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The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms

A Threat to the Specific Characteristics of the European Union and Union Law?

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Abstract

Several reasons speak in favour of the accession of the European Union to the European Convention. But the submission of the EU to the jurisdiction of the European Court of Human Rights could jeopardise the specific characteristics of the EU and of EU law. In order to take the specific institutional features of the EU into account whilst recognising the competence of the Court of Strasbourg, the draft agreement provides for amendments to the judicial system of the ECHR. However, it is not certain that the co-respondent and prior involvement mechanisms, like they have been foreseen in the draft agreement, will fulfil this aim. Moreover, EU law and ECHR law do not follow the same logic. Thus, there is a risk that the submission of the EU to the judicial system of the ECHR will alter EU law. And yet nothing has been provided for in the draft agreement to avoid such a risk. To ensure that the external review of compatibility with human rights provisions does not undermine the specific characteristics of EU law, you can only hope that the Strasbourg judiciary will allow the Union a margin of appreciation.

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The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms:
A Threat to the Specific Characteristics of the European Union and Union Law?

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1 Introduction

You could call the accession of the European Union (thereinafter "the EU") to the European Convention on Human Rights and Fundamental Freedoms (thereinafter the "Convention" or the "ECHR") a meeting that has been delayed for a long period of time. There are several good reasons for this delay. First, as long as the integration process was confined to the economic sphere, it was commonly assumed that it was impossible for the Community institutions to interfere with fundamental rights. Above all, the logic of the two European legal orders has differed from the outset. When a state becomes a party to one agreement, it submits itself, according to the most classical international public law rules, to an external control of compliance with fundamental rights exercised by an international judicial body. Through the conclusion of the other agreement, a state agrees to become a member of a Community and to transfer parts of its sovereignty to the very same Community. The object of the former is to ensure that the signatories of the agreement respect its wording. As regards the latter, a process is in place that is ensuring the gradual establishment of an entity without precedent, with its own institutions, and the development of secondary law, the aim being to build not only an internal market but also a political union.

Considering the specific characteristics of the European Union, it is understandable that there has been a certain amount of caution or even reluctance with regard to the prospect of an accession to the ECHR.

The issue of the EU accession to the ECHR may have been discussed for a long time, but it is only today that it is about to be achieved. The protection of fundamental rights within the European Community will certainly be enhanced. But the question remains whether the price of this benefit will not be that the specific characteristics of the EU will be jeopardised.

* This paper was presented within the framework of the “Europe seminar series” at Uppsala University, Faculty of Law, 22 September 2011.
2 Towards the end of a long walk

2.1 The Road to Accession

The accession of the EU to the ECHR is a long story in Union law. The debate on the issue of accession was first triggered by the Solange I decision of the German Constitutional Court. Several ways to develop the protection of fundamental rights within the European Community were envisaged. One of them was accession. The Commission adopted a memorandum recommending accession in 1979 and a formal proposal was made to the Council in 1990. But, in its opinion 2/94, the Court of Justice held that the European Community had no competence in the field of fundamental rights. Accession required a revision of the founding treaties. The legal basis for accession is now provided for through Article 6 (2) TEU, which actually includes an accession requirement in the wording of the provision: "the Union shall accede to the ECHR". As regards the Council of Europe, Article 17 of Protocol no 14 of the ECHR, which entered into force on 1 June 2010, amends Article 59 of the Convention in order to provide for the possibility of accession for the Union.

After the entry into force of the Lisbon Treaty, the common political will of the parties concerned, was to complete the process quickly. On 4 June 2010, the Council adopted a decision authorising the Commission to open the accession negotiations and giving the Commission the negotiating mandate. Discussions were opened in July 2010. An informal working group was established within the Steering Committee for Human Rights whose work was widely publicised and a draft agreement was written at the end of June 2011.

The adoption of this text will require unanimity in the Council and the consent of the European Parliament. The text will subse-

1 May 29, 1974, BVerfGE 37, 271.
2 Memorandum of 4 April 1979, Bull. of the European Communities, supp. 2/79.
6 As Article 218 (6), (a), and (8) TFEU requires.
quentl y be subject to an approval process in all the Member States in accordance with national constitutional procedures and will, moreover, require the approval of all the forty-seven signatories to the Convention, for the simple reason that the accession agreement modifies the ECHR.

In the meantime, the European Court of Justice will likely be asked, on the basis of Article 218 (11) TFEU, to give its opinion about the compatibility of the accession agreement with the TEU.

We have thus not yet reached the end of the road and will probably encounter certain obstacles before we do.

2.2 How interesting is accession?

Why should the EU accede to the ECHR?

The Lisbon Treaty gives binding force to the Charter of Fundamental Rights. It is quite a paradox that at the same time as the EU is given its own bill of rights specifically established for its own needs, it is about to accede to the ECHR. Moreover, the judicial protection of the fundamental rights has been reinforced in the EU legal order through the Lisbon Treaty. The jurisdiction of the European Court of Justice now includes all areas of EU law without restrictions, with the sole exception of the CFSP. In particular, the right to apply before the Court of Justice has now been conferred on the individuals and on the European Parliament in the area of Freedom, Security and Justice.

Will accession lead to progress?

The ECHR is now de facto, if not formally, incorporated in substance in EU law and applied by the Court of Justice with frequent referrals to the case-law of the Court of Strasbourg, some-

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7 According to Article 218 TFEU.
8 According to Article 6 TEU, the Charter has now «the same legal values as the Treaties».
9 For an analysis, see J. Andriantsimbazovina, La CEDH et la CJCE après le traité d’Amsterdam : de l'emprunt à l'appropriation, Europe, octobre 1998, chron, p. 3.
10 See for example, Case C-368/95, Familiapress, [1997], ECR 1-3689, para 26; Case C-185/95 P, Baustahlgewebe, [1998], ECR 1-8417, para 29; Case C-105/03, Pupino, [2005], ECR 1-5285, para 60; Case C-465/07, Elgafaji, [2009], ECR 1-1921, para 44.
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The Charter incorporates the 'acquis' of the ECHR. Furthermore, Article 52 of the Charter requires that the rights contained in it should be given the same interpretation as those guaranteed by the ECHR when the rights correspond.

*Why is then accession necessary?*

Accession will entail an external control of the respect of fundamental rights by the EU, like it is in all Member States. This is very important for at least two reasons.

Firstly, as long as the competences were in the hands of the Member States, their exercise was limited by the obligation to respect the ECHR and individuals could turn to Strasbourg and claim that their fundamental rights had been breached. The individuals saw themselves deprived of this possibility once the competences had been transferred to the EU. In other words, any progress made as regards integration has been accompanied by a regression in terms of the protection of fundamental rights and of solutions available to individuals. This regression has been made worse by the double movement of accession of new Member States to the EU and of increase of the competences transferred to the EU through the revisions of the original treaties.

This is so, albeit the incorporation of the material content of the ECHR in the EU legal order, since the substantive incorporation has the effect of giving the Court of Justice the last say on the ECHR within the scope of EU law. Divergences and conflicts may arise, even though, thanks to the wisdom of both Courts, they remain rare.

Secondly, the implementation of EU law is largely in the hands of the Member States, which are all parties to the ECHR. The Member States may thus be faced with a dilemma, between respecting the ECHR as interpreted by the European Court of Human Rights and complying with EU law as interpreted by the Court of Justice.

This risk of conflict between two competing obligations is not hypothetical. Provided that the applications are directed against EU

11 See for example, Case C-404/92 P, X/Commission, [1994], ECR I-4737, para 17; Case C-415/93, Bosman, [1995], ECR I-4921, para 79.
Member States, the Court of Strasbourg has asserted its competence to examine violations of fundamental rights guaranteed by the ECHR which may follow from EU law, and this, when national implementing measures of EU secondary law are called into question\textsuperscript{12} or provisions of primary EU law\textsuperscript{13}.

Giving a \textit{ratione personae} competence to the Court of Strasbourg in order to examine applications criticising Union acts will allow the EU to be defendant and adopt the measures necessary to put an end to the infringements.

Finally, however relevant all these arguments put forward in favour of accession may be, the accession of the EU to the ECHR should go ahead, because the authors of the founding treaties have decided it. However, that does not necessarily mean that the EU is ready to unconditionally conclude an agreement to this effect.

3 \hspace{1cm} The accession and the preservation of the specific characteristics of the EU

In its opinion 2/94, the Court of Justice stressed that "accession to the Convention would entail a substantial change in the present Community system in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order"\textsuperscript{14} It added that the accession would be of "constitutional significance"\textsuperscript{15}

The EU is not a state. Considering the entry of the EU into the "distinct international institutional system" that the Convention legal order constitutes or the formal integration of all the provisions of the ECHR into the EU legal order, its accession cannot be compared to the one of a state. Thus, it requires arrangements.

The Member States are aware of this, which is why a condition to the accession of the EU to the ECHR has been introduced. According to Protocol n° 8 annexed to the Treaty on European Un-

\textsuperscript{12} Bosphorus, Appl. no 45036/98,30 June 2005.
\textsuperscript{13} Matthews, Appl. no 24833/94, 18 Feb. 1999.
\textsuperscript{14} Opinion 2/94, cited \textit{supra} note 4, para 34.
\textsuperscript{15} Ibid., para 35.
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ion and to the Treaty on the Functioning of the European Union relating to accession "shall make provision for preserving the specific characteristics of the Union and Union law".

Regarding the participation of the EU in the control bodies of the Convention, this requirement was not difficult to satisfy. The arrangements provided for in the draft agreement are based on the principle of equal treatment between all contracting parties and, therefore, give the Union as far as possible an identical status concerning its participation in the appointment of judges, in the Committee of Ministers of the Council of Europe and in financing expenses related to the Convention.

Much more delicate, as regards safeguarding the specific nature of the EU, is the issue of the submission of the EU to the jurisdiction of the European Court of Human Rights and of the extent of control performed by the Court of Strasbourg on Union law. In order to take the specific institutional features of the EU into account whilst recognising the competence of the Court of Strasbourg, the judicial system of the ECHR has been amended. But the question of whether Union substantive law will be changed or not by the control exerted upon it by the Court of Strasbourg remains open.

3.1 The modifications of the judicial system of the ECHR

It will be necessary for the accession agreement to preserve the autonomy of the EU legal order and, consequently, the exclusive competence of the Court of Justice "to ensure compliance with the law in the interpretation and application of the treaties" (Art. 19 (1) TEU). In particular the monopoly of the Court of Justice to decide on the distribution of competences between the EU and its Member States, and to interpret and review the legality of EU acts shall be safeguarded. This demand is difficult to fulfill given that the EU is

16 Protocol relating to article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the protection of Human Rights and Fundamental Freedoms.


18 For a more detailed analysis, see T. Lock, Walking on a tightrope: the draft ECHR agreement and the autonomy of the EU legal order, CMLR 48 (2011), p. 1025.
a non-state entity, a composite legal order. In the draft agreement, two mechanisms have been provided for to that aim.

1) The co-respondent mechanism

The aim is to avoid a situation whereby, through the choice of the defendant, the Strasbourg Court could be called upon, at the admissibility stage, to decide on the vertical division of competences. It is, indeed, not easy for an individual to determine whether a Member State or the Union itself is responsible for the breach of one of his/her fundamental rights where a national measure of Union law implementation is concerned. The answer depends on whether the violation has been committed where Member States have no discretion or whether a Member State intervened within the limits of a margin of appreciation left to the Member States by Union law. In order to assess the admissibility of the application, the Court of Strasbourg has to consider whether the complaint has been correctly addressed to the Member State or to the Union. In doing so, it is going to interfere with the respective competences of the Member States and of the EU.

The acuteness of this problem is illustrated by the MSS ruling19. The facts of the case were the following. An Afghan national brought proceedings against Belgium for having returned him to Greece, where he first entered the Union, under the Dublin II regulation in order to make a decision regarding his request for asylum. He claimed that he should not have been sent back to Greece, because of the inhuman and degrading treatment applied to asylum seekers in Greece. The European Court of Human Rights ruled against Belgium because it interpreted the Dublin II regulation in the sense that it does not force the Member States to return the applicant in every case but permits Member States to examine a request itself. In other words, the regulation leaves a certain margin of discretion to the Member States. Hence, it refused to apply the Bosphorus solution. It is worth to quote the relevant points of the judgement:

The Court notes the reference to the Bosphorus judgment by the Government of the Netherlands in their observations lodged as third-party interveners. The Court reiterated in that case that the Conven-

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did not prevent the Contracting Parties from transferring sovereign powers to an international organisation for the purposes of cooperation in certain fields of activity. The States nevertheless remain responsible under the Convention for all actions and omissions of their bodies under their domestic law or under their international legal obligations. State action taken in compliance with such legal obligation is justified as long as the relevant organisation is considered to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides. However, a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it exercised State discretion. The Court found that the protection of fundamental rights afforded by Community law was equivalent to that provided by the Convention system.

The Court notes that Article 3 § 2 of the Dublin Regulation provides that, by derogation from the general rule set forth in Article 3 § I, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation. This is the so-called "sovereignty" clause. In such a case the State concerned becomes the Member State responsible for the purposes of the Regulation and takes on the obligations associated with that responsibility.

The Court concludes that, under the Regulation, the Belgian authorities could have refrained from transferring the applicant if they had considered that the receiving country, namely Greece, was not fulfilling its obligations under the Convention.

Consequently, the Court considers that the impugned measure taken by the Belgian authorities did not strictly fall within Belgium's international legal obligations. Accordingly, the presumption of equivalent protection does not apply in this case.

Opinion 1/91 highlights that an obstacle to the accession might be set up by the Court of Justice requested under Article 218(11) TFEU, unless the accession agreement includes a provision to avoid such interference. In this opinion, having to deal with an international agreement establishing a judicial system to which the

20 Ibid., pts. 338-340.
Community would have been submitted, the Court of Justice stated that:

This means that, when a dispute relating to the interpretation or application of one or more provisions of the agreement is brought before it, the EEA Court may be called upon to interpret the expression 'Contracting Party', within the meaning of Article 2(c) of the agreement, in order to determine whether, for the purposes of the provision at issue, the expression 'Contracting Party' means the Community, the Community and the Member States, or simply the Member States. Consequently, the EEA Court will have to rule on the respective competences of the Community and the Member States as regards the matters governed by the provisions of the agreement.

It follows that the jurisdiction conferred on the EEA Court under Article 2(c), Article 96(1)(a) and Article 117(1) of the agreement is likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order, respect for which must be assured by the Court of Justice

In order to prevent the Strasbourg Court ruling on the division of competences between the Member States and the EU, Article 1 of Protocol no 8 requires the establishment in the accession agreement of "the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate".

Article 3 of the draft agreement provides for such a co-respondent mechanism. This provision differentiates between several hypotheses in order to cover all cases where a question of the division of powers might arise, i.e. when Member States implement secondary law adopted by the EU institutions as well as when EU institutions apply the founding treaties, whose authors were the Member States. What emerges from a reading of the text is that the desire of the authors of the Treaties not to let the Strasbourg Court intervene in the division of competences has, seemingly, not been fully granted. Of course, a Member State or the EU can only become a co-respondent "at its own request". But the decision remains with the Court of Strasbourg. According to the wording of Article 3 of the draft agreement, it shall assess "in the light of the reasons given" by the EU or the Member States whether "it is plausible" that the

conditions to join the proceedings as a co-respondent alongside the addressee of the application are met. The term "plausible" should admittedly invite the Strasbourg Court not to engage in a thorough study and to accept the arguments put forward by Member States and by the EU. But it is a vague notion which leaves the Strasbourg Court a margin of discretion. Regrettably a solution of the kind provided for in Article 6 of Annex IX to the United Nations Convention on the Law of the Sea has not been adopted.

2) The prior involvement mechanism

The goal is to protect the exclusive jurisdiction of the European Court of Justice to review the conformity of Union with the fundamental rights as well as its monopoly to declare an act of the Union invalid. Due to the great care with which the Court of Justice defends its exclusive powers, any breach of its jurisdiction stemming from an international agreement would constitute an obstacle to the conclusion of this agreement. In its opinion 1/91, the Court of Luxembourg held that:

Although, under Article 6 of the agreement, the EEA Court is under a duty to interpret the provisions of the agreement in the light of the relevant rulings of the Court of Justice given prior to the date of signature of the agreement, the EEA Court will no longer be subject to any such obligation in the case of decisions given by the Court of Justice after that date.

Consequently, the agreement's objective of ensuring homogeneity of the law throughout the EEA will determine not only the interpretation of the rules of the agreement itself but also the interpretation of the corresponding rules of Community law.

It follows that in so far as it conditions the future interpretation of the Community rules on free movement and competition the machinery of courts provided for in the agreement conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community.

22 Strongly asserted by the European Court of Justice itself (see joint Cases C-402 and 415/05 P, Kadi, [2008], ECR I-6351, para 304).
23 See case 314/85, Foto-Frost, [1987], ECR 4199.
24 Opinion 1191, cited supra note 21, para 44-46.
A problem may arise, in this respect, because it comes under the general jurisdiction of the national courts to ensure the enforcement and the respect of EU law, and the help the Court of Justice can give them for that purpose through the preliminary ruling procedure is left to their discretion. Thus, when an action which has been brought before a national judge against a national measure puts into question an EU act the latter implements, the Court of Strasbourg might rule on the compatibility of this Union act with the rights enshrined in the Convention without the Court of Justice first having had the opportunity to give its own assessment on the violation of fundamental rights. The possibility of what it considers as a breach of its jurisdiction is such a major concern for the Court of Justice that it expressed it publicly in a discussion document issued on 5 May 2010, in which it requested the creation of a mechanism to ensure, as regards acts of the Union which are susceptible to being the subject of applications to the European Court of Human Rights, that external review by the Convention institutions can be preceded by effective internal review by the Court of Justice.\textsuperscript{25}

However, you could cast doubt on the necessity of such a specific arrangement enabling the Court of Justice to carry out first a review of the compliance of an EU law provision with the fundamental rights. After all, isn't it a problem due to the failures and deficiencies of the Union system of judicial remedies? By virtue of the Foto-Frost jurisprudence, all national courts have jurisdiction to consider the validity of a Union act, the only thing they are not empowered to do is to declare it invalid. If they have any doubt with regard to the legality of such an act, they must make a reference to the Court of Justice for a preliminary ruling. But if the national judge does not seize the Court on the basis of Article 267 TFEU because it considers that the EU act impugned does not infringe fundamental rights, you could say that all domestic remedies have been exhausted in accordance with Article 35 ECHR. It should solely fall to the Court of Justice to secure its monopoly to

\textsuperscript{25} See Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 5 May 2010. See also the Joint Communication from the Presidents of the European Court of Human Rights and the Court of Justice of the European Union, 24 January 2011 (both documents are available at http://curia.europa.eu/jcms/jcms/P 64268/).
rule on the legality of EU acts by amending the Foto-Frost case-law in order to oblige the national courts to refer a question to the Court of Justice every time the non-compliance of an act of the Union with human rights is alleged.

Whether the need for a specific procedure in order to ensure that the Court of Justice makes the first decision regarding possible violations is a real need or not, Article 3(6) of the draft agreement introduces a procedure to guarantee the prior involvement of the Luxembourg Court. It states that, in the case where an alleged violation of Convention rights calls into question an EU secondary law provision, if the Court of Justice has not yet assessed the compatibility with the Convention rights at stake, sufficient time shall be afforded for the Court of Justice to make such an assessment and thereafter for the parties to submit their observations to the Strasbourg Court.

However, nothing is foreseen in the draft agreement as regards the way it will be made use of this prior involvement. A major difficulty will be to introduce a procedure that will not require an amendment to the originating treaties.

In particular, there is one issue that needs to be addressed concerning the legal effect of decisions issued by the Court of Justice. These can certainly not purely be advisory. Opinion 1/91 has recalled the binding nature of the decisions of the Court of Justice. If the Union act is declared valid by the Luxembourg Court, could the Strasbourg Court still consider the applicant as a victim in the sense of Article 34 ECHR? If, conversely, the former considers that the Union act does not comply with human rights, the latter shall be free to adjudicate regarding compatibility with the Convention, if the applicant wishes to pursue the proceedings. That is what the explanatory report of the draft agreement means when it specifies that "the assessment of the CJEU will not bind the Court".

26 See to that effect, T. Lock, cited supra note 18, pp. 1048-1053.
27 Opinion 1/91, para 61: « (...) it is unacceptable that the answers which the Court of Justice gives to the courts and tribunals in the States of the European Free Trade Association are to be purely advisory and without any binding effects. Such a situation would change the nature of the function of the Court of Justice as it is conceived by the EEC Treaty, namely that of a court whose judgments are binding. Even in the very specific case of Article 228, the Opinion given by the Court of Justice has the binding effect stipulated in that article".
3.2 The preservation of the specific characteristics of EU law

The requirement to preserve the specific characteristics of Union law set in Protocol n°8 is a general one. It protects not only the institutional system of the EU but concerns also substantive Union law. The issue which deserves to be addressed is whether the submission of the EU to the judicial system of the ECHR will alter EU law.

EU law and ECHR law do not follow the same logic. The result is that the Court of Justice and the Court of Human Rights have different perspectives. The plan of the Union is, more specifically, to build an internal market where the freedom of circulation and free competition are secured. All the measures taken by the EU institutions are assessed by the Court of Justice in the light of this constitutional teleology. From this follows that the judge of Luxembourg must grasp the protection of fundamental rights in a functional way. According to settled case-law, the protection of such rights "must be ensured within the framework of the structure and objectives of the Union". Far from constituting "absolute rights", fundamental rights "must be considered in relation to their function in society". Consequently, exercising these rights can be subject to certain restrictions, "provided that those restrictions in fact correspond to objectives of general interest pursued by the Union and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights". The rationality of the ECHR legal system is very different. Its only object is to guarantee individuals the protection of their fundamental rights. Putting it bluntly, for the first institution, the paradigm is the market, for the second, it is human rights.

Therefore, the question is whether the accession of the EU to the ECHR and the acceptance of an external mechanism of judicial adjudication in the matter of fundamental rights will modify the economic and political programme of the Union, or even jeopard-

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28 See for example, Case 11/70, Internationale Handelsgesellschaft, [1970], para 4.
29 See for instance, Joined Cases C-92/09 and C-93/09 Volker [2010], para 48 ; Case C-543/09, Deutsche Telekom, [2011], para 51 ; see also, already, Case 4/73, Nold, [1974] ECR 491.
30 See for example, Case 5/88 Wachszif [1989] ECR2609, para 18 ; Case C-177/90 Kühn [1992] ECR 1-35, para 16 ; Case C-20/00 and C-60/00, Booker Aquaculture, [2003] ECR 1-7311, para 68.
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ise its achievement. The Court of Justice will arguably be compelled from now on to examine the execution of the Union’s programme in the light of the protection of human rights instead of verifying the respect of fundamental rights through the prism of the integration programme, as it used to do. The relationship between principle and exception is reversed.

This shift in Union law, which the accession is likely to bring about, is liable to alter the EU legal order much more deeply than the accession of a state would normally affect its national legal order. While the constitutional programme of a state is generally limited to a bill of rights, what is at stake here is the political and economic integration project of the Union as laid down in its constitutional charter.

Maybe such fears are exaggerated. The relationship between principle and exception exists only when fundamental rights conflict with the free play of market forces. On the other hand, the Court of Justice does not hesitate to give full effect to fundamental rights, at least when they are invoked in order to ensure that individuals benefit fully from the freedoms of circulation. Furthermore, the shift in Union law is already required, to a certain extent, by the constitutional value conferred on the Charter of Fundamental Rights since the entry into force of the Lisbon Treaty.

But all the same, even if the project of the Union is increasingly to build a political union whose achievement requires the respect of human rights, it still remains, unlike the ECHR system, to establish an economic union characterised by the free play of the market forces. Thus, the accession is, at least, likely to accentuate such a shift in Union law.

The ruling in the MSS case highlights this well. Of course, the Court of Strasbourg did not directly condemn Union law. Nonetheless, while imposing on Member States the implementation of the Dublin regulation in compliance with the fundamental rights, it

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32 See to that effect, Opinion of P. Cruz Villalón, Case C-515/08, Santos Palhota, para 50-55; S. Morano-Foadi and S. Andreadakis, Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights, EJL (17), 2011, p. 595.

puts into question the principle of mutual recognition on which the European common system for determining the Member State responsible for examining an application for asylum is based. Thus, the question may reasonably be asked whether, for instance, the *Viking Line* and *Laval rulings*[^34], which, in 2007, gave priority to the freedom of circulation over the fundamental right of collective action, could still be pronounced in the same way.

Nothing has been foreseen to safeguard against the possibility of the Court of Justice losing its power to adapt the content and the scope of the fundamental rights to the specific needs of EU law, arguably because it was presumed that the solutions envisaged would not be accepted.

The idea was put forward to limit the scope of the accession to the formal integration of all ECHR provisions into the EU legal order. Yet, accession would not lead to the submission to the ECHR system of judicial review and, especially, not to individual applications. But such a solution would amount to depriving individuals of the main advantage of the accession, that is to say an external control in the matter of the protection of fundamental rights open to individuals.

A written confirmation of the *Bosphorus* case-law has also been suggested, in other words immunity granted to EU secondary law, stemming from the Strasbourg Court’s recognition of a rebuttable presumption of the equivalent protection of fundamental rights guaranteed within the EU legal order. However, this immunity is to be seen as the counterpart of the audacity showed by the Court of Justice by declaring itself competent to review Union law, though the EU was not party to the ECHR. Once accession has been completed, there will be no reason to uphold it.

Lastly, the old idea emerged again that, in the case of a divergence of interpretation of the ECHR between the Luxembourg and the Strasbourg courts, the dispute should be sorted out by a chamber consisting of an equal number of members from the two European courts. However, everybody recognises the reluctance of the Court of Justice to introduce, through an international agreement, a judicial body in charge of interpreting provisions similar to

the EU’s provisions but in a legal context which is different from the one in the EU legal order. As none of these solutions was acceptable, none of them was chosen.

What, then, might happen if the European Court of Human Rights were about to render a judgement that would not take into due consideration the specific characteristics of Union law? The Court of Justice might, by a reasoning similar to the one developed by the national constitutional courts in order to set limits to the transfers of sovereignty required by the European integration process, refuse to give full effect to this decision for the reason that it does not comply with the condition put to the accession which has to do with respecting the constitutional identity of the Union.

Such a "nuclear" conflict between the two European courts would call into question the coherence of the protection of fundamental rights within Europe, which is precisely what the accession of the EU to the ECHR is expected to enhance. There is a way of avoiding such a conflict and it lies in fact with the Strasbourg Court. To ensure that the external review of compatibility with human rights provisions does not undermine the specific characteristics of EU law, the Strasbourg judiciary should keep a certain self-restraint and afford a margin of appreciation to the Union when striking a fair balance between an individual applicant's enjoyment of his/her fundamental rights and the general interests of the EU.

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35 See Opinion 1/91, cited supra note 21, para 49-52.
36 See to that effect, the point of view of the judge of the Court of Justice A. Tizzano, Quelques réflexions sur les rapports entre les cours européennes dans la perspective de l’adhésion de l’Union à la CEDH, Revue trimestrielle de droit européen (1) 2011, p. 9, pp. 13.