, the necessity of EU’s accession to the ECHR does not mean the accession process would be conducted without difficulty. In fact, as the Steering Committee for Human Rights (CDDH) of the Council of Europe emphasised in its 2002 preliminary study on the EU accession, several delicate questions need to be addressed before the EU will be formally bound by the Convention. Many of those issues are related to the fact that the EU’s accession consists in the participation and the responsibility of one international organisation within another one. Additionally, the fact that the EU is a *sui generis* international organisation with substantive powers and some supranational characteristics makes these questions even more complex. Moreover, as the accession concerns a treaty related to human rights, this involves unique legal challenges, not to mention the fact that the ECHR is a very special international convention of its kind.

As Odermatt rightly points out, EU accession to the ECHR will be ‘the first time that an international organisation formally submits itself to a system of external human rights review’.

This situation therefore requires creative solutions. As the Explanatory Report to the 2013 Draft Accession Agreement indicates, the challenge lies in the balance that must

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79 See Jacqué (n 65) 907.
80 Harpaz (n 5) 116.
84 See page 2.
85 Odermatt (n 40) 4. As a matter of fact, the EU is party to the UN Convention on the Rights of Persons with Disabilities since 2010, but this accession does not have the same implication as the ECHR system, in particular concerning the right to individual petition.
87 Draft Explanatory Report (n 2) para 7.
be struck between two requirements. On the one hand, the EU must be treated as far as possible in the same way as other ECHR parties, so that its membership puts the EU ‘on an equal footing’\textsuperscript{88} with them. On the other hand, some specific characteristics of the EU with regard to the ECHR must also be taken into account.\textsuperscript{89} First of all, the terminology used in the provisions of the ECHR, originally drafted for the membership of States, will have to be at least partially adapted to the accession of a non-State party.\textsuperscript{90} Secondly, some adaptations also relate to the specific characteristics of the EU as a \textit{sui generis} international organisation, such as the autonomy of the EU legal order and the monopoly of the ECJ on the interpretation of EU law. To ensure this balance is really ensured, these amendments should only include adaptations that are ‘strictly necessary’\textsuperscript{91}.

\section{The Accession Process}

A long road has been travelled since initial ideas on the need for accession were formulated into a drafting of an actual Accession Agreement.

The very first idea to formally incorporate the ECHR into the EU legal order was made in the early fifties in the Treaty of the European (Political) Community\textsuperscript{92}, which was finally aborted. It subsequently took almost thirty years before an official EU institution envisaged the accession of the Union (at the time still European Communities) to the ECHR\textsuperscript{93}: in a 1979 Memorandum, the European Commission indicated that the ‘best way of replying to the need to reinforce the protection of fundamental rights at [EU] level, at the present stage’\textsuperscript{94} consists in the EU formally adhering to the ECHR. This Commission document, where the main pros and cons of accession were comprehensively examined\textsuperscript{95}, formally launched the discussion\textsuperscript{96}. Although the Commission pointed out that ‘the negotiations over accession […] will, in any case,
take a considerable amount of time"\textsuperscript{97}, it considered at the same time that the EU ‘should adhere as soon as possible to the Convention’\textsuperscript{98}. Despite the fact that the Commission’s proposal received a favourable opinion by the European Parliament\textsuperscript{99} in 1982, no further steps were taken by EU Member States in subsequent years\textsuperscript{100}. The Commission reiterated its position in a 1990 Communication\textsuperscript{101}, in which a number of negotiating directives were proposed.

In 1996, these initiatives were seriously hampered by the ECJ. In its Opinion 2/94 on the EU accession to the ECHR, the Luxembourg Court ruled that ‘as [EU] law now stands, the Community has no competence to accede to the Convention’.\textsuperscript{102} According to the Court, this lack of proper legal basis in the EU Treaties for the accession could not be compensated by the recourse to the EU implied powers, as it was foreseen by Article 235 of the Treaty on the European Communities (current Article 352 TFEU). Indeed, while emphasising the importance of respect for human rights in the EU, the ECJ stated that the accession would ‘entail a substantial change in the present [EU] system for the protection of human rights’ and that this ‘would be of constitutional significance and, therefore, ‘could be brought about only by way of Treaty amendment’\textsuperscript{103}.

Although the ECJ’s opinion was criticised by some scholars for its overly restrictive interpretation of the Treaty\textsuperscript{104}, this undeniably led to a fall-back of the EU on the question of the accession to the ECHR.\textsuperscript{105} In contrast, the progressive expansion of EU’s competences by the Maastricht and Amsterdam Treaties made the need for accession even greater, as the new EU fields of action – such as asylum, immigration policy, and political and judicial cooperation in criminal matters – had a substantial impact on human rights issues.\textsuperscript{106} Although the Charter of Fundamental Rights was adopted – still without binding force – in October 2000, the Nice Treaty of February

\textsuperscript{97} European Commission (n 1) para 27.
\textsuperscript{98} Ibid, Preamble.
\textsuperscript{100} Margaritis (n 15) 17.
\textsuperscript{101} See note 62.
\textsuperscript{103} Ibid 34-35 (emphasis added). For a contrary opinion, see Jacqué (n 65) 905.
\textsuperscript{104} Patrick Wachsmann, ‘L’avis 2/94 de la Cour de justice relatif à l’adhésion de la Communauté européenne à la Convention de sauvegarde des droits de l’homme et des libertés fondamentales’ (1996) 32(3) RTDE 467, 477.
\textsuperscript{105} Bultrini (n 44) 7; Scheeck (n 10) 865; Rodean (n 24) 16.
\textsuperscript{106} Saltinyte (n 39) 182.
2001 did not provide any explicit legal basis for the accession to the ECHR, despite the amendment proposed by Finland during the intergovernmental conference of 2000.  

At the level of the Council of Europe, the Parliamentary Assembly has continuously supported the idea of accession since the adoption of its first resolution in this sense in 1981. The legal study conducted by the CDDH in 2002 then gave a preliminary view of the technical and legal issues related to the possible EU membership to the Convention framework. This was followed by the adoption of Protocol 14 to the ECHR in 2004, which, inter alia, amended Article 59 ECHR in order to include a specific legal basis to the EU accession.

In the meantime, the EU tried to respond to the shortcomings in its human rights protection regime and more specifically to the lack of legal basis in its own primary law for the accession to the ECHR, as pointed out by the ECJ in 1996. The European Convention and the subsequent Constitutional Treaty addressed both these issue by incorporating the Charter into the Treaties and by inserting a provision which makes the accession to the ECHR an obligation for the EU. The failure of the Constitutional Treaty was overcome by the adoption of the Lisbon Treaty in 2007, which basically included the same innovations on these topics. Article 6(2) TEU indicates that the Union ‘shall accede’ to the ECHR. In addition, Protocol 8 to the Treaty specifies the conditions on which the EU can accede to the Convention in order to preserve ‘the specific characteristics of the Union and Union law’ and to ‘ensure that the accession of the Union shall not affect the competences of the Union or the powers of its institutions’ and that ‘nothing therein affects the situation of Member States in relation to the Convention’.

The entry into force of both the Lisbon Treaty in December 2009, and Protocol 14 to the ECHR in June 2010, put an end to the question of the lack of legal bases in EU primary

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109 CDDH (n 82). See also Doblhoff-Dier and Kusmierczyk (n 6) 356.
110 Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Article 17.
111 Auvret (n 81) 382-383.
114 One can note the difference of terminology used in this Article in comparison with Protocol 14 to the ECHR which only states that the Union ‘may accede’ to the Convention.
115 Protocol No 8 relating to Article 6(2) of the Treaty on European Union on the accession of the European Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms. See also the Declaration on Article 6(2) of the Treaty on the European Union.
law and in the ECHR.\textsuperscript{116} The Council of the EU subsequently transmitted negotiating directives to the European Commission, while the Committee of Ministers of the Council of Europe adopted \textit{ad hoc} terms of reference to the CDDH. All obstacles to the opening of the negotiations were therefore removed; and negotiations between the European Commission and the CDDH – reunited in an informal ‘CDDH-EU’ working group\textsuperscript{117} – were formally set up in July 2010.

In July 2011, the CDDH-EU informal group released a first version of the set of draft accession instruments. Subsequently, negotiations were hampered by the opposition of some EU Member States on several minor aspects of the accession.\textsuperscript{118} This lack of a coordinated position within the EU made the pursuance of the negotiations with the CDDH rather problematic. These difficulties were finally overcome as negotiations resumed in May 2012 in a new \textit{ad hoc} group\textsuperscript{119}, which went on to complete the final versions of the draft legal instruments in June 2013. This final report includes, \textit{inter alia}, a Draft Accession Agreement and a Draft Explanatory Report to this Agreement.\textsuperscript{120}

After ratification, the Accession Agreement would be included as an integral part of the ECHR.\textsuperscript{121}

Nevertheless, the finalisation of the Draft Accession Agreement after three years does not mean that accession will be accomplished very soon. As a matter of fact, ‘the road to accession remains long and winding’.\textsuperscript{122} In accordance with Article 218(11) TFEU, the next – and potentially difficult – step is the opinion the ECJ will provide on the Draft Accession Agreement.\textsuperscript{123} In the event of a negative opinion by the Luxembourg

\textsuperscript{116} Bailleux, Van Drooghenbroek and Delgrange (n 43) 315.

\textsuperscript{117} Christina Eckes, ‘EU Accession to the ECHR: Between Autonomy and Adaptation’ (2013) 76(2) MLR 254, 263-264.


\textsuperscript{119} Stian Oby Johansen, ‘The EU’s Accession to the ECHR: Negotiations to resume after 7 months hiatus’ (Pluricourts, 14 May 2012) <http://blogg.uio.no/jus/smr/multirights/content/the-eus-accession-to-the-echr-negotiations-to-resume-after-7-month-hiatus> accessed 18 July 2014.

\textsuperscript{120} See note 2.

\textsuperscript{121} Margaritis (n 15) 19; Gragl (n 90) 22.


\textsuperscript{123} For a comment on the hearing of May 2014 at the ECJ concerning this opinion, see Stian Oby Johansen, ‘Some thoughts on the ECJ hearing on the Draft EU-ECHR Accession Agreement’ (Pluricourts, 28 May 2014) <http://blogg.uio.no/jus/smr/multirights/content/some-thoughts-on-the-ecj-hearing-on-the-draft-eu-echr-accession-agreement-part-1-of-2> accessed 18 July 2014.
Court, a renegotiation of the terms of the Agreement would be necessary. Furthermore, at the level of the Council of Europe, the opinions of the ECHR and of the Parliamentary Assembly will also be requested. As a last step, the Agreement must be signed by both the Committee of Ministers of the Council of Europe and the European Council of the EU. On the latter point, Article 218 TFEU specifically requires the consent of the European Parliament, as well as the unanimity of the EU Heads of State or Government for the accession to the ECHR. The Agreement must then be separately signed and ratified by Member States of the Council of Europe and of the EU. In this respect, the question may be raised as to whether the principle of duty of sincere cooperation (Article 4(3) TEU) makes the ratification of the Accession Agreement a formal obligation under EU law for EU Member States, since the accession to the ECHR is an obligation under Article 6(2) TFEU.

By way of conclusion, however complex the process of accession to the ECHR may be for the EU, it is now clearly established that this accession has become indispensable with regard to its positive impact on the coherence of human rights protection regimes in Europe.

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125 Doblhoff-Dier and Kusmierczyk (n 6) 357.

II. **The Incorporation of the ECHR within the EU Legal Order**

The eventual EU accession to the ECHR will have substantial effects on the EU legal system and on its institutional framework. One of the main aspects of these consequences relates to the way in which the Convention will be incorporated into the EU legal order. In this matter, the scope of this accession is firstly examined, both from the ECHR’s and the EU’s points of view (A). The particular impacts this accession may have on the relationship between the Charter and the ECHR will be further examined (B), as well as the future status of the Convention in the EU legal order (C) and the specific consequences of the accession on the EU Foreign, Neighbourhood and Enlargement Policies (D).

A. **The Scope of Accession**

Although the reality of the future EU accession to the ECHR is now hardly disputable, the exact scope of this accession remains, none the less, more questionable. This question can be raised both from the perspective of the ECHR and its related Protocols (1°) and with respect to EU law provisions (2°). Moreover, the possibility of inter-party cases between the EU and its Member States also raises specific concerns (3°).

1° **The Scope of Accession with respect to ECHR Provisions and Protocols**

A recurrent question in the discussions on the scope of accession relates to the Protocols to the Convention: should the EU accede only to the ECHR, or also ratify its related Protocols? And if so, should all Protocols be included, or only some of them? The difficulty here comes from the fact that not all EU Member States have ratified all Protocols; neither have they all acceded to the same Protocols. Only Protocols 1 and 6 to the Convention have been ratified by all EU Member States. In the case where the EU would only accede to these two latter Protocols, this would correspond to the ‘lowest common denominator of human rights protection’ and could theoretically go against the view of the ECJ which seeks to ensure a maximum standard of human rights protection.

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On the other hand, EU’s accession to Protocols that are not ratified by all Member States could be seen as introducing international agreements into Member States’ legal orders ‘through the backdoor’. However, this concern is not entirely justified as the application of these Protocols by Member States would only occur to the extent that they are implementing EU law. Moreover, it could also be considered as contrary to the view of the EU as an autonomous legal order. Nevertheless, this reluctance on the part of some Member States led the negotiators to opt for the minimalist approach: Article 1(1) of the Draft Agreement states that the EU will accede to the Convention and only to Protocols 1 and 6 to the Convention.

Some scholars have pointed out the potential problems of this approach with respect to ECHR Protocols that correspond to rights contained in the EU Charter. For example, Protocol 12 on non-discrimination is not ratified by all Member States, yet its content coincides with EU primary law, inter alia Article 21 of the Charter. Similarly, Article 2(2) of the Charter on the abolition of the death penalty corresponds to Protocol 6, which will be ratified by the EU, but also to Protocol 13, which is currently not included in the Draft Accession Agreement. In any case, Article 59 ECHR, as amended by the Draft Accession Agreement, provides the possibility for the EU to accede to further Protocols to the Convention.

Additionally, the EU will be indirectly bound, after accession to the ECHR, by several agreements related to procedural rules before the ECtHR. Also, in order to ensure that ECHR provisions apply equally to the EU and to other ECHR parties – while taking into account the fact that the EU is the only non-State party to the Convention – Article 1(5) of the Draft Agreement provides some clarifications on the interpretation of the terminology used in the ECHR which relates to State parties.

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129 Cohen-Jonathan (n 66) 91.
130 Jacqué (n 29) 1003.
131 Ibid.
132 Cohen-Jonathan (n 66) 91; Odermatt (n 40) 30.
133 Gragl (n 90) 17.
135 This omission can be explained by the fact that, at the time of the adoption of the Draft Agreement (June 2013), not all Member States had ratified Protocol 13. This is not the case anymore, as Poland finally ratified the Protocol in May 2014.
136 Draft Accession Agreement, Article 9. See Odermatt (n 40) 22.
The Scope of Accession with respect to EU Law

From the perspective of EU law, the potential applicability of the ECHR – and subsequent jurisdiction of the ECtHR – to the entire EU legal system has raised two types of concern among scholars and Member States, both related to the absence of jurisdiction of the ECJ on some parts of EU law.

The first concern relates to the inclusion of EU primary law in the scope of accession, and consequently to its possible review by the ECtHR with respect to its compatibility with the Convention. This concern can be explained by two related elements\(^{138}\). Firstly, primary law can neither be challenged before the ECJ nor before national courts. Secondly, the EU itself is not able to amend EU Treaties (‘Kompetenz-Kompetenz’), i.e its own ‘constitution’.\(^{139}\) In this perspective, the EU could hardly endorse the sole responsibility of the incompatibility of an EU primary law provision with the ECHR, as it was the case in Matthews, where the ECtHR held the UK responsible for such an incompatibility\(^{140}\). Some Member States therefore consider that EU primary law should simply be excluded from the scope of accession.\(^{141}\) This view cannot be reasonably supported for a number of reasons. First, this exclusion would represent a ‘disproportionate privilege’\(^{142}\) granted to the EU in comparison with other ECHR parties whose respective constitutions are not excluded from the ECtHR’s scope of review. Secondly, such an exclusion would be a reservation of ‘general character’, which is explicitly prohibited by Article 57 ECHR, and recalled by Article 2 of the Draft Agreement.\(^{143}\) Thirdly, this could also potentially force the ECtHR to interpret EU law – and therefore endanger the autonomy of the EU legal order and the ECJ’s monopoly of interpretation – in order to ascertain whether the violation is rooted in EU primary or secondary law.\(^{144}\) Fourthly and lastly, excluding its highest norms from external review would seriously put into question EU’s objective of reinforced credibility with regard to human rights policy.\(^{145}\) In any case, the Explanatory Report to

\(^{138}\) Gragl (n 45) 50-51.
\(^{139}\) According to the principle of conferral (Article 5 TEU), only EU Member States can amend EU primary law.
\(^{140}\) See page 8.
\(^{142}\) Gragl (n 45) 62.
\(^{143}\) Kuijer (n 134) 29; Odermatt (n 40) 29.
\(^{144}\) Tobias Lock, ‘Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order’ (2011) 48 CML Rev 1025, 1038; Gragl (n 45) 57.
the Draft Agreement implicitly confirms the inclusion of EU primary law into the accession scope.\textsuperscript{146} However, one must note that ECtHR decisions declaring a violation of the Convention by EU primary law would have specific consequences with regard to the attribution of responsibility between the EU and its Member States.\textsuperscript{147}

The second concern is related to the inclusion of EU Common Foreign and Security Policy (CFSP) matters in the accession scope. Similarly to the previous point, the reason behind the concern of some Member States is the general lack of jurisdiction of the ECJ on CFSP issues – with the exception of restrictive measures against individuals (Article 275 TFEU).\textsuperscript{148} This concern also stems from the fact that questions of attribution of responsibility are even more complex in the field of CFSP\textsuperscript{149}, in particular with respect to possible military operations under the mandate of the EU\textsuperscript{150}. Nonetheless, this exclusion has been clearly rejected in the Draft Agreement\textsuperscript{151}, for the same reasons as those mentioned above against the exclusion of EU primary law: privilege over other ECHR parties, prohibited reservation of general character, threat on the autonomy of EU law and on the ECJ’s monopoly of interpretation, and of the potential negative impacts on the EU’s international credibility\textsuperscript{152}. Moreover, the fact that the Lisbon Treaty has granted the EU a single legal personality and abolished the former pillar system is another argument against such exclusion of CFSP matters.\textsuperscript{153}

More generally, one can also argue that nothing in Article 6(2) TEU, in Protocol 14 or in Declaration 2 to the Lisbon Treaty explicitly indicates that EU primary law or CFSP matters should be excluded from the scope of accession. For this reason and those mentioned above, the Draft Accession Agreement includes the entire activities of the EU in its scope.\textsuperscript{154}

\textsuperscript{146} Draft Explanatory Report (n 2) paras 34, 49 and 65.
\textsuperscript{147} See page 45.
\textsuperscript{148} French Senate (n 141) 8; Dollat (n 4) 562; Jacqué (n 29) 1005-1006; Besselink (n 118) 316.
\textsuperscript{151} Draft Explanatory Report (n 2) para 23.
\textsuperscript{152} See also page 28.
\textsuperscript{153} Clemens Ladenburger, ‘Vers l’adhésion de l’Union européenne à la Convention européenne des droits de l’homme’ (2011) 1 RTDE 20, 23.
\textsuperscript{154} See also Article 1(3) of the Draft Accession Agreement which recalls that ‘[n]othing 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’, in reference to the requirement expressed in Article 6(2) TFEU.
3° Inter-Party Cases between the EU and its Member States before the ECtHR

The third issue at stake with respect to the scope of accession concerns the possibility for the EU or its Member States to submit a complaint against each other before the ECtHR. Indeed, Article 33 ECHR provides the possibility for ECHR parties to refer any alleged breach of the Convention by another party to the Strasbourg Court. The problem raised by this possibility lies in the fact that, under Article 344 TFEU, ‘Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein’: the ECJ’s monopoly of jurisdiction comprises disputes between the EU and its Member States, or between Member States inter se, in the event that EU law is at stake.\textsuperscript{155} After accession, the ECHR will form an integral part of EU law, and will consequently be subject, in the hypotheses provided in Article 344 TFEU – combined with Articles 259, 263(2) and 265(1) TFEU – to the exclusive jurisdiction of the Luxembourg Court.\textsuperscript{156} Moreover, the duty of sincere cooperation (Article 4(3) TEU) could also be understood as preventing Member States from submitting a dispute against the EU or another Member State before another jurisdiction than the ECJ.\textsuperscript{157} Therefore, for some scholars, in order to ensure the respect of the ECJ’s monopoly of jurisdiction and of the duty of cooperation, the Accession Agreement should exclude the jurisdiction of the ECtHR on inter-party complaints between the EU and its Member States, or between Member States inter se, when the compatibility of EU law with the Convention is at stake.\textsuperscript{158}

In this regard, Article 55 ECHR must also be taken into account, as it excludes any means of dispute settlement between Parties other than by referral to the ECtHR. Nevertheless, contrary to Article 344 TFEU, Article 55 ECHR allows parties to derogate from this obligation ‘by special agreement’. These terms would mean that the EU and its Member States would have to conclude an additional separate agreement ‘explicitly referring to the ECtHR’\textsuperscript{159}, in order to grant the ECJ the power to interpret

\textsuperscript{155} See European Parliament, Resolution of 19 May 2010 on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms 2009/2241(INI), para 8. See also the Mox Plant case, where the ECJ held that Ireland had breached its obligations under EU law by submitting a dispute with the UK to the dispute settlement mechanism attached to the Convention on the Law of the Sea (UNCLOS) (Case C-459/03, Commission v Ireland [2006] ECR I-4635).

\textsuperscript{156} Margaritis (n 124) 75.

\textsuperscript{157} Gragl (n 90) 21-22.


the Convention in the event of a dispute between EU Member States or between a Member State and the EU.\textsuperscript{160}

One should in fact consider the jurisdiction of the ECJ as admissible and even necessary under Article 55 ECHR, taking into account the principle of subsidiarity under the Convention and the related obligation to exhaust domestic remedies before submitting a case before the ECtHR.\textsuperscript{161} In this sense, the ECJ is seen as a domestic court, and the ECtHR has a subsidiary jurisdiction in the event that the EU or an EU Member State decides to challenge the preliminary ECJ’s decision before the ECtHR. From this perspective, disputes between EU Member States \textit{inter se} or between the EU and the Member States must first be brought before the ECJ in order to comply with Article 344 TFEU under EU law and with Article 35 ECHR with respect to the Convention.\textsuperscript{162} The monopoly of the ECJ and the requirements of the ECHR are therefore both preserved.\textsuperscript{163} In this manner, Article 5 of the Draft Accession Agreement provides that proceedings before the ECJ ‘shall be understood as constituting neither procedures of international investigation or settlement’ within the meaning of Article 35(2)b ECHR\textsuperscript{164}, ‘nor means of dispute settlement within the meaning of Article 55 of the Convention’.\textsuperscript{165}

It must be recalled that the ECJ’s monopoly of jurisdiction under Article 344 TFEU only covers disputes related to the application of EU law. In this sense, it does not theoretically preclude the EU from submitting a complaint to the ECtHR for breach of the Convention by a Member State measure which is not related to EU law.\textsuperscript{166} This possibility is, however, highly hypothetical, in view of the exceptional nature of inter-party applications in general.\textsuperscript{167}

\textsuperscript{160} Verstichel (n 35) 140-141. See also: CDDH 2002 Study on EU accession (n 82). para 65.
\textsuperscript{162} Gragl (n 90) 35.
\textsuperscript{163} Groussot, Lock and Pech (n 145) 10; Margaritis (n 124) 75.
\textsuperscript{164} Article 35(2)b stipulates that individual applications before the ECtHR are inadmissible if they have ‘already been submitted to another procedure of international investigation or settlement and contains no relevant new information’.
\textsuperscript{165} See also Article 4 of the Draft Accession Agreement, which provides adaptations of the terminology used in the Convention.
\textsuperscript{166} De Schutter (n 158) 563.
\textsuperscript{167} Gragl (n 90) 33.
B. The ECHR and the EU Charter

Envisaging the numerous issues surrounding the EU accession to the ECHR inevitably leads to the question of the relationship between the ECHR and the Charter of Fundamental Rights of the EU. This link is obvious as both these instruments are aimed at ensuring the protection of human rights in a European context.

The idea of an instrument of human rights protection specific to the EU has been suggested at least since the seventies. But it was in 1999, at the Cologne European Council, that the drafting process of the EU Charter was formally launched. Drafted by an ad hoc ‘Convention’, the Charter was solemnly proclaimed in December 2000 at the Nice European Council. As Article 51 of the Charter states, the scope of application of the Charter is limited to EU institutions, bodies, offices and agencies, and to Member States ‘only when they are implementing Union law’, in accordance with the general principle of subsidiarity.

The influence of the ECHR on the content of the Charter is multiple. At the drafting stage, the Convention served as role model in the work of the Convention. Relations between the Charter and the ECHR are also explicitly envisaged in the core text of the Charter: Article 52(3) stipulates that rights contained in the Charter, in so far as they correspond to these guaranteed by the ECHR, have the same meaning and scope as those laid down by the ECHR; but ‘[t]his provision shall not prevent Union law providing more extensive protection’. In other words, the ECHR must be considered as a ‘minimum standard’ for the protection of human rights by the EU, while the Charter offers a ‘maximum protection’ in the sense that it can offer a higher level of protection than the ECHR does. In this regard, the Explanations relating to the Charter include a list of equivalences between the ECHR and the Charter, detailing which Charter rights have the same meaning and scope as in the ECHR, or have the

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168 See for example the 1976 Communication of the European Commission examining the ‘advantages and disadvantages of a catalogue of fundamental rights’: COM (76) 37, paras 33-37.
170 Bailleux, Van Drooghenbroeck and Delgrange (n 43) 259-262.
171 Paris (n 49) 20; Stelios Andreadakis, ‘The European Convention on Human Rights, the EU and the UK: Confronting a Heresy: A Reply to Andrew Williams’ (2013) 24 EJIL 1187, 1190.
173 Lock (n 159) 382. One can note that this conception of the ECHR as a ‘minimum standard’ was already formulated in the Commission Memo of 1979: see European Commission (n 1) para 10.
174 Paris (n 49) 21.
same meaning but not the same scope as in the ECHR. The goal is therefore not to ensure uniformity between both instruments: ECHR’s principle of subsidiarity – enshrined in Article 53 of the Convention – clearly implies that nothing precludes parties from ensuring a higher protection of the rights contained in the Convention.

Moreover, although Article 52 of the Charter does not explicitly refer to the ECtHR’s case law on the interpretation of the Convention, the Preamble of the Charter and its official Explanations mention the jurisprudence of the Strasbourg Court as a relevant source of interpretation of the rights contained in the Charter. Article 53 of the Charter also refers to the ECHR, stating that ‘[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights […] as recognised’ *inter alia* by the ECHR. This provision is clearly based on the formula of Article 53 ECHR, and could theoretically be understood as opening the possibility that the ECHR could actually offer higher protection than the Charter does.

In a certain sense, the adoption of the Charter in 2000 – and its incorporation into EU primary law with the Lisbon Treaty – can be seen as increasing the complexity of the human rights protection framework in Europe. Despite the guarantees provided by Article 52 of the Charter, the risk of divergence between EU and ECHR human rights standards clearly exists. The EU Charter has also been perceived by some as a potential threat to the credibility of the Council of Europe in its role in the field of

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176 Callewaert (n 61) 12.
178 Charter of Fundamental Rights of the EU, Preamble, para 5.
179 Explanations relating to the Charter (n 175) 24, 26, 30 and 33.
180 Lock (n 159) 384; De Burca (n 23) 678-679; Rodean (n 24) 13.
human rights.\textsuperscript{184} Furthermore, the recent ECJ’s jurisprudence related to human rights suggests that the Luxembourg Court is referring more and more to the Charter as the ‘obvious point of departure’\textsuperscript{185} of its reasoning, to the detriment of the ECHR.\textsuperscript{186} The danger of such an approach is that it could threaten the objective of consistency of the European global human rights protection.\textsuperscript{187} In fact, this objective has been confirmed by the two Presidents of the ECtHR and the ECJ themselves, in their Joint Communication of January 2011.\textsuperscript{188} It must in any case be remembered that Article 52(3) of the Charter formally requires the ECJ to interpret rights contained in the Charter in accordance with the ECHR.\textsuperscript{189}

Regarding EU accession to the ECHR, neither the adoption of the EU Charter nor its incorporation into EU primary law must be seen as precluding the necessity of the accession. As mentioned above\textsuperscript{190}, the initial view of the Commission in 1976 was that a choice should be made between these two possibilities.\textsuperscript{191} In reality, the adoption by the EU of its own catalogue of fundamental rights does not solve the issue of the absence of independent and external control on EU action vis-à-vis human rights; nor does it allow individuals to challenge EU measures before the ECtHR.\textsuperscript{192} The accession to the ECHR should therefore be regarded as a complementary measure, and not as a substitute to the Charter.\textsuperscript{193} According to former ECtHR judge Tulkens, the entry into force of the Charter with the Lisbon Treaty actually makes the accession a matter of

\textsuperscript{184} Krüger (n 60) 92; Salignat (n 69) 61; Olivier De Schutter, ‘The Two Europes of Human Rights: The Emerging Division of Tasks between the Council of Europe and the European Union in Promoting Human Rights in Europe’ (2007-2008) 14 CJEJ 509, 510.


\textsuperscript{186} Rosas (n 13) 6-7; De Burca (n 183) 173-174; Polakiewicz (n 149);


\textsuperscript{188} Court of Justice of the EU and European Court of Human Rights, Joint communication from Presidents Costa and Skouris, 24 January 2011, para 1. See also Noreen O’Meara, “‘A More Secure Europe of Rights?” The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR’ (2011) 12 German L J 1813, 1819.

\textsuperscript{189} Callewaert (n 172) 596.

\textsuperscript{190} See page 6.

\textsuperscript{191} European Commission (n 168) paras 28-29. In 1988, the Commission then finally considers that the accession to the ECHR and the adoption of a catalogue of human rights should be accomplished in parallel and are not alternative choices for the EU: see European Commission, ‘A people’s Europe’ COM (88) 331 final, para 4.4.3. This view will be recalled several times, including in the Commission’s Communication on the legal nature of the Charter (COM (2000) 644 final, 5) and at the European Convention (see Working Group II Final Report (n 112) 12).

\textsuperscript{192} Lenaerts (n 169) 600; Salignat (n 69) 62-63; De Schutter (n 158) 541; Bailleux, Van Droogenbroeck and Delgrange (n 43) 312-313.

\textsuperscript{193} Krüger (n 60) 93; Pernice and Kanitz (n 175) 13-14; Verstichel (n 35) 133.
urgency: in its application of the EU Charter, the ECJ indirectly interprets provisions of the ECHR; it is therefore necessary that the ECtHR can control the validity of ECJ’s case law in this field in order to safeguard the power of the ECtHR to interpret the Convention in the last resort. 194

C. The Status of the ECHR in the EU Legal System after Accession

An interesting question with regard to the legal effects of EU’s accession concerns the status of the ECHR in the EU legal order. Once the EU is formally party to the Convention, the ECHR – including the Accession Agreement – will logically rank, like other international agreements concluded by the EU, on an intermediate level between EU primary and secondary law, as an integral part of EU law. 195 EU Member States will, as a consequence, be doubly bound by the ECHR: on the one hand by virtue of their respective individual ratifications of the ECHR, and on the other hand according to their status as an EU Member State and to the principle of primacy of law. 196 With respect to the application of the ECHR in Member States’ legal orders for matters related to EU law, the Convention will be ‘directly applicable and have self-executing effects for both individuals and government authorities’. 197

Nevertheless, the intermediary hierarchical position of the ECHR between EU primary and secondary law is somewhat put into question by two elements. First, Article 6(3) TEU ranks fundamental rights, ‘as guaranteed by the [ECHR]’, among the ‘general principles of the Union’s law’, the latter being part of EU primary law. 198 Moreover, the Charter, as part of EU primary law too, classifies the ECHR as a prevailing ‘minimum standard’ under its Articles 52(3) and 53. These two additional recognitions of the ECHR in EU law, which will be logically maintained after accession, bring some confusion regarding the exact legal position of the Convention within the EU legal hierarchy. Nonetheless, this question is probably of limited practical importance, since the ECHR constitutes the minimum standard of protection of human rights in the legal orders of the EU and its Member States, and as the EU Charter provides an equivalent, or even more extensive, standard of protection. 199

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195 Ottavio Quirico, ‘Substantive and Procedural Issues Raised by the Accession of the EU to the ECHR’ (2010) 20 Italian YB Int'l L 31, 35; Gragl (n 45) 57.
196 Gragl (n 90) 19-20.
197 Ibid 20.
198 Quirico (n 195) 35.
199 Rosas (n 13) 9; Gragl (n 90) 20.
D. The Impact of the Accession on the EU Foreign, Neighbourhood and Enlargement Policies

The impact of EU’s accession to the ECHR on the consistency and effectiveness of the EU’s human rights protection does not only have implications in the internal sphere of the Union; this accession will also reinforce the EU’s credibility at international level in the field of human rights.\(^\text{200}\) This is of symbolic importance not only for the EU’s external action, but also more specifically for the EU Neighbourhood Policy (ENP) and enlargement strategy. Since the development of the EU’s human rights agenda on the international scene, there has been a growing contradiction between the EU’s demands for the respect for human rights by its international partners on the one hand, and the absence of a comprehensive human rights protection framework within the EU on the other.\(^\text{201}\) Even after the adoption of the Charter and its incorporation in EU primary law, the lack of external scrutiny on the EU’s human rights protection was also criticised.\(^\text{202}\) This has led the EU to be accused of applying a ‘double standard’ vis-à-vis its partner States, in particular vis-à-vis EU accession candidate countries.\(^\text{203}\)

Historically, the EU’s international strategy on human rights has been continuously strengthened since the early nineties, as its powers were simultaneously extended in the field of external action, in particular with respect to the development of the EU’s Common Foreign and Security Policy (CFSP) since the Maastricht Treaty.\(^\text{204}\) The promotion of respect for human rights is explicitly referred to as one of the key objectives of the EU’s External Action\(^\text{205}\) and comprises several components. The first distinctive feature is the inclusion of human rights clauses in EU bilateral trade and cooperation agreements with third countries. The purpose of these clauses is to make respect for fundamental rights an ‘essential element’ of the agreement in the sense that this actually conditions the overall agreement giving the EU the right to suspend or terminate an agreement in the event of non-respect of human rights by the third country concerned.\(^\text{206}\) The several partnership agreements concluded by the EU with ACP

\(^{200}\) White (n 107) 435; Krüger (n 60) 94. This idea was already expressed by the European Parliament in 1982, in its resolution on EU accession to the ECHR (n 99, para 2).


\(^{202}\) Kuiper (n 134) 22; Odermatt (n 40) 9.


\(^{205}\) See Articles 3(5) and 21(1) TEU.

\(^{206}\) Brandtner and Rosas (n 204) 473-474.
countries – in particular the current Cotonou Agreement of 2000 – are a telling example of the inclusion of such human rights clauses in EU trade and cooperation agreements. Secondly, respect for human rights is also linked to the EU trade policy through ‘unilateral trade preferences’ included in EU secondary legislation. In the framework of its CFSP, the EU has also engaged in ‘Human Rights Dialogues’ with more than thirty non-EU Member States. The forthcoming accession of the EU to the ECHR will, in this regard, send a strong signal of congruence of EU’s internal and external policies in the field of human rights, in particular when referring to the EU’s objective of ‘Leading by Example’, as it was titled by a Comité des Sages in the human rights agenda for the EU in 2000.

Moreover, human rights play a key role in the framework of the EU Neighbourhood Policy (ENP) set up in 2004. Thanks to the accession to the ECHR, the EU will also gain credibility in its privileged relations with its southern and eastern neighbours, in particular with ENP countries that are also members of the Council of Europe and – consequently – parties to the ECHR.

Another important issue concerns the universality of human rights. As proclaimed – for the first time in EU primary law – in the Lisbon Treaty, the EU envisages human rights as ‘universal values’. This idea of universality is at the very foundation of the EU’s promotion of human rights in its external action. In this perspective, the EU’s accession to the ECHR can be regarded as an alignment of the Union with its own conception of human rights, since it will be directly and formally bound by the ECHR, itself being the embodiment of the universality of human rights at pan-European level. In this respect, there has been a clear and relevant evolution in the terminology used concerning human rights in EU Neighbourhood Policy instruments: while the European Neighbourhood and Partnership Instrument (ENPI) – covering the period 2007-2013 – simply referred to ‘shared’ or ‘common values’ of democracy and respect

208 Brandtner and Rosas (n 204) 477-480.
211 Verstichel (n 35) 133-134; European Parliament, Resolution of 19 May 2010 (n 155) para 1.
212 See the Preamble of the TEU, Article 21(1) TEU, and the Preamble of the Charter.
213 Bultrini (n 44) 43.
214 Spielmann (n 63).
for human rights, the European Neighbourhood Instrument (ENI) – covering the period 2014-2020 – now uses the terminology of ‘universal’ values of [...] respect for human rights.

The upcoming accession will also have a symbolic resonance for the EU’s enlargement strategy. Respect for human rights has always been one of the key requirements for the accession to the EU. The so-called 1993 ‘Copenhagen criteria’ clarified the conditions with which any candidate country would need to comply in order to be eligible for EU membership, among which human rights are of great importance. The Amsterdam Treaty then formally incorporated into EU primary law the idea that candidate countries must respect the principles on which the EU is founded, including human rights. In this respect, participation in the ECHR by candidate countries ‘appears to be the principal – if not the only – objective criterion for determining their commitment to the respect of fundamental rights’. Even if adherence to the Convention is not stricto sensu required by EU law, this has clearly become a prerequisite for EU membership in practice. Therefore, the situation under which the EU makes ratification to the ECHR a condition for accession, without being itself subject to the external scrutiny of the Convention bodies, is certainly ‘anomalous’ and ‘unacceptable’. EU accession to the ECHR will thus increase the consistency of the EU’s enlargement policy, but it will also reflect the continuous enlargement of the Union, whose 28 Member States now account for almost two-thirds of the 47 State parties to the Convention.

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217 Lenaerts (n 169) 596.
218 Former Article F TEU. See current Article 49 TEU, now referring to the ‘values’ mentioned in Article 2 TEU.
219 Lenaerts (n 169) 598.
220 Ibid 599.
221 Alston and Weiler (n 201) 30.
222 Ress (n 75) 295; Harpaz (n 5) 129.
III. THE ROLE OF THE EU INSTITUTIONS IN PROCEEDINGS BEFORE THE ECtHR

The future membership of the Union to the ECHR also means that EU institutions will be involved, as any other party, in the mechanisms of application of the Convention. However, this participation raises particular questions in the case of the EU, given its specific nature of international organisation, and since its membership will be additional to the membership of EU Member States. In this perspective, this chapter first examines the implications this accession will have on the relations between the ECJ and the ECtHR (A). The second issue concerns the EU’s participation in the proceedings before the ECtHR and the attribution of responsibility between the EU and its Member States (B).

A. The Collaboration between the ECJ and the ECtHR

Among the key issues surrounding the EU accession to the ECHR, the question of the relations between the Strasbourg and the Luxembourg Courts is certainly central. The accession may firstly have a certain impact on the so-called ‘judicial dialogue’ between both Courts (1°). The upcoming jurisdiction of the ECtHR over EU acts also has serious implications for the ECJ’s monopoly of interpretation of EU law. This issue is tackled by the Draft Agreement through the introduction of a mechanism of ‘prior involvement’ of the ECJ (2°). Moreover, the question of the future of the ‘presumption of equivalent protection’ in ECtHR’s case law (3°) and the hierarchical relation between the ECJ and the ECtHR (4°) need to be addressed as well.

1° The ECJ-ECtHR Relations Before and After Accession: From a Diplomatic Dialogue to a Stabilised Relationship?

The subject of the relations between the ECJ and the ECtHR is undoubtedly a highly discussed topic among European academics.223 It is certainly worthwhile giving a brief overview of these relations in order to fully understand what implications the EU accession will have in this regard.

Considering the totally distinct – at least initially – purposes of the international organisations to which they belong, the European Courts were actually ‘never supposed to meet’. Yet the growing importance of Union’s powers led the Luxembourg Court to develop its jurisprudence with respect to human rights, and therefore to take the ECHR and its related ECtHR’s case law into consideration. Similarly, successive delegations of powers by the Member States to the EU inevitably forced the Strasbourg Court to have a closer look to EU law in its assessment of Member States’ compliance with the Convention. In the absence of a formalised link between the EU and the Convention bodies, both supranational Courts gradually modulated their relationship in an informal way. This informal dialogue concretely takes place via bilateral meetings, but first and foremost through mutual references to each other’s case law.

From the Luxembourg point of view, besides the ‘special significance’ it attaches to the Convention, the ECJ conceives ECtHR’s case law as a ‘source of inspiration’. However, the ECJ has never formally recognised the binding status of Strasbourg’s case law on its decisions. From the Strasbourg point of view, in the absence of EU membership to the Convention, the ECtHR has introduced an indirect control of compatibility of EU law vis-à-vis the ECHR, at least when the EU measure has been implemented by Member States. Nevertheless, in the case where Member States have no margin of appreciation in their implementation, this indirect control is limited, since the ECtHR has introduced a ‘presumption of compatibility’ of EU law vis-à-vis the Convention. This has been perceived by some as the symbol of a ‘non-aggression pact’ between both Courts. Moreover, as the ECJ does, the ECtHR takes occasionally into account ECJ’s case law in its jurisprudence.

224 Scheeck (n 10) 843.
225 Ibid 873-875.
226 Besselink (n 118) 304-305.
227 See Douglas-Scott (n 223) 640-652; Callewaert (n 182) 769-774; Paris (n 49) 17-20.
228 See e.g. ECJ’s Opinion 2/94 on EU’s accession to the ECHR (n 102), para 33. See also Case C-260/89, ERT [1991] ECR I-2925, para 41.
229 See page 18.
230 Antonio Tizzano, ‘Quelques réflexions sur les rapports entre les cours européennes dans la perspective de l’adhésion de l’Union à la Convention EDH’ (2011) 1 RTDE 9, 12.
231 Harpaz (n 5) 110.
232 Paris (n 49) 3.
233 Jacobs (n 182) 292; Paris (n 49) 3. A striking example in this regard is the Christine Goodwin v UK case, App No 28957/95 (ECtHR, 11 July 2002), where the ECtHR refers (paras 43-45) to the ECJ’s P v S and Cornwall County Council decision (Case C-13/94, [1996] ECR I-2143) to support its decision. See also ECtHR’s decision Michaud v France (n 59).
These references and adjustments to each other’s case law – which can be described as a ‘mutual influence circle’ – have progressively led to the emergence of a relation of ‘judicial diplomacy’ between the ECJ and the ECtHR. However, this equilibrium remains fragile: risks of divergence of interpretation of the rights contained in the ECHR really exist, although they are not necessarily easily detectable. On the one hand, such divergences between the two Courts can be actually beneficial in the event that they contribute to raise the minimum standard of human rights protection in Europe. On the other hand, it must be kept in mind that the ECtHR always has the final word on the interpretation of the rights enshrined in the Convention; the interpretation of the ECHR by the ECJ therefore entails certain risks of inconsistency in the global human protection framework at European level, in particular taking into account the fact that, for the time being, the ECJ does not consider itself formally bound by the ECtHR’s interpretation of the Convention. In this respect, EU accession will logically bring some clarity, since the EU will be formally bound by the Convention and ECJ’s case law will be under direct external scrutiny of the ECtHR. In other words, as Scheeck states, the accession will probably ‘merely confirm existing practices’ of judicial dialogue between the ECJ and the ECtHR, but it could also ‘transform the fragile equilibrium between the two European Courts into a more stable linkage’.

2° The Prior Involvement of the ECJ

In comparison with other EU institutions, the accession to the ECHR will particularly have substantial implications on the ECJ, as this will mark the first time that the Luxembourg Court is formally part of an international judicial system where its reasoning may be questioned. This observation has led to the suggestion that, in order to preserve the monopoly of interpretation of EU law by the ECJ and the autonomy of the EU legal order, the accession agreement should include a special mechanism whereby it is made sure that, in any proceedings before the ECtHR where an EU provision is at stake, the ECJ has been given the opportunity to give its interpretation of

234 Salignat (n 69) 67.
235 Scheeck (n 10) 838.
236 Ibid 872.
237 Lenaerts (n 169) 581-582.
238 Balfour (n 77) 201.
239 See e.g. the clear divergence of interpretation in the ECJ’s case Hoechst AG v Commission (Case 46/77, [1989] ECR 2859) and in the subsequent ECtHR’s decision Niemietz v Germany (App No 13710/88, 16 December 1992), where both Courts openly disagree on the interpretation of Article 8 ECHR. For a comment of this episode, see: Spielmann (n 223) 796-803; Campbell (n 77) 32-33.
240 Jacqué (n 65) 894; Odermatt (n 40) 13.
241 Scheeck (n 10) 877.
242 O’Meara (n 188) 1828.
the EU provision before the ECtHR makes a decision. This so-called ‘prior involvement mechanism’ is supported by several arguments, but it also raises much criticism and numerous questions about its technical implementation into the ECHR’s framework.

i. The Reasons Supporting the Prior Involvement of the ECJ

Three main elements are raised in order to justify the necessity of a prior involvement of the ECJ in proceedings before the ECtHR related to the interpretation of EU law. Each of these three arguments relate to the ‘specificity of the EU legal order’ in comparison with the national legal systems of the State parties to the Convention, as it is mentioned in Protocol 8 to the Lisbon Treaty.243 From the EU point of view, this prior involvement mechanism would therefore be required in order to comply with the accession conditions set out in EU primary law.

The first two aspects of the EU’s specificity relate to the autonomy of EU law and to the ECJ’s monopoly of interpretation of EU law. In their external dimension, the autonomy of EU law and the ECJ’s monopoly of interpretation imply that questions of application and interpretation of EU law have to be resolved through modalities that are internally defined by the EU itself and that EU law provisions cannot be interpreted through an external mechanism competing with the ECJ’s jurisdiction.244 Consequently, any agreement concluded between the EU and another international organisation must be drafted in such a way that it does not substantially interfere with the way in which competences have been divided between the EU and its Member States, and that it does not grant an international jurisdiction the power to interpret or apply EU law in lieu of the Luxembourg Court.245 The Court recalled this rule many times in several opinions issued on the compatibility of international agreements with these two general principles, more notably in its Opinion 1/91 on the European Economic Area (EEA) Treaty246.

243 Protocol No 8 to the Lisbon Treaty (n 115), Article 1. See also the Declaration No 2 to the Lisbon Treaty, stating that the accession ‘should be arranged in such a way as to preserve the specific features of Union law’ and that the ‘regular dialogue’ between the ECJ and the ECtHR ‘could be reinforced when the Union accedes to that Convention’.
244 De Schutter (n 158) 548.
245 Gragl (n 45) 36.
246 Opinion 1/91, [1991] (ECR I-6079). The ECJ considered that the way the EEA Court’s jurisdiction was initially designed in the Treaty was contrary to the autonomy of EU law (para 35). For a comment of this opinion, see Barbara Brandtner, ‘The “Drama” of the EEA: Comments on Opinions 1/91 and 1/92’ (1992) 3 EJIL 300. More recently, see also the negative opinion of the ECJ on the European unitary patent concerning the jurisdiction of its patent court (Opinion 1/09, [2011] ECR I-1142).
As recalled by the ECJ in its 2010 Discussion Document, this external aspect of the EU law autonomy and of the ECJ’s monopoly of jurisdiction is a crucial issue in the framework of the accession to the ECHR. Indeed, the participation of the Union in the Convention system implies that the ECtHR will examine the compatibility of EU law provisions (which will be considered as ‘domestic law’ in the sense of the Convention) with the rights enshrined in the ECHR. The question at stake is therefore whether this external review is to be considered as contrary to the autonomy of EU law and the ECJ’s monopoly of interpretation.

On this issue, it must first be recalled that the ECJ considers that the existence of an international judicial mechanism whose decisions bind the EU is not per se incompatible with the autonomy of EU law, as long as the ECJ’s monopoly of interpretation remains untouched. As regards the accession, most scholars and institutional actors, including the Working Group of the European Convention, take the view that the ECtHR’s jurisdiction over EU law would not, as a matter of fact, affect the autonomy of EU law. The first and main argument is that, even in the case of a decision of violation, the Strasbourg Court does not impose any binding interpretation of domestic law on the ECHR parties, since the ECtHR considers domestic law provisions as part of the facts. In other words, the ECtHR is not comparable to a ‘fourth instance tribunal’; it does not focus on the potential errors of law or of fact made by domestic courts. Secondly, a decision of the ECtHR declaring a breach of the Convention has no self-executing power or direct effect within the legal orders of the parties to the Convention: ECtHR judgments are declaratory in nature and are binding only under the obligations of international law. Thirdly, national authorities keep a margin of discretion in their execution of the ECtHR decision. In conclusion, the ECJ remains ‘the ultimate arbiter of Union law’. In addition, some authors, such as Krüger and Polakiewicz, question whether it is in fact appropriate for the EU to invoke the autonomy of its legal order in the specific field of human rights.

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247 Discussion document on certain aspects of the accession (n 124) para 8.
248 See Article 1(5) of the Draft Accession Agreement.
249 Gragl (n 45) 37.
250 Wachsmann (n 104) 485; Eckes (n 117) 259.
251 See Working Group II Final Report (n 112) 12.
252 De Schutter (n 158) 553; Doblhofer-Dier and Kusmierczyk (n 6) 364.
253 Gragl (n 45) 58-59; Craig (n 175) 1146.
255 Quirico (n 195) 47.
256 Gragl (n 45) 41.
257 Krüger (n 60) 95; Polakiewicz (n 149).
The second general characteristic of the EU legal system which would justify the need for a prior involvement of the ECJ is related to the specificity of the preliminary reference mechanism in EU law, combined with the strict rules of *locus standi* for individuals challenging an EU measure before the ECJ. Indeed, the fundamental reason why a prior involvement mechanism would be necessary lies in the fact that the ECJ will not automatically have the opportunity to rule on the interpretation of the EU measure before this issue of interpretation of EU law is raised before the ECtHR. In this regard, one particularity of the preliminary reference before the ECJ is that the national court has the power to decline the request of a party to ask for this preliminary reference. Therefore, after the EU accession, the ECtHR may have to rule on the compatibility of an EU measure with the Convention, preventing the ECJ from examining the validity of such a measure beforehand. This would thus impede the monopoly of interpretation of the ECJ. Moreover, the margin of discretion left to national courts with regard to the preliminary reference also explains why the ECtHR’s admissibility requirement of exhaustion of domestic remedies will not include the preliminary ruling as one of these domestic remedies from the EU point of view.

Similarly to the first argument, many critics have been raised against this second justification of the prior involvement mechanism. The main argument is that the introduction of such a mechanism is not justified by the specificity of EU law, but that this mechanism is actually nothing but a privilege for the EU in comparison with the situation of other ECHR parties, and is solely due to the own shortcomings of the EU judicial system. Limitations of the right of individuals to challenge EU measures before the ECJ, combined with the lack of effectiveness of the preliminary reference obligation for national courts, are not a sufficient reason to grant the EU such a preferential treatment and to undermine the principle of sovereign equality of the ECHR parties. Nevertheless, some scholars consider the prior involvement mechanism as a

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258 Callewaert (n 61) 9-10.
259 De Schutter (n 158) 564; Groussot, Lock and Pech (n 145) 15-16. See also the Joint communication from ECtHR’s and ECJ’s Presidents Costa and Skouris (n 188) para 2.
260 Draft Explanatory Report (n 2) para 65. See also: Odermatt (n 40) 28; Dobhlhoff-Dier and Kusmierczyk (n 6) 361.
261 Craig (n 175) 1131; Odermatt (n 40) 26.
necessary adjustment to the Convention system, in view of the unique nature of the ECJ in the European judicial framework.\textsuperscript{263}

In any event, negotiations between the EU and the Council of Europe finally led to the inclusion of this prior involvement mechanism in the 2013 Draft Accession Agreement.\textsuperscript{264} Many questions still remain open with regard to the mode of application of this mechanism.

\textit{ii. The Technical Modalities of the Prior Involvement Mechanism}

Two cumulative conditions are laid down in Article 3(6) of the Draft Agreement with regard to the triggering of the ECJ’s prior involvement in a case brought before the ECtHR. Firstly, the EU must be co-respondent\textsuperscript{265} to the proceedings alongside one or more of its Member States. The underlying logic of this requirement is that the mechanism ‘can be triggered only in situations whereby implementation of EU law is strictly required from Member States’.\textsuperscript{266} The second requirement corresponds to the same logic: the mechanism will apply only if the ECJ ‘has not yet assessed the compatibility with the rights at issue […] of the provision of European Union law’.\textsuperscript{267}

Apart from these two prerequisites, the Draft Agreement confines itself to indicating that the assessment by the ECJ must be made ‘quickly’ and that this ‘shall not affect the powers of the [ECtHR]’. The ECJ’s opinion will thus not formally bind the ECtHR. The Explanatory Report further indicates that ‘such assessment should take place before the Court decides on the merits of the application’.\textsuperscript{268}

However, it remains unclear which actor to the procedure before the ECtHR is entitled to request the prior involvement of the ECJ. The most plausible solution would probably be to entrust the European Commission with the task to ask for this prior ruling.\textsuperscript{269} Furthermore, a major concern is the risk this prior involvement could pose to the length of proceedings and, as a consequence, to the right of the applicant to a fair and speedy trial.\textsuperscript{270} Although the Draft Agreement insists that the ECJ must act

\textsuperscript{263} Roberto Baratta, ‘Accession of the EU to the ECHR: the Rationale for the ECJ’s prior involvement mechanism’ (2013) 50 CML Rev 1305, 1326; Margaritis (n 124) 71.
\textsuperscript{264} See Articles 3(6) and 5 of the Draft Accession Agreement.
\textsuperscript{265} On the concept of ‘co-respondent’, see page 42.
\textsuperscript{266} Baratta (n 263) 1313-1314.
\textsuperscript{267} Article 3(6) of the Draft Accession Agreement,
\textsuperscript{268} Draft Explanatory Report (n 2) para 66.
\textsuperscript{269} Groussot, Lock and Pech (n 145) 15
\textsuperscript{270} Jacqué (n 29) 1020; Campbell (n 77) 45; Gragl (n 90) 26.
‘quickly’, there is currently no guarantee that the ECJ will do so.\(^{271}\) Also, this new mechanism could possibly lead to additional burdens for the individual claimant before the ECtHR, in terms of legal assistance and expertise.\(^{272}\)

Other modalities of the mechanism, in particular the ECJ’s internal rules of procedure, are left to be determined by EU law.\(^{273}\) Nevertheless, the numerous uncertainties surrounding this prior involvement, as well as its non-binding nature, seriously question the necessity of such a mechanism – leaving aside the discussion on its objective justification.\(^{274}\) It must in any case be kept in mind that the situations covered by this instrument remain extremely marginal.\(^{275}\)

3\(^{\circ}\) **The ‘Bosphorus Presumption’: To Be Maintained After Accession?**

As indicated above\(^{276}\), one of the reasons supporting the need for the EU to accede to the ECHR is the responsibility Member States can currently endorse before the ECtHR for the implementation – without margin of appreciation – of an EU measure which is incompatible with the Convention. In this case, the Strasbourg Court granted EU law a ‘presumption of equivalent protection’ in comparison with the protection offered by the Convention system. This so-called ‘Bosphorus presumption’ – in reference to the case where the ECtHR confirmed this reasoning\(^{277}\) – is widely seen as a privilege granted to the EU and its Member States in the absence of formal EU membership to the ECHR. It could therefore be logically assumed that the ECtHR would abandon this special treatment once the EU accedes to the Convention, as this is precisely one of the main legal reasons of the accession.\(^{278}\)

In spite of this, the hypothesis has been raised that the *Bosphorus* presumption could be maintained after the accession.\(^{279}\) This would be justified by the fact that the specificity of the EU legal order, as the crucial argument in favour of this presumption, will remain

\(^{271}\) Craig (n 175) 1134; Odermatt (n 40) 27.
\(^{272}\) den Heijer and Nollkaemper (n 150) 19.
\(^{273}\) Murphy (n 122).
\(^{274}\) Olivier De Schutter, ‘Chronique – Les droits fondamentaux dans l’Union européenne’ (2011) Journal des Tribunaux 109, 111; Lock (n 144) 1011; Doblhoff-Dier and Kusmierczyk (n 6) 360
\(^{275}\) Joint communication from ECtHR’s and ECJ’s Presidents Costa and Skouris (n 188) para 2; De Schutter (n 274) 111; Odermatt (n 40) 27.
\(^{276}\) See page 7.
\(^{277}\) See page 9.
\(^{278}\) Jacobs (n 182) 295; De Hert and Korenica (n 41) 892; Odermatt (n 40) 35.
unchanged once the EU becomes party to the ECHR. In addition, the substantive grounds on which the ECtHR considers that the EU provides an equivalent human rights protection could be seen as reinforced by the EU’s formal participation in the Convention, together with the other positive changes introduced by the Lisbon Treaty in the field of human rights.

On the contrary, it could be argued that the upholding of the presumption would significantly diminish the concrete impact of EU’s accession by immunizing EU law from a comprehensive human rights control. Moreover, this would be probably understood by non-EU Member States as an unacceptable privilege and would therefore possibly call into question the ratification of the Accession Agreement by these ECHR parties.

According to De Schutter, three scenarios exist concerning the future of the Bosphorus presumption. The first hypothesis is that the presumption will be simply abandoned by the Strasbourg Court. A second possibility is the upholding of the presumption for EU law, as the ECtHR’s case law currently provides. The third scenario is the extension of this presumption to all parties to the Convention, in cases where, at domestic level, such ‘equivalent protection’ is provided. This last option could possibly be welcomed by some parties as a reinforcement of the subsidiarity principle of the ECHR system, but also as a possible contribution to solving ECtHR’s workload problems. On this latter point, however, former ECtHR judge Tulkens insists that the congestion of the Court and the EU’s accession are two distinct problems which require distinct solutions.

In this regard, the Draft Accession Agreement does not include any reference to the Bosphorus presumption nor to any of these three scenarios. This is quite logical since it is primarily up to the ECtHR to decide on the outcome of the presumption that it introduced itself.

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280 Saltinyte (n 39) 191-192; White (n 107) 440-441.
281 Besselink (51) 8.
282 Groussot, Lock and Pech (n 145) 9; Campbell (n 77) 42; De Hert and Korenica (n 41) 895.
283 De Schutter (n 279).
284 See in this regard Andrew Williams, ‘The European Convention on Human Rights, the EU and the UK: Confronting a Heresy’ (2013) 24(4) EJIL 1157, 116
285 Tulkens (n 187). See also Françoise Tulkens and Johan Callewaert, ‘La Cour de justice, la Cour européenne des droits de l’homme et la protection des droits fondamentaux’ in Marianne Dony and Emmanuele Bribosia (eds), L’aventur du système juridictionnel de l’Union européenne (ULB 2002) 203.
286 De Schutter (n 78) 9.
4° The Hierarchical Relation between the ECJ and the ECtHR after Accession

The last question concerning the impact of the EU accession on the relations between the ECtHR and the ECJ relates to the hierarchical relation which could exist between the two Courts.\textsuperscript{287} The idea that the Luxembourg Court would become subject to the authority of the Strasbourg Court after the accession is undoubtedly a cross-cutting concern in discussions surrounding this accession.

As recalled by the Explanatory Report\textsuperscript{288}, decisions of the ECtHR will be binding on the EU, including the ECJ, by virtue of international law. This principle has been admitted by the ECJ itself in its Opinion 1/91.\textsuperscript{289} The question may therefore be raised whether this binding status subsequently implies – at least indirectly – a subordination of the ECJ to the ECtHR.\textsuperscript{290} For many scholars, however, the question of hierarchy is not the right perspective from which the issue of the future relation between both Courts should be tackled.\textsuperscript{291} In view of the two Courts’ respective scopes of jurisdiction, the ECtHR should 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 ECHR’.\textsuperscript{292} Moreover, considering the judicial dialogue currently existing between Luxembourg and Strasbourg\textsuperscript{293}, neither of the two Courts has interest in a ‘guerre des juges’, which could certainly undermine their legitimacy.\textsuperscript{294}

B. The Participation of the EU in the ECtHR Proceedings and the Attribution of Responsibility between the EU and its Member States

The involvement of the EU in the proceedings before the ECtHR raises two specific questions. First, the criteria under which the EU can act as respondent – alongside with or in lieu of its Member States – will be examined. In this respect, the Draft Agreement introduces the mechanism of ‘co-respondent’ (1°). Subsequently, in the case of a

\textsuperscript{287} Gragl (n 45) 34.
\textsuperscript{288} Draft Explanatory Report (n 2) para 26. See also page 36 of this contribution.
\textsuperscript{289} Opinion 1/91 (n 246) para 39.
\textsuperscript{290} Spielmann (n 223) 809.
\textsuperscript{291} Krüger (n 60) 96; Harpaz (n 5) 137; Andreas Voßkuhle, ‘Pyramid or Mobile? – Human Rights Protection by the European Constitutional Courts’ Speech at the Opening of the Judicial Year 2014 at the ECtHR, 31 January 2014.
\textsuperscript{292} European Convention Working Group II Final Report (n 112) 12.
\textsuperscript{293} See page 33.
\textsuperscript{294} Tulkens (n 194) 33.
decision of violation, the question of the attribution of responsibility between the EU and its Member States also deserves attention (2°).

1° The Participation in the Proceedings before the ECtHR: The ‘Co-Respondent’ Mechanism

The first issue at stake concerning the EU’s involvement in the ECtHR proceedings is related to the difficulty to distinguish the correct respondent in a case before the ECtHR, between the EU and its Member States. Indeed, the complex division of competences and implementation rules of the Union make it challenging for a complainant without legal background to assess whether he should lodge his application against the EU, against a Member State, or against both of them.295

This specificity of the EU as a non-State party would therefore require an adjustment of the Convention system. This adjustment would need to be conceived as simple as possible for the benefit of the individual applicant, while complying at the same time with the principle of autonomy of EU law.296 For these reasons, the suggestion to attribute responsibility according to the EU’s division of competences is not appropriate as it would force the ECtHR to interpret these EU internal rules on division of competence.297 In the same way, a preliminary general declaration of competence made by the EU would probably be too complex as human rights issues are not limited to a specific field of activity.298 In addition, these two proposals would clearly not be of much help to the complainant.299

In the light of these different elements, Article 3 of the Draft Accession Agreement amends the Convention by inserting a mechanism of ‘co-respondent’: in cases directed against the EU or against one or more Member States, one of them which is not initially involved as respondent before the ECtHR can become co-respondent to the proceedings. The co-respondent consequently becomes party to the case alongside with the initial respondent.

Three different scenarios of joint participation of the EU and its Member States to the proceedings are in fact envisaged in the Draft Agreement.300 The first possibility is that

295 Jacqué (n 65) 903; Lock (n 126) 119-120; Gragl (n 90) 14-15. This issue is recalled by Protocol 8 to the TEU (n 115), Article 1(b).
296 Lock (n 124) 781.
297 Lock (n 126) 118.
298 Odermatt (n 40) 23-24.
299 Lock (n 126) 120.
300 For a comprehensive analysis, see: Groussot, Lock and Pech (n 145) 10-14; Gragl (n 128) 138-173. See also CDDH 2002 Study on EU accession (n 82) paras 57-62.
the EU joins one or more Member States as co-respondent to the case, in the event that the alleged violation of the Convention calls into question the compatibility of an EU law provision with the rights at issue in the ECHR. The Draft Accession Agreement specifies that this would be the case ‘notably where that violation could have been avoided only by disregarding an obligation under European Union law’. Such a wording implies that the EU should join the proceedings as co-respondent mainly – if not exclusively – in situations where Member States could have not avoided the incompatibility with the Convention because they had no margin of discretion by virtue of EU law. This is quite logical, as the EU would have no reason to be co-respondent to the proceedings if EU law granted Member States room for manoeuvre so that they could have avoided the violation.

The second scenario is that Member States can become co-respondents to the proceedings in the event of an application directed against the EU. Article 3(3) of the Draft Agreement restricts this possibility to cases where the compatibility of a provision of EU primary law is at stake.

The third scenario concerns cases where the complaint before the ECtHR is directed against both the EU and one or more of its Member States. In this respect, Article 3(4) of the Draft Agreement provides the possibility for each of those respondents to change its status to that of a co-respondent, provided that the situation of the case corresponds to the first or second scenario.

As regards the conditions of application of this mechanism, a central issue is whether the decision to grant the status of co-respondent to the EU or its Member States should be made either by the ECtHR, by the complainant, or by the EU and its Member States themselves. To give the ECtHR the power to decide proprio motu in this regard would certainly be highly problematic, as it could be understood as prejudging the responsibility for the violation and as a form of interpretation of EU law by the ECtHR. In the same way, allowing the applicant to designate the EU or a Member

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301 Article 3(2) of the Draft Accession Agreement (emphasis added).
302 Streinz (n 262) 2-3. This situation is in fact similar to the hypothesis addressed by the ‘Bosphorus presumption’ (see page 9 of this contribution).
303 Lock (n 126) 125.
State as co-respondent would certainly lead to cases of misuse of the mechanism in situations which are completely unrelated to EU law.\textsuperscript{305}

The solution adopted by the Draft Agreement is therefore to grant the EU and its Member States the responsibility to decide themselves whether they will intervene as co-respondents. Two options are in fact envisaged: ‘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’\textsuperscript{306}. The right of initiative therefore belongs to both the ECtHR and the potential co-respondent. When the request emanates from the potential co-respondent, the ECtHR will accept it if it is ‘plausible’ that the conditions of the first or second scenario are met.\textsuperscript{307} Conversely, in the case of an invitation by the ECtHR, it is for the EU or its Member States to decide whether they accept to join the proceedings as co-respondents. In this regard, the Draft Agreement provides the insertion of a ‘Draft declaration by the EU to be made at the time of signature of the Accession Agreement’\textsuperscript{308}, which stipulates that the EU will in any case accept the invitation of the Court if the conditions set out in the Draft Agreement are met. Nevertheless, it must be reminded that this Declaration is not formally binding. Therefore, the voluntary nature of the co-respondent mechanism is perceived by several scholars as contradicting the statement of the Explanatory Report that this is ‘not a procedural privilege for the EU or its Member States’\textsuperscript{309}.

From the viewpoint of the applicants, the co-respondent mechanism does not seem to impose additional burdens on them. For instance, the requirement of exhaustion of domestic remedies will not be affected by the participation of a co-respondent to the proceedings.\textsuperscript{310} More fundamentally, as explained in the next point, the main advantage of the mechanism is that the co-respondent is bound by the decision of the ECtHR in the same way as the initial respondent.\textsuperscript{311} This feature is the key element that distinguishes the co-respondent mechanism from third party interventions. In the latter case, the intervener only has the right to submit written observations and to participate to the hearing, but he is neither party to the case nor bound by the decision of the ECtHR.

\textsuperscript{305} Lock (n 124) 786.
\textsuperscript{306} Article 3(5) of the Draft Accession Agreement.
\textsuperscript{307} This \textit{prima facie} analysis is undoubtedly aimed at ensuring the conformity of this mechanism with the Protocol 8 requirements concerning the respect of the EU law autonomy: see Campbell (n 77) 48-49.
\textsuperscript{308} See Appendix II of the Draft Accession Agreement.
\textsuperscript{309} Draft Explanatory Report (n 2) para 39. See: O’Meara (n 188) 1820-1821; Gragl (n 90) 18-19.
\textsuperscript{310} Králová (n 304) 140.
\textsuperscript{311} Besselink (n 118) 320.
Nevertheless, the possibility to intervene as a third party will be possible for the EU after its accession to the Convention.312

2° The Attribution of Responsibility between the EU and its Member States

In the case of a decision of violation by the ECtHR which involves EU law, the subsequent issue at stake will inevitably be the attribution of responsibility between the EU and its Member States. The Draft Agreement contains a particularity in this respect in that it provides for the joint responsibility of the EU and its Member States if one of them is co-respondent to the procedure.313 Nevertheless, the ECtHR can still decide that either the respondent or the co-respondent will be held solely responsible, ‘on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant’. Such a wording thus provides the ECtHR with a flexible method, while preserving the autonomy of EU law concerning the division of competences between the EU and its Member States.314

From a comprehensive point of view, different hypotheses are to be envisaged regarding the attribution of responsibility between the EU and its Member States. The first possibility concerns the responsibility for a violation of the Convention due to EU primary law. In this case, the Member States can be held responsible, together with the EU, if they are involved in the case as respondents or co-respondents.315 This solution differs from the current situation, where Member States can be held solely responsible, as it was the case in the Matthews decision.316 Secondly, in the event that the violation of the ECHR is exclusively caused by an EU measure which does not include any implementation measure, the EU will be solely responsible.

Thirdly, as regards the attribution of responsibility for a violation originating in a national measure of implementation of EU law, the basic principle remains the responsibility of the Member State, as recalled by Article 1(4) of the Draft Agreement. Nevertheless, if the EU decides – or accepts after invitation by the ECtHR – to join the proceedings as co-respondent, it may be held jointly responsible for the violation. In a second step, the question of the internal allocation of responsibility between the EU and

312 Lock (n 126) 130.
313 Article 3(7) of the Draft Accession Agreement.
314 De Schutter (n 158) 557; O’Meara (n 188) 1822.
315 Gragl (n 90) 19.
316 See page 8.
the Member State remains an internal matter for the EU.\textsuperscript{317} This assessment will certainly be a complex issue which should be done on a case-by-case basis, taking into account the margin of appreciation left to the Member State by the EU instrument.\textsuperscript{318} Given the confidentiality surrounding the negotiations on these EU internal rules, one can only speculate on the institutional solutions which will be provided in this regard.\textsuperscript{319} Several possible options have in any case already been suggested, including the involvement of the ECJ through a new procedure – which would probably require a formal amendment to the EU Treaties\textsuperscript{320} – or the establishment of a committee consisting of representatives from the Member States and the European Commission.\textsuperscript{321}

In any case, the joint responsibility of the EU and its Member States would certainly not facilitate the task of the Council of Europe’s Committee of Ministers in its role of supervision of the execution of ECtHR’s decisions.\textsuperscript{322}

\textsuperscript{317}Lock (n 124) 787.
\textsuperscript{318}For a comprehensive analysis of the issues surrounding this internal allocation of responsibility, including the delicate hypothesis of CFSP military operations, see den Heijer and Nollkaemper (n 150).
\textsuperscript{319}Gragl (n 90) 19.
\textsuperscript{320}Lock (n 124) 787.
\textsuperscript{321}Gragl (n 90) 19.
\textsuperscript{322}De Schutter (n 158) 560.
IV. **The Participation of the EU Institutions in the Bodies of the ECHR and of the Council of Europe**

Besides its involvement in the proceedings before the Strasbourg Court, the EU will also, after its accession, take part in the global institutional framework of the Convention. In comparison with the participation of ‘traditional’ State parties, the EU’s participation is complicated by two factors.\(^{323}\) The first challenge lies in the fact that the EU will participate in the ECHR bodies alongside – and not in lieu of – the EU Member States. Secondly, the EU will become the first party to the Convention which is not member of the Council of Europe.\(^{324}\) Furthermore, these specificities of the EU as an international organisation have to be combined with the general requirement to put the EU on an equal footing with other ECHR parties, in order to avoid the reluctance of non-EU Member States to accept this EU accession.\(^{325}\)

The two main features of EU’s participation in the ECHR institutional framework consist of the election of an ‘EU judge’ at the ECtHR (A) and the participation of the EU in the supervisory task of the Committee of Ministers of the Council of Europe (B). Moreover, the EU’s accession has further implications with regard to the broader relationship between the EU and the Council of Europe (C).

**A. The Election of the EU Judge at the ECtHR**

As Article 20 ECHR states, the ECtHR consists of a number of judges equal to that of the parties to the Convention. Once the EU accedes to the ECHR, the composition of the Strasbourg Court will therefore logically include a supplementary ‘EU judge’.

Yet doubts have been initially expressed about the necessity for the EU to have its own judge, in the same way as other parties, given that EU Member States are already ‘represented’\(^{326}\) by their own judges in the Court.\(^{327}\) However, this view is contrary to the wording of the ECHR, and would also certainly be an ‘unjustified dissymmetry’\(^{328}\) between the EU and State parties to the ECHR. Another suggestion was to envisage a limited participation of a judge from the ECJ, on an *ad hoc* basis, only in cases where

\(^{323}\) Odermatt (n 40) 18.  
\(^{324}\) Eckes (n 117) 270.  
\(^{325}\) Schilling (n 262) 197.  
\(^{326}\) It must be noted that ECtHR judges do not formally represent the party which nominated them, by virtue of the principle of independence of the Court.  
\(^{327}\) Schermers (n 74) 5-6.  
\(^{328}\) Jacqué (n 65) 905.
EU law is at stake before the ECtHR. This second option would lead to the same problems of dissymmetry; it would moreover be hardly applicable in practice and contrary to the EU Treaties with respect to the requirement of independence of ECJ judges.

Under these circumstances, the best option therefore remains the election of an EU judge which will participate on an equal footing with other ECtHR judges. There is no need to amend the Convention in this respect, since Article 20 ECHR already provides for the same number of judges as parties.

One additional issue concerns the nationality of the EU judge. Although the Convention does not formally require ECtHR judges to have the nationality of the party that nominated them, it is very likely that the EU judge will have the EU citizenship and, as a consequence, the nationality of an EU Member State. This will result in the presence, at the ECtHR, of two judges having the nationality of the same EU Member State, and perhaps more problematically, to the possibility that these two judges sit together on a case brought against this EU Member State. Such a possibility could lead the ECtHR to revise its internal rules of procedure, in order to avoid this situation.

The election procedure of the EU judge will follow the general rules set out in Articles 21 and 22 ECHR. These provisions indicate that each ECtHR judge is elected by the Parliamentary Assembly of the Council of Europe, on the basis of a list of three candidates nominated by the party to the Convention. Contrary to other parties to the Convention, the EU will not be member of the Council of Europe and will have, as a consequence, no representative within the Parliamentary Assembly. Article 6 of the Draft Agreement therefore provides for the involvement of the European Parliament in this regard: a delegation of Members of the European Parliament (MEPs) will participate, with the right to vote, in all sittings of the Parliamentary Assembly which relate to the election of ECtHR judges – not only the EU judge. The EU delegation will consist of the same number of MEPs as the highest number of representatives entitled for a State. Additional modalities of participation of the MEPs – including the adoption of criteria ensuring the representativeness of the delegation of MEPs – are to

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329 Cohen-Jonathan (n 66) 105.
330 Verstichel (n 35) 138.
331 Wachsmann (n 104) 48; Groussot, Lock and Pech (n 145) 3; Kuijer (n 134) 28.
332 Odermatt (n 40) 18.
333 Dobhollf-Dier and Kusmierczcyk (n 6) 366; Margaritis (n 124) 74.
334 Groussot, Lock and Pech (n 145) 8.
335 According to Article 26 of the Statute of the Council of Europe, this number is now eighteen.
be defined jointly by both assemblies, co-operating within a ‘joint informal body’. Moreover, the modalities of selection by the EU of its three candidates for the post of EU judge will require the adoption of specific EU internal rules in this regard.

B. The EU’s Participation in the Committee of Ministers

The Committee of Ministers of the Council of Europe exercises several tasks related to the application of the Convention, including the supervision of the execution of ECtHR’s decisions. Despite the lack of EU membership to the Council of Europe, it has been agreed that the EU needs to have a say in the meetings of the Committee of Ministers that are related to the ECHR.

Nevertheless, some concerns have been expressed about the consequences of EU’s participation alongside its Member States in the control tasks of the Committee of Ministers. It has been first argued that the EU is not entitled to a full participation in the Committee of Ministers, since its sphere of competence is more limited and as EU Member States are already represented within this body. Also, non-EU Member States fear that the combined involvement of the EU and its Member States would create situations of ‘block-voting’, as they will account for 29 of the 48 representatives within the Committee of Ministers. On the other hand, the general requirement to put the EU ‘on an equal footing’ with other parties to the ECHR must also be kept in mind.

In this respect, Article 7 of the Draft Agreement amends Article 54 ECHR by envisaging two types of participation of the EU in the Committee of Ministers. Firstly, the EU will only have a consultation right on decisions concerning the adoption of an instrument related to the Convention or to the selection of candidates for the election of judges by the Parliamentary Assembly. Secondly, the EU will have a right to vote with respect to the other competences of the Committee of Ministers related to the application of the ECHR. These include, inter alia, the supervision of the execution of ECtHR judgments, decisions to reduce the number of judges of the Chambers, requests of advisory opinions from the ECtHR on the interpretation of the Convention, as well as the adoption of additional protocols to the ECHR.

337 Gragl (n 90) 30.
338 See Article 1(a) of the Protocol No 8 to the Lisbon Treaty (n 115).
339 Verstichel (n 35) 140.
340 Salignat (n 69) 71.
The Draft Agreement also tackles the issue of risks of block-voting by the EU and its Member States in decisions of the Committee of Ministers related to the supervision of execution of ECtHR’s judgments. Three situations are to be distinguished in this regard.\(^{341}\)

Firstly, with respect to the supervision of obligations for judgments where the EU is respondent or co-respondent, the risk of block-voting clearly exists. Indeed, both the EU and its Member States must, by virtue of the EU’s principle of sincere cooperation, coordinate their positions and votes when the application of EU law is at stake.\(^{342}\) Therefore, the Draft Agreement indicates that the Rules of the Committee of Ministers will be adapted ‘to ensure that the Committee of Ministers effectively exercises its functions in those circumstances’.\(^{343}\)

Secondly, in cases where the Committee of Ministers examines the fulfilment of obligations solely by one or more EU Member States, the EU is actually precluded, under EU primary law, from expressing a position or from voting. This requirement is based on the lack of EU competence for cases of application of the Convention which do not relate to EU law, as Articles 6(2) TEU and Article 2 of Protocol 8 indicate. As a consequence, there is no risk of block voting in these situations, since Member States have no obligation to act in a coordinated manner.\(^{344}\)

Thirdly and finally, concerning the supervision of obligations by non-EU Member States under the Convention, there is no obligation of coordination for the EU and its Member States. The EU has the right to vote in these situations, as it does not concern EU Member States and by virtue of the EU’s general competence in the field of human rights in EU external action.\(^{345}\) However, as Gragl rightly points out, this could be perceived as an unequal treatment for non-EU Member States in the sense that the EU will not vote on the fulfilment of obligations by its own Member States, but will have the possibility to act on the same matter concerning non-EU Member States’ obligations.\(^{346}\)

\(^{341}\) Gragl (n 90) 30-32.
\(^{342}\) Králová (n 304) 141.
\(^{343}\) Article 7(4) of the Draft Accession Agreement. The Explanatory Report (n 2) suggests (para 86) that this adaptation could be realised through the insertion of an additional requirement of vote by a ‘hyper minority’ of one quarter of the representatives.
\(^{344}\) Draft Explanatory Report (n 2) para 91.
\(^{345}\) Article 21(2) TEU.
\(^{346}\) Gragl (n 90) 32.
C. Next Perspectives in the Relationship between the Council of Europe and the EU

As the EU accession to the ECHR will result in the membership of the EU to the most fundamental legal instrument of the Council of Europe, this accession naturally raises the broader issue of the relationship between the EU and the Council of Europe.347 Since the mid-eighties, formal and informal links have been gradually developed at different levels between the EU and the Council of Europe. The accession to the ECHR can certainly be seen as a major step in this perspective, and as a symbol of greater coherence and coordination at a pan-European level in the field of human rights.348 The accession to the ECHR could also pave the way for EU’s accession to other conventions of the Council of Europe. The accession to the European Social Charter was for example already envisaged in 1984 by the ‘Spinelli Project’ of Treaty establishing the EU.349 Also, an increasing number of Conventions adopted in the framework of the Council of Europe have been amended or drafted in order to allow EU’s membership.350 In its 2006 Report on the relations between the EU and the Council of Europe, Jean-Claude Juncker was even considering that these relations should go a step further through the Union’s accession to the Council of Europe as a mid-term objective.351 Nonetheless, from another point of view, the growing activity of the Union in the field of human rights can also be perceived as a way for the EU to step on the Council of Europe’s toes, as human rights is one of the core fields of activity of the latter. The adoption of the EU Charter and its incorporation into EU primary law, as well as the establishment of an EU Agency for Fundamental Rights in 2003, have contributed to raise the question of the existence of a certain kind of competition between the two Europes.352 The successive EU enlargements to the East have further increased these concerns.353 However, it remains doubtful whether the EU can, similarly to the Council

347 On this general issue, see Maria Magdalena Kenig-Witowska, ‘European Union and Council of Europe – interaction and cooperation’, in Stéphane Doumbé-Billé (ed), La régionalisation du droit international (Bruylant 2012).
348 White (n 107) 434.
349 De Schutter (n 158) 568.
350 Eckes (n 126) 104.
352 Salignat (n 69) 62.
353 De Schutter (n 184) 513.
of Europe, be considered as a proper ‘human rights organisation’, as its accession to the ECHR for example required an explicit legal basis in EU primary law.\textsuperscript{354}

The adoption in 2007 of a Memorandum of Understanding\textsuperscript{355} between the Council of Europe and the EU helped to clarify this issue by specifying that the objective of cooperation is not to set clear boundary lines between the activities of both organisations in the field of human rights.\textsuperscript{356} However, the Memorandum recalls that ‘the Council of Europe will remain the benchmark for human rights […] in Europe’ and that ‘the relevant Council of Europe norms will be cited as a reference in EU documents’.\textsuperscript{357}

In conclusion, the joint involvement of the EU and the Council of Europe in the field of human rights must not be simply understood as an overlap between two international organisations. On the contrary, in view of the continuous evolution of the EU towards a supranational structure, the EU legal system certainly needs to define its own human rights standards, but must at the same time increase its contribution to the global human rights protection system of the ‘Greater Europe’.\textsuperscript{358}

\textsuperscript{354} Mathisen (n 161) 4; Rosas (n 13) 9.
\textsuperscript{356} De Schutter (n 184) 511.
\textsuperscript{357} Memorandum of Understanding (n 355) paras 10 and 17.
\textsuperscript{358} De Schutter (n 184) 560.
CONCLUSION

According to ECtHR’s President Dean Spielmann and to former judge Tulkens, the EU accession to the ECHR can be seen as ‘one of the greatest European legal projects’ and as ‘a major event for the protection of human rights in Europe’.

The accession is first and foremost a legal necessity. The external scrutiny of the ECtHR over EU law will clearly contribute to fill the remaining gaps of the EU’s human rights protection system. Besides this necessity, the accession also has a significant symbolic value: by becoming party to the ECHR, the EU will send a strong signal of coherence vis-à-vis its Member States and in its external relations concerning its own human rights standards.

Yet EU’s membership to the ECHR entails serious legal and technical difficulties with respect to the specific characteristics of the Union’s legal order. Therefore, the risk exists that the solutions provided by the Accession Agreement would in fact complicate matters more that actually improve them. In this perspective, the objective of coherence in the judicial protection of human rights in Europe should always be kept in mind by the EU, the Council of Europe and their respective Member States in negotiations surrounding this accession.

From the EU’s viewpoint, the accession can be considered as a matter of constitutional significance – as the ECJ stated in its Opinion 1/94 – in that it consists in the participation of the Union itself, alongside its Member States, in the pan-European human rights protection framework. In this sense, EU’s accession could possibly mark a move forward in the European integration process.

Nonetheless, the importance of this step forward depends on the way EU’s membership to the ECHR will be eventually designed. While adaptation of the Convention system to the accession of a non-State entity is undoubtedly necessary, this must be done in a way which ensures that the EU is, as far as possible, on an equal footing with other Parties to the ECHR. Only then will the Union gain coherence and credibility in the field of human rights.

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359 Spielmann (n 63).
360 Tulkens (n 194) 27.
361 Scheeck (n 10) 879-880.
362 Besselink (n 118) 331.
363 Callewaert (n 61) 16.
364 See page 15.
365 White (n 107) 435.
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