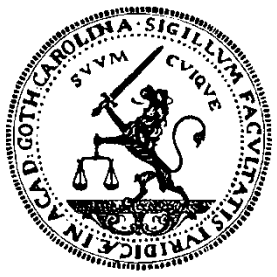

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The legally binding Charter and the EU's accession to the ECHR

Consequences of Art 6 TEU for the autonomy of EU law and fundamental rights protection within Europe

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Contents

Abbreviations

AG	Advocate General
CCHD	Steering Committee for Human Rights
CCFSRW	Community Charter of the Fundamental Social Rights of Workers
CFI	Court of First Instance
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EC	European Community
EEA	European Economic Area
ESC	European Social Charter
EU	European Union
ECHR	European Convention on Human Rights / European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EKMR	Europeiska Konventionen om Skydd för de Mänskliga Rättigheterna och grundläggande friheterna
FEU	Fördraget om Europeiska Unionen
FEUF	Fördraget om Europeiska Unionens Funktionssätt
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VAT	Value Added Tax

Abstract

This thesis analyses and discusses some of the substantial changes brought about for the field of fundamental rights by virtue of the entry into force of the Lisbon Treaty 1 December 2009; Art. 6(1) to the Treaty on European Union (TEU), according to which the Charter of Fundamental Rights of the European Union (CFREU) "shall have the same legal value as the Treaties" and Art. 6(2) TEU according to which "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms." (ECHR) The focus of this thesis is the effects of these changes for the level of protection of fundamental rights within Europe and the autonomy of the EU legal order.

In order to estimate how the level of protection of fundamental rights and the autonomy of EU law have been affected by the Charter's legal status, it is necessary to analyse the general provisions governing the interpretation and application of the Charter (Art. 51-53 CFREU). The Court of Justice of the European Union (CJEU) has in the recent cases *Melloni, Åkerberg Fransson* and *Toshiba Corporation* to a certain extent clarified Art. 51-53 CFREU. It appears that the CJEU has interpreted Art. 51 on the Charter's field of application extensively. By contrast, it has interpreted Art. 52(3) on the relationship between the Charter and the ECHR a partially autonomously in relation to the principle of *ne bis in idem*. It is unclear how to interpret Art. 53 CFREU but it is certain that it does not allow any deviation from the principle of supremacy. In my view, the CJEU should not have interpreted Art. 51 as extensively as it did in *Åkerberg Fransson* because of the quite clear phrasing of the provision - that the Charter shall *only* apply when Member States are implementing EU law. As far as I am concerned, it was reasonable of the Court to choose a partially autonomous interpretation of Art. 52(3) and not interfere with the non-consensus among the Member States in relation to the *ne bis in idem* principle as enshrined in ECHR, as it would involve the risk of rendering the Charter dependent on an international agreement. It is unsurprising that the CJEU did not accept an interpretation of Art. 53 that allows deviation from the principle of supremacy of EU law over national law. In my view, this approach is justified, as disturbance of this well-established principle would endanger the autonomy of EU law and prevent it from applying uniformly throughout the Union. In my opinion, the fact that the Charter has become legally binding enhances the level of protection of fundamental rights in Europe. By review of the Charter's content, it is clear that it draws upon various fundamental rights instruments and contains several rights that are not enshrined in the ECHR.

The negotiation process on the EU's accession to the ECHR started in March 2010 and the last Draft agreement from June 2011 was finalized in April 2013. The task of integrating the two judiciaries has been difficult. The fact that an external court will be able to review EU measures causes issues for the autonomy of the EU legal order. For this reason, Protocol No. 8 relating to Art. 6(2) requires that the Draft agreement "shall make

provision for preserving the specific characteristics of the Union and Union law". By review of the case law and opinions of the CJEU, it appears that the "specific characteristics" relates to the autonomy of EU law. Moreover, this protocol stipulates that nothing in the Draft agreement shall affect Art. 344 to the Treaty on on the Functioning of the European Union (TFEU), according to which national courts are prevented from submitting any case concerning EU law to an external court. The requirement relating to Art. 344 TFEU addresses the need to preserve to the key functions and the autonomy of the CJEU. The final version of the Draft agreement contains a number of mechanisms that seek to strike the balance between preserving the specific characteristics of EU and EU law without compromising the autonomy of the European Court of Human Rights (ECtHR) or the level of protection of fundamental rights. The prior involvement mechanism allows the ECtHR to ask the CJEU for a preliminary ruling in so far an alleged violation of the ECHR concerns EU law. The co-respondent mechanism allows the EU and its Member State(s) to be co-respondents in proceedings where a EU institution has adopted a EU measure, that a Member State has implemented, which is alleged of violating ECHR. The provision on Inter-Party complaints will amend the current provision on Inter-State complaints in Art. 33 ECHR to include the EU and its Member State(s). I am of the opinion that these mechanisms together strike the desired balance of preserving the autonomy of EU law, the CJEU's and the ECtHR's key functions. For instance, the prior involvement mechanism preserves an essential feature of EU law. The mechanism appears to mirror the preliminary ruling procedure, according to which Member States can refer cases to the CJEU insofar they contain EU law, which preserves the CJEU's function of being the only court that can declare EU measures to be invalid. The mechanisms have also managed to place the EU on equal footing with the other Contracting Parties. For example, they have included the EU and its Member State in proceedings under Art. 33 ECHR. The co-respondent mechanism is an appropriate solution on how to integrate the EU in proceedings where an alleged violation of the ECHR has its origin in EU law. It allows the issuing institution, as well as the implementing Member State, to be co-respondents to the proceedings. It succeeds in doing so without requiring the ECtHR to interpret EU law in a binding manner, decide the Member States obligations under EU law or decide where the alleged violation took place. To conclude, accession of the EU to the ECHR will preserve the autonomy of EU law as well as the central functions of the CJEU and the ECtHR, because of these mechanisms and because of the fact that the ECtHR is of subsidiary character. Moreover, accession will lead to an enhancement of the level of protection of fundamental rights within Europe as two obvious judicial gaps will be closed; henceforth the ECtHR will be able to scrutinize EU cats and hold the EU responsible for violations of the ECHR.

Sammanfattning

I detta examensarbete analyseras och diskuteras de omfattande förändringar inom rättsområdet grundläggande rättigheter som följt efter att Lissabonfördraget trädde i kraft den 1 december 2009. Arbetet är avgränsat till att beskriva de förändringar som art. 6.1 och art. 6.2 i Fördraget om Europeiska Unionen (FEU) inneburit. Enligt art. 6.1 ska den Europeiska Unionens Stadga om de Grundläggande Rättigheterna (Stadgan) ges "samma rättsliga värde som fördragen" och enligt art 6.2 ska EU ansluta sig till den Europeiska Konventionen om skydd för de mänskliga rättigheterna (EKMR). Arbetets fokus är att diskutera effekterna av art. 6.1 och 6.2 för skyddsnivån av de grundläggande rättigheterna samt dess konsekvenser för EU:s och dess rättsordnings autonomi.

För att kunna bedöma hur skyddsnivån och EU:s rättsordnings autonomi påverkas krävs en analys av Stadgans allmänna bestämmelser om tolkning och tillämpning (art. 51-53). De nyligen utkomna rättsfallen *Melloni, Åkerberg Fransson* och *Toshiba Corporation* har i viss mån belyst art. 51-53. EU-domstolen tolkade art. 51 om stadgans tillämpningsområde extensivt i *Åkerberg Fransson*. Art. 52.3 om stadgans förhållande till EKMR verkar däremot ha givits en delvis autonom tolkning i relation till principen om *ne bis in idem* i *Åkerberg Fransson* och *Toshiba Corporation.* Det är oklart hur art. 53 ska tolkas efter genomgång av *Melloni,* men det är uppenbart att bestämmelsen inte tillåter någon avvikelse från principen om EU-rättens företräde framför nationell rätt. Enligt min mening skulle EU-domstolen inte ansett sig ha jurisdiktion i fallet *Åkerberg Fransson* på grund av det mycket tydliga ordvalet att stadgan *endast* ska gälla när medlemsstaterna implementerar EU-rätt. Jag anser att det var klokt av EU-domstolen att välja en delvis autonom tolkning av art. 52.3 och inte lägga sig i bristen av konsensus mellan medlemstaterna i relation till principen om *ne bis in idem* i EKMR, eftersom det skulle innebära en risk att stadgans bindande kraft skulle bli beroende av ett internationellt avtal. Det var föga förvånande att EU-domstolen inte skulle acceptera en tolkning av art. 53 som tillät avvikelse från principen om EU-rättens företräde framför nationell rätt. Detta är enligt min åsikt helt riktigt, eftersom att rucka på denna väletablerade princip skulle äventyra EU rättens autonomi och förhindra dess uniforma tillämpning i EU.
Att Stadgan har blivit rättsligt bindande ökar rättsskyddet i Europa eftersom den innefattar ett antal rättigheter som inte omfattas av EKMR.

Förhandlingsprocessen om EU:s ansluting till EKMR började i mars 2010 och det sista Anslutningsavtalet från juni 2011 slutfördes i april 2013. Uppgiften att integrera de två domstolarna har varit svår. Faktumet att en extern domstol kommer att kunna granska EU-rätt innebär uppenbarligen problem för EU:s rättsordnings autonomi. Därför stipulerar Protokoll (8) till FEU att Anslutningsavtalet ska "avspegla nödvändigheten i att bevara unionens och unionsrättens särdrag." Mot bakgrund av EU-domstolens rättspraxis och beslut framstår det som att dessa "särdrag" relaterar till EU:s och dess rättsordnings autonomi. Vidare stipulerar protokollet att Anslutningsavtalet inte ska påverka art. 344 i Fördraget om Europeiska

Unionens Funktionssätt (FEUF). Enligt denna bestämmelse förbjuds nationella domstolar från att hänföra tvister som rör EU-rätt till en extern domstol. Hänvisningen till art. 344 relaterar till EU-domstolens huvudfunktioner och dess autonomi i relation till Europadomstolen. Den senaste versionen av Anslutningsavtalet innehåller ett antal mekanismer som syftar till att uppnå en balans av att bevara EU:s och EU-rättens särdrag utan att äventyra Europadomstolens självständighet eller skyddsnivån av grundläggande rättigheter i Europa. *The prior involvement mechanism* möjliggör att Europadomstolen kan be EU-domstolen om ett förhandsavgörande, förutsatt att tvisten omfattar EU-rätt. *The co-respondent mechanism* möjliggör att EU och dess medlemsstater tillsammans kan vara parter i förhandlingar där en medlemsstat har implementerat ett EU direktiv utfärdat av en EU institution som har anklagats för att bryta mot EKMR. *Inter-Party complaints* kommer att ändra den nuvarande bestämmelsen om *Inter-State complaints* i art. 33 EKMR så att bestämmelsen efter anslutning kommer att inkludera EU och dess medlemsstater. Jag anser att de här tre mekanismerna *tillsammans* uppnår balansen av att bevara EU:s och dess rättsordnings autonomi, EU-domstolens och Europadomstolens centrala funktioner och leder till en ökad skyddsnivå av grundläggande rättigheter inom Europa. Mekanismerna har bevarat viktiga element av EU rätt. *The prior involvement mechanism* speglar möjligheten för nationella domstolar att begära EU-domstolen om förhandsavgörande såvida tvisten rör tolkningen av EU-rätt vilket gör att EU domstolen förblir den enda domstol som kan förklara EU bestämmelser ogiltiga. Mekanismerna har även givit EU samma skyldigheter som de övriga anslutande parterna. Exempelvis har de inkluderat EU och dess medlemsstater i förfarande under art. 33 ECHR. *The co-respondent mechanism* är en utmärkt lösning som möjliggör att både EU-institutionen som utfärdat ett direktiv som anklagas för att strida mot EKMR och medlemsstaten som implementerat det kan vara parter i förhandlingar utan att Europadomstolen ska behöva tolka EU bestämmelser på ett bindande sätt, avgöra medlemsstaternas skyldigheter under EU rätt eller bedöma var exakt det påstådda brottet mot konventionen inträffade. Sammanfattningsvis kommer EU:s anslutning till EKMR att delvis på grund av ovan nämnda mekanismer men också eftersom Europadomstolen är av subsidiär karaktär att bevara EU:s och dess rättsordnings autonomi, EU-domstolens och Europadomstolens centrala funktioner. Vidare kommer anslutningen att leda till en förbättring av skyddsnivån för grundläggande rättigheter i Europa eftersom två uppenbara juridiska brister kommer att åtgärdas. Efter anslutning kommer EU bestämmelser att kunna granskas av Europadomstolen och EU kommer att kunna hållas ansvaring för brott mot EKMR.

Preface

I would like to thank all people who have been involved in the process of writing this thesis. I would like to thank my supervisor Xavier Groussot for your involvement and for the inspiring discussions on the subject. Thank you Ragnar for your helpful opinions on my work. Thank you Sarah and Nathan for your valuable linguistic opinions on this thesis. Thank you also Nathan for all our fantastic memories from Montpellier and elsewhere.

I would also like to thank all the people who have been a part of my time at university. To all the fantastic people I have met during my studies in Lund and Montpellier, thank you for our great friendships and for all the endless fun we have had together.

And at last, my thanks go to my beloved, unbeatable family - Marco, Anita, Amelie and Alfred. Without your invaluable support and love, I doubt I would have made it half way through university.

1 Introduction

1.1 Background

The entry into force of the Lisbon Treaty on the 1 December 2009 has brought about substantial changes for the autonomy of EU law in the field of fundamental rights. For this reason, it is of great relevance to assess 'the shape of things to come' for the field of fundamental rights in Europe as well as the autonomy of EU legal order. The autonomy of the EU legal order in this field of law has two dimensions: external autonomy in relation to international law (notably the ECHR) and internal autonomy with regard to fundamental rights as protected by the national constitutions of the EU Member States. In this sense, the CJEU is fighting a "two front battle," with the constitutional courts of the EU Member States on the one hand, and the ECtHR on the other hand. The internal dimension may have been affected by article 6(1) TEU, according to which the Charter of Fundamental Rights of the European Union has acquired legal status. The external dimension has been affected by Art. 6(2) TEU, according to which the EU is under the obligation to accede to the ECHR. Discussion on the EU's accession to the ECHR has been continuing for over thirty years. As of today, the main obstacles have been removed and it appears that the thirty-year long struggle to reach an agreement on the terms of accession will soon come to an end. The EU's accession to the ECHR will have substantial effects for the autonomy of the EU legal order, which has been a major obstacle to reaching an agreement on the terms of accession. This is particularly as following accession, the EU institutions will be exposed to external control by the ECtHR. It has been a difficult task for the drafters to preserve the specific nature of the EU and satisfy political demands while simultaneously ensuring a sufficient level of protection of fundamental rights. One of the main arguments in favour of accession has been that it would legitimize the EU's commitment to protect fundamental rights. However, the EU had already a very dignified fundamental rights record despite the absence of an EU catalogue of fundamental rights. Prior to the entry into force of the Lisbon Treaty, the CJEU developed fundamental rights through general principles by drawing inspiration from the ECHR and the ECtHR's case law. It is therefore questionable whether accession will have any substantial effects on the CJEU's case law on fundamental rights when the ECHR transforms into a formal source of law.

Another consequence of the Lisbon Treaty is that the EU henceforth has a legally binding catalogue of rights of its own. The Charter contains a provison on corresponding rights and the explanatory notes to the Charter encourage reference to the ECtHR's case law. By review of the CJEU's case law on fundamental rights since the Lisbon Treaty's entry into force, two lines of case law can be discerned. On the one hand, for most rights enshrined in the ECHR as well as the Charter, the CJEU continues to refer to the ECHR and the ECtHR's case law, ensuring that rights in the CFREU that correspond to rights in the ECHR are given the same interpretation. On

the other hand, in certain recent cases by the CJEU, the absence of reference to the convention and the ECtHR's case law is remarkable. It seems as if the right in question has been given a different scope and meaning en EU law than the corresponding right guaranteed by the ECHR. It is questionable whether this absence of reference convey that the ECHR and CFREU are autonomous instruments, or that the two fundamental rights catalogues are converging. Furthermore, the field of fundamental rights is one of the few fields where the constitutional courts of the Member States still dispute the principle of supremacy of EU law. Does the Charter enhance fundamental rights to the extent that, where the national standard is higher, an EU law provision might have to give way to a fundamental right guaranteed by the national constitution of the Member State? In other words, does it allow Member States to deviate from the principle of supremacy of EU law? The CFREU is the most modern fundamental rights catalogue of the world whereas the ECHR is by now over sixty years old. The CFREU contributes with several novelties and encompasses the changes in and developments of the society. However, the CJEU have continuously been accused of compromising the level of fundamental rights for economic and political objectives, and it is doubtful that the existence of an EU legally binding fundamental rights catalogue will dramatically change its tendency to compromise fundamental rights. Overall, what does the most modern fundamental rights catalogue of the world bring about for the protection of fundamental rights within Europe?

1.2 Purpose and question formulations

The purpose of this thesis is to describe and analyse the most significant changes brought about by the entry into force of the Lisbon Treaty for the autonomy of the EU legal order in the field of fundamental rights and the level protection of fundamental rights within Europe. The most fundamental changes are; the Charter becoming legally binding pursuant to Art. 6(1) TEU and; the EU's accession to the ECHR pursuant to Art. 6(2) TEU. In order to analyse the effects of the Charter legal status for the internal and external dimension of the autonomy of the EU legal order as well as the level of protection of fundamental rights within Europe, I will specifically address the following questions:

In the light of the cases Melloni, Toshiba and Åkerberg Fransson, how should the general provisions governing the interpretation and application of the Charter (Art. 51-53 CFREU) be understood? How have these provisions affected the internal and external dimensions of the autonomy of EU law? How has the Charter becoming a legally binding document affected the level of protection of fundamental rights within Europe?

Subsequently, for the purpose of analysing the effects of the EU's accession to the ECHR for the external dimension of the autonomy of the EU legal order, I will specifically address the following questions:

Does the final Draft agreement on accession succeed in preserving the autonomy of the EU legal order and the key functions of the CJEU? What effects will accession of the EU to the ECHR have for the level of protection of fundamental rights within Europe?

1.3 Method and material

For the purpose of this thesis, I have used a traditional legal dogmatic method. Accordingly, I have examined the law, *travaux préparatoires,* relevant case law and academic opinion in order to answer the questions formulated in the previous chapter. Considering the fact that EU law differs flagrantly from national law, the method I have used deviates somewhat from traditional legal dogmatic methods used for the purpose of assessing national law. The sources of law within the EU legal order are in hierarchical order: the Treaties; the Charter; general principles; international agreements; secondary law; the case law by the CJEU and the CFI; *travaux préparatoires*; the Advocates' General opinions; and legal doctrine. The binding sources of law are; primary law; the Charter, which pursuant to Art. 6(1) TEU has transformed from soft law to one of the central parts of EU primary law and its constitutional framework; general principles, which reached constitutional recognition by virtue of Art. 6(3); international agreements; and binding secondary law (*i.e.* regulations, directives and decisions). The case law by the European courts is binding *in principle*; as general principles appear through recognition by the CJEU. The unwritten sources of law are characteristic for the EU legal order. The case law by the European courts and the general principles of EU law are more extensive and more significant than the case law and general principles within most national legal orders. The major difference is the relationship between the rules created by the judiciary and the legislator. Within many fields of EU law, the existing law is to be found in the case law of the European courts.[1] This reflects the incomplete character of EU law. As many areas of law are governed on the national level, the CJEU has been using general principles as a central source of law in order to determine the content of EU law. In this sense general principles constitute the "unwritten" European constitution.[2] The importance of the case law of the Court in the EU legal setup cannot be overemphasised; its case law has *inter alia* had substantial effects for the relationship between EU law and national law. It was the CJEU that established and developed the concepts of direct effect and supremacy of EU, which constitute key features of the EU legal order.[3] Non-binding secondary law, *travaux préparatoires*; the Advocates' General opinions and legal doctrine are not binding. Nevertheless, they are important sources of guidance.[4]

The central sources of EU law for the purpose of this thesis are the Charter, its related the explanatory remarks, the ECHR and its protocols. Of

[1] Hettne and Otken Eriksson, 2011, p. 40 f.
[2] Hettne and Otken Eriksson, 2011, p. 163.
[3] Hettne and Otken Eriksson, 2011, p. 171 ff.
[4] Hettne and Otken Eriksson, 2011, p. 40 f.

great relevance are naturally the Treaties; the TEU, the TFEU and specifically Protocol No. 8 relating to Art. 6(2). It should be emphasised that in the hierarchy of EU law, international agreements rank higher than secondary law but are subordinate to the Treaties, which has effects for the relevance of Protocol No. 8 relating to Art. 6(2) in the negotiation process on the EU's accession to the ECHR[5]. In addition, I am referring to a number of other Charters and Conventions from which the drafters drew inspiration when stipulating the Charter's provisions. I have also examined Draft legal instruments on the accession of the ECHR, press releases and important updates in the negotiation process, which are to be found at the Official website of the Council of Europe. Due to the CJEU's crucial role for the EU legal order, I have studied a large amount of relevant cases of the CJEU and to some extent, particularly when analysing how the general provisions in Art. 51-53 CFREU should be interpreted, the related opinions by the Advocates General, which are delivered prior to the judgements of the Court to serve as guidelines for the Court. Additionally, I have studied relevant opinions by the CJEU under Art. 228 TEC and 218(11) TFEU and case law by the ECtHR. Being a highly current issue, when describing the academic debate, I am referring almost exclusively to journal articles, annual reports and working reports.

1.4 Delimitations

The focus of this thesis is to discuss and analyse Art. 6(1) and 6(2). The Lisbon Treaty may have had other effects in the field of fundamental rights, but the Charter acquiring legal status and the obligation for the EU to accede to the ECHR are in my view the two most important. When discussing the Charter as a legally binding document, and its effects for the level of protection of fundamental rights and the autonomy of the EU legal order I have paid much attention the the general provisions governing the interpretation and application of the Charter, as Art. 51 and Art. 53 are of great importance for the internal dimension of the autonomy of EU law, and as Art 52(3) is crucial for the external dimension. By contrast, I only briefly present the rights enshrined in Charter and how they relate to the corresponding provisions in the ECHR. Thus, this thesis provide no in depth analysis of the Charter's content.

When discussing the effects of EU's accession to the ECHR, I focus on three solutions provided for by the Draft agreement. In my opinion, *the prior involvement mechanism*, *the co-respondent and Inter-Party complaints* are the most problematic features of the Draft agreement in relation to the autonomy of the EU legal order and the key functions of the CJEU. Hence, this is by no means an exhaustive review of the Draft agreements content.

[5] Baratta, 2013, p. 1322 f.

1.5 Disposition

This thesis deals with some of the most substantial changes brought about by the Lisbon Treaty for the autonomy of the EU legal order in the field of fundamental rights; Art. 6(1) and Art. 6(2) TEU. In section two, I will attend to the difference between the autonomy of EU law in general and the autonomy of EU law in the field of fundamental rights. I will also attend to how the CJEU elaborated a fundamental rights standard based on general principles prior to the entry into force of the Lisbon Treaty. Subsequently, the thesis is divided into two main sections (section 3 and 4). Section 3 deals with the Charter's legal status. In this section, I will initially describe why the Charter was drawn up and how it has transformed from soft law a legally binding document. I will proceed to describe; its contents; where the rights contained in the Charter derive from and (insofar as they correspond to the ECHR); how they differ where the corresponding provisions are not identical. Thereafter, I will describe the general provisions governing the interpretation and application of the Charter (Art. 51-53) and present different opinions on how they should be interpreted. At last, I will describe how these provisions have been interpreted by the CJEU and the Advocates General in *Åkerberg Fransson*, *Toshiba Corporation* and *Melloni.* Section 4 deals with the EU's accession to the ECHR. Initially, I will describe why accession of the EU to the ECHR is still relevant since, pursuant to Art. 6(1) TEU, the EU has a fundamental rights catalogue of its own. I will continue by discussing the main obstacles to accession and explain how they were removed. Thereafter, I will present the requirements under Protocol No. 8 relating to Art. 6(2) TEU. Subsequently, I will discuss the external dimension of autonomy which has been asserted by the CJEU in various opinions and cases. I will proceed to describe the process of the negotiations on accession, from initiated to finalized. Consequently, I will describe the most important mechanisms in the Draft agreement, depending on their relevance for the autonomy of the EU legal order. Lastly, I will discuss whether the *Bosphorus*-presumption, as elaborated by the ECtHR, is likely to continue after accession. In section 5 follows analyse of the questions formulated in Chapter 1.2. In Part I., I will analyse and discuss the level of protection of fundamental rights prior to and after the Lisbon Treaty's entry into force. Similarly, I will discuss and analyse the internal and external dimensions of the autonomy of the EU legal order prior to and after the Charter became legally binding. In Part II., I will begin by discussing what effects the EU's accession to the ECHR will for the level of protection of fundamental rights within Europe. Subsequently, I will discuss the three most important solutions provided for by the Draft agreement in the light of the requirements set out in Protocol 8 TEU. When discussing these three procedural aspects, I will focus on whether they succeed in preserving the specific characteristics of the EU; notably the autonomy of EU law and the key functions of the CJEU. At last, I will briefly discuss whether the *Bosphorus*-presumption, elaborated by the ECtHR in its case law, is likely to continue once the accession of the EU to the ECHR has taken place. In section 6 follows conclusions on what effects Art. 6(1) and Art. 6(2) TEU have brought about.

2 The autonomy of the EU legal order in the field of fundamental rights

2.1 The EU legal order in general

It is difficult to assign EU legal order its rightful place in the legal order as a whole. EU law is neither a collection of international agreements nor an addendum to the domestic legal systems of the Member States. It is a unique legal system to which the Member States have limited their legislative sovereignty and as a result created a self-sufficient legal body that is binding on them and their citizens. By review of the groundbreaking case *Costa ENEL*[6] of 1964, two important observations by the CJEU can be discerned. Firstly, the Member States have definitely transferred sovereign rights when establishing the Community. Secondly, the Member States may not question the status of EU law as a system that applies uniformly and generally throughout the Union. On the basis of these two observations, the CJEU established the principle of primacy of EU law, according to which which EU law shall prevail over conflicting provisions of the national legal orders. The principle of supremacy is crucial for the autonomy of the EU legal order as it is the only guarantee that EU law will not dissolve through interaction with the Member States domestic laws. Moreover, it secures the uniform application of EU law as it prevents the Member States from individually deciding on the substance of EU principles.

Despite the fact that EU is self-sufficient in relation to its Member States, the two systems are interlocked. They are applicable to the same people, who are citizens of a national state while simultaneously being EU citizens simultaneously. The double citizenship contradicts such a rigid dividing line of the respective legal orders. Moreover, the EU is dependent on the Member States. As the EU can not fully achieve its objects without the enforcement of EU law on the national level, Member States must not only respect EU law, but apply and implement it into their own legal orders. For this reason, the principle of sincere cooperation stipulates:

> 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'[7]

[6] Case 6/64 *Costa v. E.N.E.L*

[7] Art. 4(3) TEU

The relationship between EU law and national law results in occasional conflicts between the different legal orders. For this purpose, the CJEU established the concept of direct applicability of EU law. This principle guarantees the existence of the EU legal order. The first time the CJEU referred to this concept was in the case *Van Gend & Loos*, in which it held that "[...] the Community constitutes a new legal order [...] the subjects of which comprise not only the Member States but also their nationals. Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community."[8] The principles of direct effect and supremacy are the guardians of the autonomy of the EU legal order. Without these principles, the EU would not apply uniformly throughout the EU and would be watered down by contact with national law.[9]

2.2 The EU legal order in the field of fundamental rights

The principle of direct effect of EU law is particularly important in the field of fundamental rights as it improves the position of the individual by turning the fundamental rights protected by the EU into rights that can be enforced by individuals in national courts. By contrast, it is uncertain whether the principle of supremacy enhances the level of protection of fundamental rights within the EU. Since its establishment in *Costa ENEL*, the principle of supremacy had been frequently re-asserted by the CJEU. Whereas the *Costa ENEL*-judgment concerned the question of the primacy of EU law over national law in general, the Court has several times confirmed the principle of primacy also in relation to fundamental rights guaranteed by the national constitutions.[10],[11] Primacy of EU law with regard to fundamental rights as protected by the national constitutions has been hard to accept for some Member States. After initial hesitation, most national courts eventually accepted the interpretation by the CJEU. The constitutional courts of Germany and Italy were particularly resistant to accepting the primacy of EU law over national constitutional law, especially when it concerned the protection of fundamental rights. They did not withdraw their objections until the protection of fundamental rights in the EU legal order had reached a standard that corresponded in essence to that of their national constitutions, although the Germany's Federal Constitutional Court continues to make reservations towards the principle of supremacy.[12] For

[8] Case 26/62 *Van Gend & Loos*, para. 3
[9] Borchardt, 2010, p. 113 ff.
[10] See particularly the judgments of the German Bundesverfassungsgericht of 29 May 1974, *Solange I* (2 BvL 52/71) and of 22 Oct. 1986, *Solange II* (2 BvR 197/83); the judgment of the Italian Corte Costituzionale of 21 April 1989 (No. 232, Fragd, in Foro it., 1990, I, 1855); the declaration of the Spanish Tribunal Constitucional of 13 Dec. 2004 (DTC 1/2004).
[11] Lenaerts, 2012, p. 397.
[12] Borchardt, 2010, p. 113 ff.

more than forty years, the CJEU and the constitutional courts of the Member States have been living in an illusion of unilateral supremacy. In the CJEU's view, EU law has supremacy over national constitutions and in the national supreme courts' view, the EU derives its legitimacy from the Member States' constitutions, subjecting the EU to constitutional review. Their respective views have allowed the courts coexist in a harmonious relationship for almost half a century.[13]

2.3 The CJEU's development of fundamental rights through general principles

The Treaty establishing the European Community in 1957 (TEC) contained only a few fundamental rights. As the CJEU was concerned with protecting the autonomy of the EU legal order in the field of fundamental rights, it refused to enforce the fundamental rights guaranteed by national constitutions in its case law. Because of this refusal combined with the absence of a fundamental rights catalogue, there was a risk that the there would be no fundamental rights standard within the EU legal order whatsoever. In an attempt to fill this judicial gap, the CJEU started to develop general principles of EU law on the legal basis of Art. 220 TEC (which was replaced by Art. 19 TEU in the Lisbon Treaty), which stated that the European courts should "ensure that in the interpretation and application of this Treaty, the law is observed."[14] In addition, it created several fundamental rights on the basis of the general principle on equality.[15] Similarly, from the four fundamental freedoms, through which the basic freedoms of professional life are guaranteed, the rights to freedom of movement and freedom to choose and practice a profession could be derived.

A fundamental right becomes a general principle by recognition of the CJEU. When developing fundamental rights of the EU legal order through general principles, the CJEU drew inspiration from the constitutional traditions common to the Member States and international agreements, notably the ECHR. On the basis of the ECHR, the CJEU recognised several fundamental freedoms and rights; e.g. the right of ownership, freedom of opinion, economic freedom, freedom of religion or faith, the right to due legal process, the ban on being punished twice for the same offence.[16]
However, it was not until the late 1960's that the CJEU started to build this framework for the protection of fundamental rights through its case law. Hitherto, the CJEU had rejected all actions relating to basic rights based on the argument that it was not for the Court to decide on matters that fell

[13] Sarmiento, 2013. p. 1267 f.
[14] Lenaerts and de Smijter, 2001, p. 274 ff.
[15] e.g. the prohibition of any discrimination on grounds of nationality (Article 18 TFEU), preventing people being treated differently on the grounds of gender, race, ethnic origin, religion or beliefs, disability, age or sexual orientation (Article 10 TFEU), the equal treatment of goods and persons in relation to the four basic freedoms (freedom of movement of goods — Article 34 TFEU; freedom of movement of persons — Article 45 TFEU; the right of establishment — Article 49 TFEU; and freedom to provide services — Article 57 TFEU), freedom of competition (Article 101 et seq. TFEU) and equal pay for men and women (Article 157 TFEU).
[16] Borchardt, 2010, p. 25 f.

within the scope of national constitutional law. It had to alter its position after it had invented the concept of the supremacy of EU law in 1964, as it could only be properly established if EU law offered sufficient protection of the fundamental rights protected by the national constitutions. The starting point for the CJEU's development of fundamental rights was the *Stauder*-case from 1969 in which it referred to general principles and thereby recognised the existence of a EU framework of fundamental rights.[17] The Court stated that "[...]the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court."[18] A year later, in *Internationale Handelsgesellshaft*, it proclaimed that fundamental rights form an integral part of the general principles of law protected by the Court and referred to the constitutional traditions common to the Member States.[19] In *Nold* of 1973, the CJEU mentioned the ECHR for the first time and declared itself "bound to draw inspiration from the Member States' constitutions."[20] In *Hauer* of 1979, the Court made explicit reference to a provision of the ECHR.[21] In *Johnston* of 1984, the CJEU stated that the requirement of judicial control is a general principle that underlies the constitutional traditions of the EU Member States and referred to Art. 6 and Art. 13 of the ECHR.[22] In the late 1980's, it became apparent that the CJEU's would not only scrutinize acts by the EU institutions, but also acts by the Member States when implementing EU law.[23] To conclude, from the early 1970's and onwards, the CJEU increasingly emphasises fundamental rights, acknowledges the Member States' constitutional fundamental rights and refers to the ECHR as a source of fundamental rights that should be followed.

However, the fundamental rights standard that was achieved exclusively by the case law of the CJEU had a serious disadvantage; the Court was limited to the case in point. The CJEU could neither develop fundamental rights in all areas where it was necessary nor elaborate the necessary scope of and limits to the rights generally and distinctly enough. Moreover, the EU institutions could not assess whether there was a risk that they were infringing fundamental rights and the EU citizens could not know with certainty whether their rights had been violated.[24] In addition to these disadvantages, the CJEU was frequently criticised for compromising the level of protection of fundamental rights for economic or political objectives.[25] For example, in *Nold* the Court held that "Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched." In this case, the applicant asserted that the contested decision violated his right to property and his right to the free pursuit of

[17] Borchardt, 2010, p. 24
[18] Case 29/69, *Stauder* v. *Ulm*, para 7.
[19] Case 11/70, *Internationale Handelsgesellschaft* v. *Einfuhrund Vorratsstelle Getreide*, para 4.
[20] Case 4/73, *Nold* v. *Commission*, paras 12-13.
[21] Case 44/79, *Hauer*, paras 17-19.
[22] Case 222/84, *Johnston* v. *Chief Constable of the Royal Ulster Constabulary*, para 18.
[23] e.g. Case 5/88, *Wachauf* and Case 260/89 *ERT.*
[24] Borchardt, 2010, p. 27.
[25] Craig and de Burca, 2011, p. 399 f.

business activity, both of which were protected by the German constitution and international treaties, there among the ECHR. The CJEU reached the conclusion that the submission must be dismissed because the disadvantages claimed by the applicant were the result of economic changes brought about by the recession in coal production and not of the contested EU decision.[26]

Despite the criticism, together with the disadvantages of developing a fundamental rights standard based solely on a court's case law, and the obvious need for an EU catalogue of fundamental rights, it was not until the ratification of the Lisbon Treaty that constitutional recognition of the CJEU's case law on general principles was achieved. Art. 6(3) TEU, declares that "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." Moreover, due to the entry into force of the Lisbon Treaty, the EU finally received a legally binding catalogue of its own: The Charter of Fundamental Rights of the European Union.[27]

[26] Case 4/73, *Nold*, paras 12-16.
[27] Lenaerts and de Smijter, 2001, p. 274 ff.

3 The Charter as a legally binding document

3.1 The Charter - from soft law to a legally binding document

The CJEU was not the only EU institution that was trying to enhance fundamental rights within the EU legal order. In 1989, the European Parliament adopted a declaration of fundamental rights and fundamental freedoms.[28] However, there was no political motivation to go further and adopt a legally binding declaration.[29] Moreover, there was great reluctance to amend the EC Treaty along the lines in order for the Union to adhere to ECHR. In the CJEU's opinion 2/94 of 1996 (which will be elaborated in Chapter 4.4) the Court concluded that the EU had no competence to adhere to the ECHR.[30] It was not until the entry into force of the Lisbon Treaty that the EU acquired competence to adhere to the ECHR. The precursor to the Charter was drawn up on the initiative of the EU Council for the purpose of demonstrating the EU's achievements with regard to fundamental rights. The Presidents of the European Parliament, the Council and the European Commission proclaimed the 'European Union's Charter of Fundamental Rights' on 7 December 2000. However, this version of the Charter was not binding and while awaiting the outcome of a series of constitutional processes the Charter's status remained undetermined. Due to the non-ratification of the Constitutional Treaty the "ambiguous status" of the Charter was prolonged. It was renamed the "European Union's Charter of Fundamental Rights, and was once again proclaimed by the Presidents of the European Parliament, the Council and the European Commission on 12 December 2007 in Strasbourg, this time as a separate instrument. By this point, it was frequently cited by the CFI, Advocates General and eventually even by the CJEU.[31] Due to the entry into force of the Lisbon Treaty the Charter, in the 2007 version, finally acquired legal status through Art. 6(1) TEU, which states that the Charter "shall have the same legal value as the Treaties." Thus, the Charter established the applicability of fundamental rights in EU law. The Charter applies to all but two Member States; Poland and the United Kingdom could not (or did not want to) adopt the system of fundamental rights of the Charter, as they were concerned with having to surrender or change certain national positions such as religious issues or the treatment of minorities. Hence, they are not bound by the fundamental rights of the Charter but, as previously, only by the case law of the CJEU.[32]

[28] OJ, 1989, C 120/51.
[29] Lenaerts and de Smijter, 2001, p. 274 ff.
[30] Opinion 2/94, paras 35-36.
[31] Craig and de Burca, 2011, p. 394.
[32] Borchardt, 2010, p. 28.

When the Charter finally acquired legal value, there was reason to believe that the Charter would only be a "confirmation of past practice" since the EU already had a very dignified fundamental rights record. Besides the fact that the Charter encompasses many of the well-established fundamental rights that were developed through general principles by the CJEU, the Charter's contents corresponds largely with the ECHR.[33] Nevertheless, the Charter contributes with certain novelties while maintaining well-established fundamental rights, all summarised in a straightforward manner. In its preamble, it asserts the need to "strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological development." It also sets out one of the Charter's main purposes; to make the rights guaranteed within the EU legal order more visible to the EU citizens.[34] In hindsight, the Charter has arguably brought about significant changes in EU law. Far from "being a decorative declaration validating past practices," it has forced the EU and the CJEU to take fundamental rights more seriously. It has indeed made fundamental rights more visible to its citizens and has brought to light issues that have been considered peacefully resolved. Henceforth, Member States may be exposed to specific obligations that will limit their margin of action when implementing EU law. Individuals are more familiar with the fundamental rights in the EU and the Member States' responsibility to implement them. Thus, it is easier for them to seek judicial relief if their rights protected within the EU legal order have been violated. Lastly, the EU and its Member States are no longer "enforcers of a casuistic array of rights" which contents are spread over a number of judgments of the CJEU, but are the guardians of "a fully-fledged declaration of rights."[35]

3.2 The Charter and its contents

The Charter is divided into seven titles. The six first titles contain the provisions on dignity, freedoms, equality, solidarity, citizens' rights and justice. The seventh title, which will be dealt with in the next three chapters, contains provisions governing the interpretation and application of the Charter.

In the first title on dignity, the right to life[36] and the prohibition of slavery and forced labour[37] have been stripped to their core in the Charter. The latter deviates from the right enshrined in the ECHR in the sense that the prohibition of trafficking in human beings has been added to the CFREU provision. The wording of the provision prohibiting torture and inhuman or degrading treatment[38] is identical to its corresponding right in ECHR. The novelty in this title is the title is the right to the integrity of the person,[39] which contains e.g. the prohibition of harvesting of organs and the prohibition of the reproductive cloning of human beings.

[33] Sarmiento, 2013, p. 1269 f.
[34] OJ 2012, C 326/391, para 4.
[35] Sarmiento, 2013, p. 1270.
[36] Art. 2 CFREU and Art. 2 ECHR
[37] Art. 5 CFREU and Art. 4 ECHR
[38] Art. 4 CFREU and Art. 3 ECHR
[39] Art. 3 CFREU

In the second title on freedoms, the right to liberty and security,[40] respect for private and family life,[41] freedom of thought, conscience and religion,[42] freedom of assembly and association,[43] the right to education,[44] the right to property,[45] and protection in the event of removal, expulsion or extradition[46] are guaranteed by the Charter as well as the ECHR and its protocols. Novelties in this title are; the protection of personal data,[47] a right contained in Art. 268 of the TEC as well as in EU secondary law; the freedom of the arts and science,[48] which is a right deduced from the right to freedom of thought and expression and; the right to asylum,[49] a right that derives from the Treaties (Art 78. TFEU) and the Geneva Convention on Refugees.[50] The title also contains the freedom to choose an occupation and right to engage in work[51] and the freedom to conduct a business,[52] which were developed through general principles in the CJEU's case law.[53] Moreover, certain rights in this title have been given a broader concept than its corresponding right in ECHR: instead of the right to marry, the CFREU protects the right to marry and the right to found a family[54] and instead of protecting freedom of expression, the Charter guarantees freedom of expression and information.[55] In this title, one discerns some differences between the two catalogues, and it becomes obvious how the Charter seeks to encapsulate the changes in the society.

In the third title on equality, only one right corresponds to a right enshrined in ECHR, namely the article on non-discrimination.[56] All other rights in this title (equality before the law, cultural, religious and linguistic diversity, equality between women and men, the rights of the child, the rights of the elderly and integration of persons with disabilities)[57] derive from other sources of law. These sources are the Treaties,[58] general principles, the European Social Charter[59] (ESC), the Community Charter of the Fundamental Social Rights for Workers[60] and other conventions such as the Convention on Human Rights and Biomedicine with regard to genetic heritage[61] and the New York Convention on the Rights of the Child.[62] This title demonstrates that the Charter is not merely a copy of the ECHR, but draws upon various human rights instruments and reinforces several rights

[40] Art. 6 CFREU and Art. 5 ECHR
[41] Art. 7 CFREU and Art. 8 ECHR
[42] Art. 10 CFREU and Art. 9 ECHR
[43] Art. 12 CFREU and Art. 11 ECHR
[44] Art. 14 CFREU and Art. 2 Protocol No. 1 (1952) ECHR
[45] Art. 17 CFREU and Art. 1 Protocol No. 1 (1952) ECHR
[46] Art. 19 CFREU and Art. 4 Protocol No. 7 (1984). See also ECtHR's case law on Art. 3 ECHR, e.g. *Ahmed v. Austria* of 1986 and *Soering v. the UK* of 1989.
[47] Art. 8 CFREU
[48] Art. 13 CFREU
[49] Art. 18 CFREU
[50] Convention relating to the Status of Refugees, 1951, and its Protocol 1967, UNHCR
[51] Art. 15 CFREU.
[52] Art. 16 CFREU
[53] See e.g. Case 4/73 *Nold* and Case 44/79 *Hauer.*
[54] Art. 9 CFREU and Art. 12 ECHR
[55] Art. 11 ECHR and Art. 10 ECHR
[56] Art. 21 CFREU and Art. 14 ECHR and its Protocol No. 12 (2000)
[57] CFREU Art. 20, 22-26
[58] Art. 6, 3 TEU and Art. 19, 167(1,4), 8, 157(3-4) TFEU
[59] Art. 23, 15 ESC
[60] p. 24, 25, 26 CCFSRW
[61] Art. 11 to the Convention on Human Rights and Biomedicine
[62] See particularly Art. 3, 9, 12, 13 the New York Convention on the Rights of the Child (1989)

guaranteed by the Treaties.

Similarly, in the fourth title on solidarity, the rights largely correspond to rights in several other EU charters; the ESC;[63] the revised Social Charter;[64] and the Community Charter of the Fundamental Social Rights for Workers.[65] The rights included in this title are largely related to employment; workers right to information and consultation within the undertaking; right of collective bargaining and action; right of access to placement service; protection in the event on unjustified dismissal; fair and just working conditions and prohibition of child labour and protection of young people at work. Moreover, the title contains; the right to family and professional life; social security and social assistance; health care; access to services of general economic interest; environmental protection and consumer protection.[66] For the majority of the rights in this title, inspiration was drawn from the EU charters mentioned above. The exceptions are environmental protection and consumer protection, which derive directly from the Treaties.[67]

Likewise, in the fifth title on citizens' rights, the right to vote and to stand as a candidate at elections to the European Parliament and the right to vote, and stand as candidate at municipal elections partially corresponds with the right to free elections enshrined in ECHR[68] and are partially enshrined in the Treaties.[69] The right to good administration has partly been developed as a general principle of law by the CJEU, draws partly on the Treaties[70] and corresponds to some extent with the right to an effective remedy in the sixth title. The right of access to documents, the article governing the European Ombudsman, right to petition, freedom of movement and of residence, and diplomatic consular protection all have their origin in the Treaties.[71]

In the sixth title on justice, the right to an effective remedy and to a fair trial, presumption of innocence and right to defence, principle of legality and proportionality of criminal offences and penalties in the charter all have corresponding rights in ECHR.[72] The principle of *ne bis in idem* is enshrined in the Charter as well as in one of the protocols to the Convention but, as will be described later, perhaps with different scopes and meanings.[73]

To summarize, the ECHR and the Charter contains many of the same rights, albeit not necessarily with identical wording. By review of the Charter's content, it is also clear that the Charter contains many novelties that reflect the changes in society, social progress and scientific and technological development. Many of the rights in CFREU have been given the same meaning as the corresponding right guaranteed by the ECHR. However, some of the rights in the CFREU have been given a wider scope – and certain rights a more limited scope – than in the ECHR.

[63] Art. 21, 6, 1(3), 3, 2, 7, 16, 8, 12, 13, 11, ESC
[64] Art. 24, 26, 27, 30, 31, the Revised Social Charter
[65] p. 19, 8, 10, CCRW
[66] Art. 27-38 CFREU
[67] Art. 3(3) TEU and Art. 11, 191 TFEU
[68] Art. 39-40 CFREU and Art. 3 Protocol No. 1 (1952) ECHR
[69] Art. 20(2) TFEU and Art. 14(3) TEU
[70] Art. 340, 20(2d), 25 TFEU
[71] Art. 15(3), 20, 228, 227, 20(2a), 77-79, 20 TFEU
[72] Art. 47-49 CFREU c. Art. 6, 13, 7 ECHR
[73] Art. 50 CFREU c. Art 4. Protocol No. 7 (1984) ECHR

3.2.1 Art. 51 – Field of application

From Art. 51 CFREU follows:

> 1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
>
> 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

From the explanatory notes related to Art. 51 follows *inter alia:*

> […] As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law […]

The provision on the Charter's field of application is of importance for the divided competences between the EU and its Member States as well as the autonomy of their respective legal orders. Art. 51 governs when the Charter applies for the Member States; namely when they are implementing EU law. The most debated part of Art. 51 has certainly been how the expression "only when they are implementing Union law" should be interpreted, as it raises the issue of how the powers between the EU and its Member States should be distributed. Additionally, it raises the issue of the jurisdictions of the CJEU and the national supreme courts, which are the guardians of their respective legal orders, particularly the fundamental rights contained therein.[74] A broad interpretation of the provision on the Charter's field of application would be similar to the application of fundamental rights through general principles, prior to the entry into force of the Lisbon Treaty.[75] According to certain scholars, a broad interpretation is preferable, as it would to enhance the unity and coherence of EU fundamental rights. According to Judge Marek Safjan, a broad interpretation is also more likely, mainly for two reasons. Firstly, the accession to ECHR will have the effect of turning the CJEU's attention to areas of law that are connected with EU law but fall within the national competences. In Safjan's words, "Even if it could be justified by a specific opportunism of the judges, driven by the intention of reducing the risk of a clash with the Court in Strasbourg, it would undoubtedly be a factor in favour of a broader application of the Charter." Secondly, a broad interpretation would allow the CJEU to include the constitutional traditions of the Member States in its interpretation and application of the Charter. As put by Safjan, "Could the scope of the Charter's application be differentiated due to a different character of constitutional protective standards adopted in different Member States? The

[74] Sarmiento, 2013, p. 1274.
[75] Groussot and Olsson, 2013, p. 8.

positive answer to this question could hypothetically lead to a narrowing of the sphere of unified application of guarantees of fundamental rights included in the Charter."[76]

Similarly, Rosas and Kaila favour an application similar to general principles. According to them a "the reinforcement of the Charter's status does not imply a rupture between the past and the present."[77] Consequently, the expression "when they are implementing EU law" calls for a quite broad interpretation, what matters is the existence of a connection with that law. The CJEU interpreted Art. 51 extensively in *Åkerberg Fransson*, where it considered itself to have jurisdiction, a position in contrast to the Advocate General's opinion. A restrictive interpretation approach to Art. 51 would be to consider that the Charter is merely applicable in the situation of implementation of EU law in its strictest sense. Several Member States (e.g. Sweden, the Czech Repuplic, Ireland and the Netherlands) as well as the Commission and Advocate General Cruz-Villalón were of the opinion that Art. 51 should have been interpreted restrictively; the CJEU should not have had jurisdiction in *Åkerberg Fransson*, which will be elaborated in Chapter 3.4.1.[78]

3.2.2 Art. 52 – Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
5. […]
6. […]
7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.
8.

Art. 52 can be described as a "Pandora's box" in the sense that paragraphs 4-7, which were added in the drafting of the Constitutional Treaty in October 2004 for the purpose of clarifying the article, may have created a "new layer of doctrinal complexity." Since the introduction of these paragraphs, the article can be seen as an internal as well as an external regulation clause. Paragraphs 1 and 2 govern the internal regulation i.e.

[76] Safjan, 2012, p. 15.
[77] A. Rosas and H. Kaila, 2011, p. 19 ff.
[78] Groussot and Olsson, 2013, p. 8 ff.

how the rights within the Charter function. Paragraph 1 constitutes a general limitation (or derogation) clause and paragraph 2 aims to avoid the Charter replacing *l'acquis communautaire.* For this purpose, the second paragraph limits paragraph 1 in order to exclude the use of the limitation clause when derogations by way of the Treaty are applicable. Paragraphs 3 and 4 govern the external regulation *i.e.* how the Charter relates to other sources of fundamental rights in the EU. These paragraphs are of relevance for the autonomy of the EU legal order as they seek to govern how the rights enshrined in the Charter relate to fundamental rights protected by national constitutions and international agreements. The aim of Art. 52(4) is to ensure a harmonious relationship between the Charter and the Member States' national constitutions. The aim of Art. 52(3) is to ensure a harmonious relationship between the Charter and the ECHR. Thus, Art. 52 is both an internal and external regulation clause in the sense that it acknowledges the complicated application of fundamental rights in a pluralist context while simultaneously seeking to prevent the conflict of interpretation.[79]

The drafters of the Lisbon Treaty clearly foresaw the problems that might arise where the two European fundamental catalogues overlap and therefore included Art. 52(3) to the CFREU as well as two comprehensive lists relating to that provision in the explanatory notes to the Charter.[80] Among the paragraphs of Art. 52, paragraph 3 is probably the most complex one. Its purpose is to ensure consistency between rights guaranteed by the Charter that correspond to rights enshrined in the ECHR, including authorised limitations.[81] The explanatory remarks to Art. 52(3) present two lists. The first is a list of rights for which both the meanings and the scopes shall be the same as for the corresponding rights in ECHR. The second is a list of rights where the meanings shall be the same as for the corresponding ECHR rights, but where the scopes are wider. For example, the right to life and prohibition of torture and inhuman or degrading treatment will be given the same meaning and scope. By contrast, e.g. Art. 9 of the Charter covers the same field as Art. 12 ECHR (the right to marry) but may be extended to other forms of marriage, depending on the national legislation of the Member State. Similarly, the principle of *ne bis in idem* enshrined in Art. 50 of the Charter corresponds to Article 4 of Protocol No. 7 ECHR. However, it deviates from the ECHR right in the sense that "its scope is extended to European Union level between the Courts of the Member States."[82]

In Advocate General Kokott's words, the first sentence of the article can be looked upon as a "homogeneity clause."[83] Presidents Skouris and Costa also favour an extensive interpretation of Art. 52(3). In their view, the Charter has become "the reference text and the starting point" for the CJEU's assessment of the fundamental rights enshrined in the EU fundamental rights catalogue. It is therefore important to "ensure that there is the greatest coherence" between the Charter and the ECHR in so far as the rights of the two documents correspond. Given that the related explanatory

[79] Groussot and Olsson, 2013, p 13 ff.
[80] Lenaerts and de Smijter, 2001, p. 292 f.
[81] Groussot and Olsson, 2013, p. 13 ff.
[82] OJ, 2007, C 303/17, p. 17. f.
[83] Opinion of AG Kokott in Case C-110/10 P *Solvay*, para. 95.

remarks to Art. 52(3) stipulates that (for certain rights) the meaning and scope of the rights guaranteed by the ECHR and the Charter shall the same, a "parallel interpretation" of the two fundamental rights catalogues would be preferable.[84] However, the many attempts to include an unequivocal reference to ECHR have failed. According to the explanatory remarks relating to Art. 52(3), the ECtHR's case law on the ECHR and its related protocols shall be taken into consideration.[85] This requirement has deliberately been left out from the Charter. Moreover, Art. 52(7) of the Charter merely requires that the explanatory remarks shall be given *due regard.* Thus, the Charter does not require the CJEU to follow the explanations relating to the Charter in its interpretation.[86]

3.2.3 Art. 53 – Level of protection

"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

The purpose of Art. 53 is to maintain the level of protection currently provided for by EU law, national constitutions and international agreements, ultimately ensuring the constitutional autonomy of the Charter as well as a high standard of protection of human rights in the European legal orders.[87] However, it is uncertain how the expressions "nothing in this Charter" and "in their respective field of application" should be interpreted. Moreover, the references to the ECHR and national constitutions appear superfluous, as their respective relationships with the Charter are already addressed in Art. 52(3) and 52(4). It seems as if Art. 53 is trying to reassure the Council of Europe and the EU Member States and that the Charter is not intended to replace the ECHR or the Member States national constitutions, although it is questionable whether it succeeds in doing so. Furthermore, it is debated whether the aim is to address the constitutional courts as well as the ECtHR, or whether it is specifically aimed at one of the two. In other words, does it particularly seek to preserve the internal or the external autonomy? With regard to the internal autonomy, the article could, interpreted extensively, be looked upon as a "conflict of rules-clause" or a "best protection-clause," *i.e.* giving national courts permission to deviate from the principle of supremacy if the level of protection of fundamental rights guaranteed by their constitutions is higher. Conversely, interpreted restrictively, it could be interpreted as a reinforcement of the principle of supremacy. With regard to the external autonomy, Art. 53 could be interpreted as seeking to prevent the risk of two fundamental rights standards within Europe.
The scholars have certainly tried to clarify the ambiguities of Art. 53. Should it be interpreted as a codification of the 'Solange approach' *i.e.* can the principle of supremacy of EU law be conditional? Does it allow the

[84] Costa and Skouris, 2011, para 1.
[85] OJ, 2007, C 303/17, p. 17.
[86] Groussot and Olsson, 2013, p. 14.
[87] Groussot and Olsson, 2013, p. 20.

national courts to deviate from the principle where EU law does not provide for a level of protection of fundamental rights equivalent to the protection provided for by the Member States constitutions? According to some scholars, as well as the CJEU, such an interpretation cannot be accepted. The aim of Art. 53 is not to limit the supremacy of EU law, but to reassure the Member States that the Charter is not intended to be a substitute for their constitutions. For this reason, the expression "in their respective fields of application" has been included to the provision. This expression can be interpreted as seeking to clarify that the Charter does not apply in situations that fall outside the scope of implementation of EU law; such situations are still exclusively governed by the Member States national constitutions. However, such an interpretation of Art. 53. deprives it of its *effet utile*, since it repeats what is already provided for by Art. 51. Similarly, the references to the ECHR and the national constitutions in Art. 53 are repetitions of issues that are already addressed in Art. 52(3) and 52(4). The expression "nothing in this Charter" have a more limited scope than "no provision of EU law." Consequently, although the provisions of the Charter may not contradict the national constitutions, the TEU and TFEU may well do so.

In Lenaert's view, the most apt interpretation of Art. 53 would be that it is a rule seeking to reinforce the principle of supremacy of EU law in the sense that it demands the CJEU to explain its reasons for following - or departing from - the level of fundamental rights protection guaranteed by the Member States' constitutions, and not a rule of conflict. Art. 53 expresses the "constitutional pluralism" and mandates the CJEU to engage in dialogue with the national constitutional courts. To conclude, Art. 53 must not be interpreted in line with the 'Solange' approach. Instead, it must be interpreted in light of the cases *Omega*[88] and *Sayn-Wittgenstein.*[89] In *Omega*, the CJEU held that "it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State."[90] Thus, Art. 53 could never deprive EU law of its supremacy over national law, even where a national constitution offers a higher level of protection than that guaranteed under EU law. However, the CJEU is unlikely to give supremacy to an EU measure which "does not pay due homage" to the Member States' constitutional traditions. Provided that the essential interests of the EU are not adversely affected by national measures implementing EU law, the CJEU leaves to the Member States the question of determining the level of protection of fundamental rights in accordance with their constitutions.[91]

As far as the external dimension of the autonomy of EU law is concerned, it has been argued that Art. 53 could have increased the risk of

[88] Case 36/02 *Omega*
[89] Case 208/09 *Sayn-Wittgenstein*
[90] Case 36/02 *Omega*, paras. 37 and 38.
[91] Lenaerts, 2012, p. 397 ff.

two potential European fundamental rights standards. Consequently, where the wordings of the texts in CFREU and ECHR do not correspond exactly, the CJEU and the ECtHR could interpret corresponding rights differently. The risk of one "CFREU standard" and one "ECHR standard" for corresponding rights has been rejected by some scholars in the academic debate. According to Lenaerts and de Smijter, the Charter was never drawn up for the purpose of replacing the ECHR and where the texts of the two documents depart, it can never be at the expense of the level of protection guaranteed by the ECHR.[92] In fact, because of the ECtHR jurisdiction's subsidiary character, the risk of two fundamental rights standards for corresponding rights is rather weak. According to Advocate General Jacobs, "[t]he danger of an overlap between the jurisdiction of the Court of Justice and the European Court of Human Rights would not in fact be great. The latter has always stressed that its jurisdiction is subsidiary, in the sense that it is primarily for the national authorities and the national courts to apply the Convention [...] Thus, if the Court of Justice were to extend the circumstances in which the Convention may be invoked under Community law, the result would simply be to increase the likelihood of a remedy being found under domestic law, without the need for an application to the organs established by the Convention."[93] Moreover, the threat of diverging interpretations would vanish completely following accession to ECHR, as the ECHR will transform into a formal source of law in the EU legal order, which will be elaborated in section 4.

3.3 The emergence of the Charter in the CJEU's case law

Since the entry into force of the Lisbon Treaty, the number of references to the Charter by the CJEU has increased rapidly. The number of decisions in which the Court referred to the Charter in its reasoning almost doubled in a year, from 43 in 2011 to 87 in 2012. Similarly, the number of preliminary rulings in which the national courts referred to the Charter had increased by 65 % in a year, from 27 in 2011 to 41 in 2012.[94] The *DEB*- case of the 22 December 2010 serves an illustrative example. In this case, the Court stated: "As regards fundamental rights, it is important, since the entry into force of the Lisbon Treaty, to take account of the Charter, which has 'the same legal value as the Treaties', pursuant to the first subparagraph of Article 6(1) TEU." The case concerned the right to a fair trial. The CJEU recognized that Art. 52(7) and the third subparagraph of Article 6(1) TEU requires that the explanatory notes to the Charter must be taken into consideration when interpreting the Charter. The relevant provision of the Charter was Art. 47(2), which corresponds to Article 6(1) of the ECHR. The Court declared that when a case concerns a right in the Charter that corresponds to rights guaranteed by the ECHR, according to Art. 52(3) the right shall be given the same meaning and scope as the latter. Moreover, the explanatory notes to

[92] Lenaerts and de Smijter, 2001, p. 296 f.
[93] Opinion of AG Jacobs in Case 168/91 *Konstantinidis*, para. 50.
[94] *2012 Report on the Application of the EU Charter of Fundamental Rights*, 2013, p. 24.

Art. 52(3) requires that the meaning and scope shall be determined not only by reference to the text of the ECHR, but also by reference to the case law of the ECtHR.[95] In the CJEU's own case law,[96] the CJEU had previously ruled that particularly for Art 47(3) the provision should include legal aid where the absence of such aid would make it impossible to ensure an effective remedy. In *DEB*, the Court held that Art. 47(3) "must be interpreted in its context, in the light of other provisions of EU law, the law of the Member States and the case-law of the European Court of Human Rights." When reviewing the ECtHR's case law, the CJEU found that the ECtHR had stated several times that the right of access to a court is intrinsically linked to the right to a fair trial. For this purpose, it is crucial that a one is not denied one's right to present one's case effectively before a court. However, the right of access to a court is not absolute. The CJEU found it apparent, after review of the ECtHR's case law, that the grant of legal aid to legal persons was not *in principle* impossible. Thus, The Court reached the conclusion that "the principle of effective judicial protection, as enshrined in Article 47 of the Charter, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle..."[97] However, the grant of legal aid would have to be assessed in the light of the applicable rules and the company's situation. The *DEB*-case demonstrates the CJEU's deferential treatment of the ECHR provisions and its sincere wish that its case law shall be in line with that of the ECtHR. It shows how the Court takes the duties set out in Art. 52(3) and Art. 52(7) sincerely and ensures consistency between rights guaranteed by the Charter and the ECHR.

Similarly, the Court strived to ensure the Charter's coherence with the ECHR in the joined cases *N.S.* and *M.E.* of the 21 December 2011.[98] The central right in these cases was the prohibition of torture and inhuman or degrading treatment and the cases concerned the Common European Asylum System. The CJEU emphasised that "this system is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted." The Court proceeded to state that the Common European Asylum System was conceived in a context where it would be possible to assume that the participating states observed fundamental rights as guaranteed e.g. by the Geneva Convention and the ECHR. In fact, it was because of that principle of mutual confidence that the contested regulation was adopted, with the aim to "increase the legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping…*"* Under such circumstances, it must have been possible to assume that all the Member States' asylum systems complied with the Charter, the Geneva Convention and the ECHR. The CJEU referred to the ECtHR-case *M.S.S.* v. *Belgium and Greece*[99] and reached the conclusion that Art. 4 of the Charter "must be interpreted as meaning that the Member States…may not transfer an asylum seeker to the 'Member State responsible'…where they cannot be unaware that systemic deficiencies in

[95] Case 279/09 *DEB*, paras. 30-35.
[96] *Airey v. Ireland* of 1979, Appl. No. 6289/73
[97] Case 279/09 *DEB*, paras. 36-59.
[98] Case 411/10 and joined cases 493/10 *NS* and *M.E.*
[99] *MSS v. Belgium and Greece*, 2011, Application No. 30696/09

the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision."[100]

To conclude, also in this case, the respectful treatment of the corresponding ECHR provisions and the ECtHR as a specialised court in the field of human rights is apparent. However, the CJEU's treatment of ECHR illustrated by *DEB* and *N.S.* and *M.E* is only one of the lines of case law that can be discerned by review of the CJEU's case law.

3.4 The general provisions on application and interpretation of the Charter in the light of *Melloni, Toshiba Corporation* and *Åkerberg Fransson*

3.4.1 Art. 51 as interpreted by the CJEU in Åkerberg Fransson

Since the Lisbon Treaty's entry into force, a couple of cases brought before the CJEU have dealt with Art. 51, but none of them clarified its scope of application.[101] The CJEU's ruling in *Åkerberg Fransson*[102] of the 26 February 2013 has casted some light over the provision. The case concerned a dispute between the Swedish public prosecutor's office and the defendant Mr Fransson concerning proceedings for serious tax offences. For these offences, criminal penalties (*Skattebrottslagen*) as well as administrative penalties (*Taxeringslagen*) exist under Swedish law.[103]

The admissibility of the questions referred to the CJEU was disputed among the Member States and the Commission, some of which were of the opinion that the CJEU should only have jurisdiction if the administrative penaltiy that was the subject matter of the main proceedings arose from implementation of EU law. With regard to the admissibility of the case, the CJEU initially stated:

"The Court's settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures."

[100] Case 411/10 and joined cases C-493/10 *NS* and *M.E.*, paras. 70-106.
[101] Groussot and Olsson, 2013, p. 8.
[102] Case 617/10 *Åkerberg Fransson*
[103] Case 617/10 *Åkerberg Fransson,* paras. 1-11.

The explanatory notes with regard to Art. 51 state the provision is only binding upon the Member States "when they act in the scope of Union law." In the case at hand, the tax penalties and criminal proceedings imposed on Mr. Åkerberg Fransson were partly connected to breaches of his obligations to declare value added tax (VAT). From several directives as well as the Art. 4(3) TEU follow that each Member State is obliged to take "all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion." Moreover, Art. 325 TFEU obliges the EU Member States "to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests." The Court proceed to state that "Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter."[104] For the purposes of Art. 51(1), where a national court is to review if a national provision complies with fundamental right in an area of law that is not entirely determined by EU law, "national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised."[105] Consequently, because the information provided for by the defendant had provided was false, the tax penalties and criminal proceedings for tax evasion constituted implementation of several EU directives and Art. 325 TFEU. Subsequently, the CJEU had jurisdiction on the *Åkerberg Fransson*- case. In other words, Sweden had implemented EU law and the case was within the scope of Art. 51(1) of the Charter.[106]

Advocate General Cruz-Villalón was of the opinion that the CJEU lacked jurisdiction in the *Åkerberg Fransson*-case. According to him, the competence of the EU to assume responsibility for guaranteeing the fundamental rights, in relation to the exercise of a national public authority implementing EU law, must be explained by a specific interest of the EU in ensuring that that he exercise of the national public authority is in accordance with fundamental rights as guaranteed by EU law. "The mere fact that such an exercise of public authority has its ultimate origin in Union law is not of itself sufficient for a finding that there is a situation involving the 'implementation' of Union law."[107] Consequently, "the question is whether a State legislative activity based directly on Union law is equivalent to the situation in this case, where national law is used to secure objectives laid down in Union law. In other words, the question is whether the two situations are equivalent from the perspective of the qualified interest of the

[104] Case 617/10 *Åkerberg Fransson*, para. 21.
[105] Case 617/10 *Åkerberg Fransson*, paras. 16-29.
[106] Case 617/10 *Åkerberg Fransson*, paras. 27-29.
[107] Opinion of AG Cruz-Villalón in Case 617/10 *Åkerberg Fransson*, para. 40.

EU in assuming direct, centralised responsibility for guaranteeing the right concerned." It seems risky to assert that, by means of a provision of a EU directive, the legislature was anticipating the transfer of all the constitutional guarantees governing the exercise of the Member States' power to impose penalties, including the collection of VAT, from the Member States to the EU. Therefore, this case must not be regarded as a situation involving the implementation of Union law within the meaning of Art. 51(1). Accordingly, the CJEU should have declared that it lacked jurisdiction in the proceedings at hand.[108]

It appears that the *Åkerberg Fransson*-case confirms the CJEU's previous case law on Art. 51(1) such as *Wachauf*[109]and *ERT,*[110] according to which actions of the Member States must be in accordance with the requirements deriving from the fundamental rights guaranteed in the EU legal order which are applicable in all situations governed by EU law, but not outside such situations. The CJEU's position is that "Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter."[111] According to the logic of the CJEU's reasoning, CJEU assimilates the meaning of "implementing EU law with "the scope of EU law." It confirms that the Charter and general principles overlap in the sense that they have a similar scope of application in EU law. To conclude, the Charter does not alter the scope of application of fundamental rights protection, but respects the constitutional allocation of powers provided for by the Treaties.[112]

3.4.2 Art. 52(3) as interpreted by the CJEU in Åkerberg Fransson, Toshiba Corporation and Melloni

In contrast to the line of case law in e.g. *DEB* and *NS* and *M.E.*, the CJEU seemed much less concerned to ensure the Charter's consistency with ECHR in the case *Melloni*[113] of 26 January 2013, concerning a European warrant's compatibility with the right to a fair trial. Initially, the CJEU proclaimed the Charter's legal status, as set out in Art. 6(1) TEU. The Court proceeded to remind the reader that the right to a fair trial in Art. 47 and 48(2) is not absolute and referred to its own case law. The Court mentioned quite briefly that the interpretation of Art. 47 and 48(2) of the Charter was in keeping with the scope of Art. 6(1) and (3) of the ECHR as interpreted by the ECtHR in its case law,[114] but did not refer to Art. 52(3). In *Toshiba*

[108] Opinion of AG Cruz-Villalón in Case 617/10 *Åkerberg Fransson*, paras. 60-64.
[109] Case 5/88 *Wachauf*
[110] Case 260/89 *ERT*
[111] Case 617/10 *Åkerberg Fransson*, para. 21.
[112] Groussot and Olsson, 2013, p. 11 f.
[113]Case 399/11 *Melloni*
[114] Case 399/11 *Melloni*, paras. 48-50.

Corporation and *Åkerberg Fransson*, it was even more apparent how the CJEU was avoiding the requirement of harmonious interpretation as neither of these cases contained any reference to Art. 52(3), the corresponding ECHR provision in Art. 4 to Protocol 7 ECHR or the ECtHR's case law on this provision. Both these cases concerned the principle *ne bis in idem* the "right not to be tried or punished twice" or, as put in the Art. 50. CFREU, the "right not to be tried or punished twice in criminal proceedings for the same criminal offence."

The principle of *ne bis in idem* is guaranteed within many legal orders and international agreements. For instance, it is enshrined in ECHR. However, given that the ECtHR is of subsidiary character, this provision is limited to the jurisdiction of each Contracting Party to the ECHR. By contrast, the principle guaranteed within the scope of EU law can apply in domestic, transnational and/or on EU level. Hence, despite the vast array of principles of *ne bis in idem*, there is no similar principle with a similar function to Art. 50 CFREU.[115] Therefore, the explanatory remarks stipulate that, in relation to Art. 4 Protocol 7 ECHR, the scope of Art. 50 CFERU "is extended to European Union level between the Courts of the Member States."[116] The ECtHR has elaborated the meaning of Art. 4 to Protocol 7 in its landmark case *Zolotukhin*[117], Art. 4 of Protocol No. 7 "prohibits prosecution or trial for the same offence in so far as it arises from identical facts or facts that are substantially the same."[118] Thus, when deciding the nature of the offence, the ECtHR only takes account of whether the facts are identical or not, and not of the legal classification if the offence. Moreover, the ECtHR has stipulated three criteria (the *Engel*-criteria[119]) in order to determine whether the first penalty is of criminal nature and, in combination with prosecution under criminal law, constitutes infringement of Art. 4 Protocol 7 ECHR. These criteria are based on its legal classification of the offence under domestic law, the nature of of the offence and the degree of severity of the penalty that the defendant is liable to incur. It is clear by review of the ECtHR's case law, e.g. *Janosevic*[120] and *Västberga Taxi Aktiebolag*,[121]that the administrative fiscal penalties provided for by Swedish law of criminal nature under Art. 6 ECHR. Thus, the combination of administrative penalties (provided for by *Taxeringslagen*) and criminal proceedings, which were also at hand in *Åkerberg Fransson*, is not accepted according to the *ne bis in idem* principle as it is enshrined in the ECHR.[122]

Before the Charter became legally binding, the CJEU protected the principle of *ne bis in idem* as a general principle of community law. However, the CJEU adopted its own interpretation of the principle, which did not exclude double prosecution or the imposition of punitive damages. In its case law, the CJEU has adopted two lines of case law in relation to *ne bis in idem.* On the one hand, it has adopted the *Engel*-criteria, for example

[115] Vervaele, 2013, p. 131.
[116] OJ, C 303/17, 2007
[117] *Zolotukhin v. Russia*, 2009, Appl.No. 14939/03
[118] *Zolotukhin v. Russia*, 2009, Appl. No. 14939/03, para. 82.
[119] *Engel and Others v. the Netherlands*, 1976, Appl. No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72
[120] *Janosevic*, 2002, Appl. No. 34619/97
[121] *Västberga Taxi Aktiebolag*, 2002, Appl. No. 36985/97
[122] Vervaele, 2013, p. 133.

in the case *Bonda.*[123] On the other hand, in the field of competition law, the CJEU has not elaborated a principle that is fully in line with the ECtHR's case law on Art. 4 Protocol 7 ECHR. For instance, in the joined cases *Cement,*[124] it avoided the *Engel*-criteria and adopted instead a threefold condition in order to determine the character on the first penalty, based on: the identification of facts, unity of offender, and unity of the legal interest protected. This approach is not in line with the *Zolotukhin*-doctrine as elaborated by the ECtHR.[125]

Toshiba Corporation[126] of the 14 February 2012 concerned a decision by the commission to penalise the members of a cartel, which had already been subjected to sanctions by a national competition authority before that state acceded to the EU. Advocate General Kokott was of the opinion that the requirement of homogeneity in Art. 52(3) CFREU was applicable. According to her, Art. 4 of Protocol No. 7 as interpreted by the ECtHR constitutes a minimum standard that must be guaranteed in the interpretation and application of the principle of *ne bis in idem* in EU law. Consequently, she examined the ECtHR's case law. According to the *Zolotukhin*-doctrine,[127] Art. 4 of Protocol No. 7 "prohibits prosecution or trial for the same offence in so far as it arises from identical facts or facts that are substantially the same." When deciding the nature of the offence, the ECtHR only takes account of whether the facts are identical or not, and not of the legal classification if the offence. As there was nothing that suggested that the scope of the protection provided by the principle should be less extensive in relation to competition law, account should only be taken to the identity of the facts.[128] The CJEU adopted a different approach than the one suggested by the Advocate General. Rather than referring to the *Zolotukhin*-doctrine and give Art. 50 the same meaning and scope as the corresponding ECHR right, the Court referred exclusively to its own case law. There was no mentioning of neither the ECHR nor the ECtHR's case law.[129] The CJEU reached the conclusion that the principle of *ne bis in idem* does not prohibit that fines are imposed by the Commission on cartel members, because sanctions had already been imposed by a national competition authority on the same members for undertakings in the same cartel that had anticompetitive effects in that Member State before its accession to the EU, as long as the second punishment was "not designed to penalise the said effects.[130]

To interpret Art 50 CFREU in line with Art. 4 to Protocol 7 ECHR would indeed problematic particularly in relation to competition law. By contrast to Art. 4 to Protocol 7, the reach of Art. 50 CFREU is not limited to the jurisdiction of every single Member State but has transnational effect in the integrated legal order of the EU. For the EU Member States, the

[123] Case 489/10 *Bonda*
[124] Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Cement*
[125] Vervaele, 2013, p. 116.
[126] Case 17/10 *Toshiba Corporation*
[127] *Zolotukhin v. Russia* , 2009, Appl. No. 14939/03
[128] Opinion of AG Kokott in C-17/10 *Toshiba Corporation*, paras. 120-122.
[129] Case 17/10 *Toshiba Corporation*, paras. 94-95.
[130] Case 17/10 *Toshiba Corporation*, para. 103.

consequences are considerable when they implement and enforce EU law, as they no longer can limit the principle of *ne bis in idem* to criminal law *sensu strictu* but have to face the transnational application of *ne bis in idem* for all punitive sanctions. Thus they have to provide for a wider scope of protection so as to include punitive administrative sanctions. This will have the effect of an increasing need to determine the case allocation in the EU with regard to investigations and punishment under administrative and criminal law. As put by Vervaele, "the ne bis in idem principle cannot function properly in a common area without the coordination of jurisdiction and binding criteria on choice of jurisdiction and a proper allocation of cases in the common justice area."[131]

If the absence of reference to ECHR could have been interpreted as an *accident de parcours* in *Toshiba Corporation*, the *Åkerberg Fransson* case proved that the absence of reference to ECHR and the ECtHR's case law was a deliberate choice. Once again, the CJEU referred only to its own case law. However, it implicitly applied the ECtHR's case law when using the *Engel*-criteria. In order to determine the criminal nature of the administrative penalties within the frame of the CFREU right,[132] the CJEU referred to *Bonda* (a CJEU-case that in turn refers to these criteria).[133] It is not surprising that the CJEU adopted this approach rather than a full application of the *Engel*-criteria, as a full adoption thereof would threaten the effectiveness of EU competition law.[134] Moreover, the CJEU did not refer to cases from the ECtHR in which that Court had already, through application of these criteria, recognized the criminal nature of the tax increase stipulated by the contested administrative penalty *(taxeringslagen).*[135] The definite distance taken with the ECHR was that the CJEU stated that if the national court decides to apply national standards because the ECHR requires that the Member State must give up the accumulation of tax and penalties, it can not do so without disregarding EU law, unless the remaining sanctions are effective, proportional and deterrent.[136] By contrast to the corresponding ECHR provision, the interdiction of the double punishment is not an absolute right in EU law. Its application remains subordinate the imperative of effectiveness of EU law, and therefore it offers a lower level of protection than that guaranteed by the ECHR Thus, the CJEU was ignorant of Art. 53 of the ECHR, which serves as a safeguard for existing human rights.[137]

Advocate General Cruz-Villalón based his reasoning on why Art. 50 CFREU is not guaranteed in the same way as the corresponding principle in ECHR on the non-consensus among the EU Member States with regard to Art. 4 Protocol 7. This ECHR provision is either not fully applicable or not applicable at all in several Member States. For instance, France and Luxembourg have made reservations with regard to Art. 4, the Netherlands and Germany have not ratified Protocol 7 and the UK has not even signed it.

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[131] Vervaele, 2013, p. 133.
[132] Case 617/10 *Åkerberg Fransson*, para. 35.
[133] Ritleng, 2013, p. 28 ff.
[134] Groussot and Olsson, 2013, p. 19 f.
[135] See *Västberga Taxi Aktiebolag*, 2002, Appl. No. 36985/97 and *Janosevic*, 2002, Appl. No. 34619/97
[136] Case 617/10 *Åkerberg Fransson*, para. 36.
[137] Ritleng, 2013, p. 28 ff.

Several Member States, such as Austria, Italy and the Netherlands have limited the scope of application of Art. 4 by precluding its application to punitive penalties outside the area of criminal law.[138] By contrast, Sweden, which is the State that referred the *Åkerberg Fransson*-case to the CJEU, is one of the EU Member States that has ratified Protocol 7 to the ECHR.[139]

Thus, there is an obvious lack of agreement between the EU Member States on the imposition of both criminal and administrative penalties in relation to the same offence. For a great deal of Member States, measures imposing administrative penalties and the possibility of initiating criminal prosecutions are equally crucial. As put by Advocate General Cruz-Villalón: "On the one hand, States do not wish to abandon the characteristic effectiveness of administrative penalties, particularly in sectors where the public authorities seek to ensure rigorous compliance with the law, such as fiscal law or public safety law. On the other hand, the exceptional nature of criminal prosecution and the guarantees which protect the accused during proceedings incline States to retain an element of decision-making power as regards actions which warrant a criminal penalty." This twofold interest explains why several Member States hold on to this dual power to punish despite the fact that it is prohibited in the ECHR. Advocate General Cruz-Villalón continued by stating "The fact that the referring court appears to assume that Article 4 of Protocol No 7 to the ECHR and the Charter are on an equal footing raises serious difficulties." According to him, the *Åkerberg Fransson*-case demonstrates how the lack of agreement concerning Art. 4 of Protocol 7 clashes with the widespread existence and well-established nature of domestic systems in the EU Member States in which both an administrative and a criminal penalty may be imposed in respect of the same offence. Such systems could even be described as a common constitutional tradition of the Member States. In his view, the CJEU should rightly not strictly follow the ECtHR's case law in this case. The principle of *ne bis in idem* does not constitute a "core-principle" *i.e*. a right that, according to the explanatory notes, shall be given the same meaning as well as the same scope as the corresponding ECHR right. Therefore, the court must take "A partially autonomous interpretation of Article 50 of the Charter."[140] Such an interpretation of Art. 50 is incompatible with the ECtHR's line of case law and resembles the CJEU's application of *ne bis in idem* in relation to competition law.[141] A partially autonomous interpretation of Art. 50 CFREU has the effect of nullifying the non-ratifications and reservations that several Member States have made with regard to Art. 4 of Protocol 7 ECHR. Arguably, in this sense, the CJEU's interpretation is an extension of the competence of the EU and in breach of Art. 51(2) of the Charter.[142]

The CJEU, did not discuss the issue of non-consensus in its reasoning. Initially, the Court stated that Art. 50 CFREU does not preclude a Member State from imposing a combination of tax and criminal penalties. Such a

[138] Vervaele, 2013, p. 115.
[139] Groussot and Olsson, 2013, p. 16 ff.
[140] Opinion of AG Cruz-Villalón in Case 617/10 *Åkerberg Fransson*, paras. 70-85.
[141] Vervaele, 2013, p. 130.
[142] Groussot and Olsson, 2013, p. 16 ff.

combination is only precluded if the tax/administrative penalty is criminal in nature, *i.e.* based on its legal classification of the offence under domestic law, the nature of of the offence and the degree of severity of the penalty that the person concerned is liable to incur. These criteria are known as the *Engel*-criteria, elaborated by the ECtHR and adopted by the CJEU in the *Bonda*-case. The assessment of whether the first tax penalty is of criminal nature is for the national court to decide, by assessment of these criteria. The national court may conclude that the combination violates the principle of *ne bis in idem*, as long as the remaining penalties are effective, proportionate and dissuasive, which is a reference to the *effet utile* notion in relation to enforcement (see *Inspire Art*[143] from 2003.)[144] As the CJEU left for the national court to decide whether the combination at hand infringed the principle of *ne bis in idem* as enshrined Art. 50 CFREU, it is unclear if the combination of tax and criminal penalties under Swedish law is allowed under the Charter.[145] According to Vervaele, it was tactful of the CJEU to avoid the non-consensus discussion, by not referring to the limited binding force of the corresponding ECHR provision in relation to some Member States, as the non-consensus debate does not concern the EU legal order as such. Moreover, to not apply the Charter because of the non-ratifications or reservations by EU Member States in relation to the ECHR would involve the risk that the Charter could become dependent on reservations under international law. Thus, Member States may apply their national standards in relation to double sanctions but the outcome must comply with the lower threshold provided by Art. 50 CFREU. Arguably, interpreted as an autonomous document, the Charter contribute to the level of protection of fundamental rights within Europe, in the sense that it is a leeway for the development of fundamental rights protection that goes beyond the minimum requirement under ECHR, a possibility foreseen by Art. 52(3) CFREU. As Art. 50 CFREU applies, not only in domestic situations, but also in transnational situations and on EU level, it has a wider scope of application that all other provisions guaranteeing the right not to be punished twice. Moreover, according to Art. 52(3), the Charter can provide for a wider scope than *inter alia* Art. 4 Protocol 7 ECHR. Thus, when considering the risk of diverging interpretations, one must bear in mind that the CJEU can provide for a wider protection than the ECtHR, as the ECHR constitutes a minimum standard. An interpretation by the CJEU that diverges with that of the ECtHR could still be in perfect harmony with the CFREU as well as the ECHR as long as the minimum standards of both of the fundamental rights catalogues are respected.[146]

[143] Case 167/01 *Inspire Art*
[144] Vervaele, 2013, p. 125 f.
[145] Case 617/10 *Åkerberg Fransson*, paras. 34-37.
[146] Vervaele, 2013, p. 130 f.

3.4.3 Art. 53 as interpreted by the CJEU in Melloni

The *Melloni*-case primarily dealt with the question of the correct interpretation of Art. 53 CFREU. In essence, the referring Court asked whether Art. 53 CFREU allows the Member State to make conditional the surrender of a person convicted in his or her absence, when the conviction is subject to review in the referring Member State, in order to avoid that the right to a fair trial as guaranteed by the referring Member State's constitution is adversely affected. One of the interpretations envisaged by the referring court is that Art. 53 CFREU is a general authorisation allowing Member States to apply the standard of protection of fundamental rights guaranteed by their constitutions if the standard is higher than that guaranteed by the Charter. In other words, it would allow the Member State to deviate from the principle of supremacy. In the case at hand, such an interpretation would allow the referring Court to make the execution of a European arrest warrant (issued for the purposes of executing a sentence rendered *in absentia*) conditional, in order to avoid adverse effects for fundamental rights recognised by its constitution, despite the fact that the application of such conditions is not allowed under the EU decision relating to the EU warrant. In paragraph 60, the CJEU stated: "It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised." However, the interpretation of Art. 53 conceived by the referring court cannot be accepted as it would undermine the principle of supremacy of EU law. Were a Member State allowed to set aside a provision of EU law in order to protect a constitutional right, it would cast doubt on "the uniformity of the standard of protection of fundamental rights as defined in the framework decision. It would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision*."* In the light of the foregoing, Art. 53 must be understood as not allowing a Member State to make the surrender of a person convicted in his or her absence conditional.[147] The reasoning of Advocate General Bot went along the same lines. In his view, Art. 53 is not an apt clause for regulating conflicts between provisions of EU law and the Member States constitutions. It has neither the objective nor the effect of giving priority to the rule providing the highest level of protection. If an EU provision had to give way for a provision deriving from a national constitution, it would undermine the principle of primacy settled by the CJEU in its case law. As far Advocate General Bot was concerned, one must not underestimate the political and symbolic value of Art. 53. When identifying the role of Art. 53 within the Charter, one must also bear in mind that Art. 53 complements Art. 51 and 52 and must therefore be read together with these provisions.

[147] Case 399/11 *Melloni*, paras. 55-64.

According to the explanatory remarks to Art. 53, "[t]his provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law. Owing to its importance, mention is made of the ECHR." The drafters of the Charter were clearly aware of the existence of other sources of protection for fundamental rights that were binding for the Member States. The seventh title's main objective is to provide a way for the Charter to coexist with the plurality of sources of protection for fundamental rights. The provisions of the Charter must be interpreted *in the light of* other national and international legal sources. According to Art. 52(3) the ECHR constitutes a minimum standard and according to Art. 52(4) in so far as the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, the Charter must be interpreted in harmony with those traditions. Art. 53 emphasises that the Charter is not intended to become the exclusive instrument for protecting fundamental rights. It cannot on its own have the effect of adversely affecting or reducing the level of protection resulting from other sources of fundamental rights protection in their respective fields of application. The expression "in their respective fields of application" seeks *inter alia* to reassure Member States of the fact that the Charter is not designed to replace the national constitutions. The Charter imposes a level of protection for fundamental rights *only* within the field of application of EU law. Thus, it cannot have the effect of requiring Member States to lower the level of protection of fundamental rights guaranteed by their national constitution in cases, which fall outside the scope of EU law. Conversely, adoption of the Charter should not serve as a pretext for a Member State to reduce the protection of fundamental rights in the field of application of national law.[148]

The CJEU never explicitly referred to Art. 53 in *Åkerberg Fransson*. However, it referred to the above stated paragraph 60 of the Melloni case. Hence, the Court implicitly dealt with the question of the CFREU's level of protection. In Åkerberg, the CJEU stated, that"[n]ational authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised see, paragraph 60 in the *Melloni*-case."[149] The CJEU proceeded to state that "It is for the referring court to determine, in the light of those criteria, whether the combining of tax penalties and criminal penalties that is provided for by national law should be examined in relation to the national standards as referred to in paragraph 29 of the present judgment, which could lead it, as the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive."[150] According to Sarmiento, the CJEU has in *Åkerberg* and *Melloni,* "created a framework of 'situations' with the purpose of allocating the respective scopes of application and protection of the Charter and of national

[148] AG Bot in Case 399/11 *Melloni*, paras. 99-136.
[149] Case 617/10 *Åkerberg Fransson*, para 29.
[150] Case 617/10 *Åkerberg Fransson*, para 36.

fundamental rights."[151] The new arrangement recognizes the strategic role of constitutional courts and assures the autonomy of Member States as well as the Charter's prominent role in fundamental rights protection. The CJEU has interpreted Art. 53 as mandating the CJEU to engage in dialogue with constitutional courts. However, there is a risk that for the purpose of the uniformity of EU law, the level of protection of fundamental rights is compromised. Rather than applying the high standard provided for by the Spanish constitution, the CJEU chose to apply the lower standard afforded by the EU provision in the *Melloni* case. However, in the context of the European Arrest Warrant, Art. 53 should not be used as it is a fully regulated area of EU law. For such areas, the level of protection is limited by the requirement of respecting the uniformity and autonomy of EU law. Thus, the provision is not to be looked upon as a provision seeking to ensure the best protection possible. The principle of *ne bis in idem*, is another example of a fully regulated area of EU law, for which Art. 53 should not apply. The Charter is the starting point of interpretation on fundamental rights, at the top of the normative hierarchy. The CJEU uses it to provide for the continuous protection of individual rights and liberties. To this end, it is "a purposive document;" its aim being to guarantee and protect the rights and freedoms it enshrines, within reasonable limits. Arguably, an interpretation of the Charter as a purposive document justifies a ruling like *Åkerberg Fransson*, in which the CJEU applied an autonomous interpretation of Art. 50 CFREU, without considering the lack of consensus between the Member States of the Council of Europe in relation to Art. 4 of Protocol 7. In other words, Art. 50 CFREU sets out its own uniform standard of protection of the *ne bis in idem* principle between the twenty-eight EU Member States. In the particular case of *ne bis in idem*, reliance on the ECHR standards is not compulsory**.**[152]

3.5 Summary: Art. 51-53 as interpreted by the CJEU

To conclude, by review of *Melloni, Toshiba* and *Åkerberg Fransson*, the CJEU seems to have adopted a broad interpretation of Art. 51 in *Åkerberg Fransson*, in the sense that the contested national laws did not necessarily have to be a result of implementation of EU law in order for the Charter to apply. Thus, "implementation of EU law" does not mean implementation in the strictest sense. The CJEU adopted a partially autonomous interpretation of Art. 52(3) in *Åkerberg Fransson* and *Toshiba Corporation.* In relation to the principle of *ne bis in idem*, the requirement to interpret Art. 50 CFREU in line with the corresponding Art. 4 to Protocol 7 ECHR is not compulsory. After review of *Melloni*, it is uncertain how Art. 53 should be interpreted. However, so long as it protects fundamental rights to a higher standard than the Charter, Art. 53 will clearly not allow for the Member States to deviate from the principle of supremacy of EU law in favour of their own national constitutions.

[151] Sarmiento, 2013, p. 1272.
[152] Groussot and Olsson, 2013, p. 24 ff.

4 Accession to the European Convention on Human Rights

4.1 Why accession when there is the Charter?

Despite the CJEU's development of fundamental rights through general principles, the CJEU has repeatedly been criticized for not having a genuine commitment commitment to the protection of human rights and for being more interested in advancing other objectives of economic or political character. It has been accused of using human rights as a pretext to extend its influence into other fields of law. Some critics have asserted that the CJEU used fundamental rights as a rhetorical method, whereas in practice, the Court worked for advancing commercial goals of the EU. For example, it would use the headline "market rights" for the purpose of promoting the integration of the single market. Another reason for directing scepticism towards the CJEU's transformation into a "human rights court," has been that this was not its function under the Treaties. Moreover, the ECtHR is a much more apt court to interpret human rights as it was established for that purpose, and as it had acquired an expertise that the CJEU falls short of.[153]

As discussed in Section 3, the Charter is to a certain extent a codification of rights that already exist in the ECHR. It was not drawn up for the purpose of replacing the ECHR. One can wonder, given that the EU today has a legally binding catalogue of its own which contains a requirement of harmonious interpretation, would accession to the ECHR actually add anything to the present system of fundamental rights protection within the EU? The answer to this question is affirmative, as accession would have the effect of enhancing the uniform protection of fundamental rights further. It enables individuals to address the EU for violations of the ECHR in front of the ECtHR, which would, as a result of accession, be able to scrutinize EU acts.[154] The problem that the EU currently cannot be held directly responsible in front of the ECtHR became apparent in the case *Conolly*.[155] Under certain circumstances, individuals can hold EU Member States responsible for violating the ECHR, which has been confirmed in e.g. *Matthews vs. UK*[156] and *Bosphorus v Ireland*.[157] In these cases, Member States were alleged for violations of the ECHR *in lieu* of the EU. However, responsibility can only arise if the Member State was implementing EU law and if it had any discretion when doing so, which was the case in e.g. *MSS v. Belgium and Greece*. By contrast, if a Member State implements a EU measure (e.g. a regulation) which does not leave it any room for discretion,

[153] Craig and de Burca, 2011, p. 399 f.
[154] Lenaerts, p. 297 f.
[155] *Conolly*, 2008, Appl. No. 73274/01
[156] *Matthews vs UK*, 1999, Appl. No. 24833/94
[157] *Bosphorus v. Ireland*, 2005, Appl. No. 45063/98

responsibility for violations of the ECHR cannot arise. As accession would enable individuals to address applications directly against the EU for violations of the ECHR, an obvious judicial gap would be closed.[158] Furthermore, given that the EU exercises powers that are transferred by the Member States, an extension of the ECtHR's control to the EU is logical. Moreover, the EU requires that Member States that wish to enter the Union are Contracting Parties to the ECHR. Therefore, it seems quite odd that the EU itself stands outside the jurisdiction of the ECtHR. It is about time that the EU itself accedes to foster its credibility on human rights issues.[159]

4.2 The main obstacles to accession

In order for the EU to be able to accede to the ECHR, two main obstacles had to be removed. The TEC needed to be amended in order for the EU to acquire competence to accede to the ECHR, an obstacle anticipated by the CJEU in its Opinion 2/94 of 1996. Moreover, the Convention itself had to be revised in order for the EU to adhere to it. Previously, only states could be parties to the ECHR. The EU's accession to the Convention required, besides the agreement of the EU and its Member States, approval by all the 47 Member States of the Council of Europe. Thus, there have been quite a few players in the negotiations on the terms of accession. Amongst these, Russia blocked the negotiations for several years due to its failure to ratify Protocol No. 14 to the ECHR.[160] This explains why the provision permitting the EU to accede to the Convention did not enter into force until 2010. As a consequence of the ratification of Protocol 14., Art. 52(2) of the ECHR henceforth states, "the European Union may accede to this convention." The EU's competence to adhere to the ECHR was achieved through the entry into force of the Lisbon Treaty, which amended Art. 6(2) of the TEU. This provision states, "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."[161]

4.3 The specific characteristics of the Union

Art. 6(2) of the TEU places the EU under the duty to accede to the ECHR. However, the provision does not specify the exact scope of that duty. Nothing requires the EU to accede under all circumstances, regardless of the content of the accession agreement. On the other hand, is seems clear that the EU and its Member States cannot reject accession outright. As the Treaty stipulates that the CJEU *shall* accede, a "minimal accession" would logically not conflict with the autonomy of the EU legal order, or else the wording of the article would have been different. Such a minimal accession must nevertheless include a possibility for review by the ECtHR of EU

[158] Lock, 2011, p. 1026 f.
[159] Lock, 2010, p. 777 f
[160] Craig and de Burca, 2011, p. 399 f.
[161] Lock, 2010, p. 777.

provisions alleged of violating the ECHR. Obviously, an agreement that allows an external court to scrutinize EU law is expected to conflict with the autonomy of EU law. It is crucial that the exact ramifications for review of EU law by the ECtHR as they are laid down in the accession agreement preserves the autonomy of the CJEU as well as the ECtHR.[162] In attempt to ensure that the autonomy of EU law will be preserved following accession, the drafters of the Lisbon Treaty stipulated Protocol (No. 8) relating to Art. 6(2) of the TEU on the accession of the EU to the ECHR.[163] It stipulates:

> Article 1
> The agreement relating to the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the 'European Convention') provided for in Article 6(2) of the Treaty on European Union shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to:
>
> (a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention;
>
> (b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.
>
> Article 2
> The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.
>
> Article 3
> Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union.

In the EU hierarchy of norms, international agreements are of higher rank than secondary law but subordinate to primary law. Given that the agreement on accession must not affect the EU's competences as defined in the Treaties, the Draft agreement must comply with the requirements set out by Protocol. No. 8. If the agreement was inconsistent with the conditions set out therein, it will be rejected by the CJEU in an opinion under Art. 218(11).[164] The protocol does not provide any further guidance on what "the specific characteristics of the Union and Union law" refer to. But given that the CJEU has based its reasoning on the concept of autonomy in several cases and opinions, one can assume that Protocol No. 8 refers to the autonomy of the EU legal order. Thus, it is justified to assess the draft agreement by the standards set by the CJEU's in its case law the autonomy of EU law.[165]

[162] Lock, 2011, p. 1033.
[163] OJ, 2010, C 83/273.
[164] Baratta, p. 1322 f.
[165] Lock 2011, p. 1033.

4.4 The autonomy of EU law

Due to the requirements set out in Protocol No. 8 to the Lisbon Treaty, one of the major challenges to the EU's accession to the ECHR has certainly been the autonomy of the EU legal order. Indeed, it has been a difficult task for the drafters to ensure a high level of protection of human rights while simultaneously satisfying political demands and ensuring the autonomy of the EU legal order. The past draft agreements have not succeeded in overcoming this obstacle. The CJEU has asserted the autonomy of EU law and explained the meaning thereof in several opinions and cases. By review of the CJEU's case law a distinction can be drawn between the internal dimension of autonomy and the external dimension of autonomy. The former encapsulates the relationship between the EU's legal order and the domestic legal orders of its Member States, and the latter encapsulates the relationship between the EU legal order and international law. The landmark case *Costa v. ENEL* from 1964, discussed in Chapter 2.1 was the first case on the internal dimension. In this case, the CJEU declared "…that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question."[166] The CJEU argued that the principle of supremacy was needed in order to preserve the autonomy of the EU's legal order. From this case and onwards, the CJEU has continuously asserted the principle of autonomy towards the Member States' legal orders.[167] For instance, it was at the heart of the *Melloni*-case.

With regard to the external dimension, the CJEU has emphasized the importance of the autonomy of the EU's legal order in several opinions. Most famously, it declared that the EU lacked competence to adhere to the ECHR.[168] In this opinion, the Court reflected whether Art. 235 TEC constituted a legal basis for accession to the ECHR. The article was designed to apply where there were no specific provisions of the Treaty that conferred powers on the institutions to act, and when such powers appeared to be necessary to "enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty."[169] The Court reached the conclusion that accession, being "Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235." Accordingly, accession could only occur if the Treaties were amended.[170] The external dimension of autonomy had been highlighted by the CJEU previously,[171] on the first draft agreement on the European Economic Area (EEA).[172] Later

[166] Case 6/64, *Costa v. ENEL*
[167] Lock. 2011, p. 1028 ff.
[168] Opinion 2/94, 1996.
[169] Opinion 2/94, 1996, paras. 28-29.
[170] Opinion 2/94, 1996, para 35.
[171] e.g. in Opinion 1/91, 1991
[172] Lock. 1011, p. 1029 f.

on, the CJEU reaffirmed the meaning of the autonomy of EU law. The CJEU identified two aspects of the external dimension of autonomy; "Preservation of the autonomy of the Community legal order requires therefore, first, that the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered [...]Second, it requires that the procedures for ensuring uniform interpretation of the rules of the European Common Aviation Area Agreement and for resolving disputes will not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement."[173] Consequently, an external court must not interpret the Treaties in an internally binding fashion.[174]

In 8 March 2011,[175] the Court held that the EU may be subjected to the external control of an international court, provided that the autonomy of EU law was not adversely affected. It stipulated that "As regards an international agreement providing for the creation of a court responsible for the interpretation of its provisions, the Court has, it is true, held that such an agreement is not, in principle, incompatible with European Union law." However, the submission of the EU to an external court must not change the character of the CJEU's key functions as set out in the Treaties or adversely affect the autonomy of the EU legal order.[176]

In the light of the foregoing, it is not surprising that the autonomy of the EU has been a central issue in the negotiations on accession to the ECHR. However, it is quite interesting that the EU has been so reluctant towards being supervised by an external court. Given that the EU itself was founded as an international organization, it appears hypocritical that it emphasizes its autonomy to the extent that it does towards international law. Similarly, the CJEU has on several occasions compromised of the autonomy of the Member States legal orders while proclaiming the supremacy of the EU legal order. The CJEU's case law on the autonomy of the legal EU order illustrates the EU's emancipation from an international organization to what can be described as a "supranational entity", similar to a federal state. Even though the principle of supremacy and the autonomy of the legal order as stemming from the Treaties, are generally accepted among the Member States, the Treaties can nevertheless provide for limits to these principles. One provision that could be interpreted as such a limit is Art. 6(2), which requires the EU's accession to the ECHR.[177]

4.5 On the road to accession

The task of drafting an agreement on accession of the EU to ECHR has been a difficult one. The agreement on accession needed to address a number of issues. Adjustments of the ECHR with regard to the specificity of the EU legal order needed to be made, including the controversial question of how

[173] Opinion 1/00, 2002, paras. 12-13.
[174] Lock, 2011, p. 1030.
[175] Opinion 1/09, 2011.
[176] Opinion 1/09, 2011, paras. 74-75.
[177] Lock, 2011, p. 1032.

to integrate two international judiciaries. They had to achieve this without compromising the ECtHR's authority of making the final ruling regarding a provision of EU law alleged of violating of the ECHR.[178]

In March 2010, the Commission proposed negotiation Directives for the EU's accession to ECHR. In May 2010, the Committee of Ministers of the Council of Europe designated the Steering Committee for Human Rights (hereafter the CDDH) through an ad-hoc mandate for the purpose of drawing up the necessary legal documents in order to enable the EU's accession to the ECHR. In June 2010, the Commission received negotiating mandate by the Council to negotiate on the Council's behalf. Henceforth, negotiators from the Commission and experts from the CDDH met regularly to work on the accession agreement.[179] This joint process began with a meeting between the Secretary General of the Council of Europe, Thorbjørn Jagland, and the Vice-President of the European Commission, Viviane Reding, on the 7 July 2010 in Strasbourg, where they discussed how accession will enable the European citizens to benefit from stronger and more coherent European fundamental rights protection. "Today is a truly historic moment. We are now putting in place the missing link in Europe's system of fundamental rights protection, guaranteeing coherence between the approaches of the Council of Europe and the European Union," said Vice-President Viviane Reding, the EU's Commissioner for Justice, Fundamental Rights and Citizenship. "The EU has an important role to play in further strengthening the Convention's system of fundamental rights. We already have our own Charter of Fundamental Rights, which represents the most modern codification of fundamental rights in the world. This is a very good precondition for a successful meeting of the minds between the negotiation partners." Thorbjørn Jagland stated that "The European Convention on Human Rights is the essential reference for human rights protection for all of Europe. By accepting to submit the work of its institutions to the same human rights rules and the same scrutiny which apply to all European democracies, the European Union is sending a very powerful message – that Europe is changing – and that the most influential and the most powerful are ready to accept their part of responsibility for that change and in that change."[180] The instruments on the accession of the EU to the ECHR will consist of; the Accession Agreement; a explanatory report to the Accession Agreement; a declaration by the EU; a rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the EU is party and; a memorandum of understanding, all of which are are equally necessary for the accession of the EU to the Convention.[181]

The final version of the Accession Agreement is from June 2011. This Draft agreement, which consists of twelve articles, has the purpose of preserving *"*the equal rights of all individuals under the Convention, the rights of applicants in the Convention procedures, and the equality of all High Contracting Parties*."* The control mechanism of the ECHR is

[178] Baratta, 2013, p. 1306.
[179] Press release, 545(2010), Strasbourg, 7 July 2013.
[180] Press release, 545(2010), Strasbourg, 7 July 2013.
[181] 47+1(2013)007, Strasbourg, 2 April 2013 p. 9.

preserved to a great extent; it applies to the EU in the same way as to the other Contracting Parties to teh ECHR. The preamble to the Draft Agreement stipulates that "the European Union is founded on the respect for human rights and fundamental freedoms" and that "accession of the European Union to the Convention will enhance coherence in human rights protection in Europe." Moreover, it stresses that "the individual should have the right to submit the acts, measures or omissions of the European Union to the external control of the European Court of Human Rights." Lastly, it acknowledges that accession requires certain adjustments to the Convention system, which need to be made by common agreement, due to "the specific legal order of the European Union."[182]

The report from October 2011 by the CDDH to the Committee of Ministers on the elaboration of legal instruments to accession states that "the EU would, as a matter of principle, accede to the Convention on an equal footing with the other Contracting Parties, that is, with the same rights and obligations." However, due to the fact that the EU is not a State, some adaptations to the ECHR were necessary. The CDDH made minor changes to this draft and called a meeting for the purpose of discussing this draft, which took place 12-14 October 2011. Several of the delegations were of the opinion that the current draft instruments reflected an "acceptable and balanced compromise" of the parties' different views. . However, because of political implications with regard to certain pending issues that could not be solved at the time for this meeting the CDDH decided that it could do nothing more as a steering committee. Thus, it passed on this report and the amended draft instruments to the Committee of Ministers for consideration and further guidance.[183] On 13 June 2012 the Committee of Ministers gave a new mandate to the CDDH to pursue negotiations with the EU, in an ad hoc group "47+1," with a view to finalise the legal instruments setting out the modalities of accession of the EU to the ECHR. This negotiation group held in total five meetings with the European Commission. The last negotiation meeting between the CDDH and the Commission took place on the 3 to 5 April 2013 which is also when the Draft agreement was finalised.[184] The final report is from the Council of Europe to the CDDH concerning this meeting is from June 2013.[185] The Draft agreement is currently subject to an opinion[186] by the CJEU under Art. 218(11) TFEU; the Court was requested by the Commission to rule on the draft's compatibility with the Treaties as negotiated up to April 2013 on 4 July 2013.[187] Provided that the CJEU considers the current draft compatible with the Treaties, the agreement on accession will be concluded between the forty-seven contracting parties to the Council of Europe and the EU in accordance with Art. 218 TFEU. According to this provision, after having obtained the consent of the European Parliament, the Council shall unanimously adopt a decision concluding an agreement on the EU's

[182] CDDH-UE(2011)16, Final Version, Strasbourg, 19 July 2011, p. 2 f.
[183] CDDH(2011)009, Strasbourg, 14 October 2011.p. 2 ff.
[184] 47+1(2013)007, Strasbourg, 2 April 2013
[185] 47+1(2013)008rev2, Strasbourg, 10 June 2013.
[186] Opinion 2/13, pending.
[187] Baratta 2013, p. 1505.

accession to ECHR. Subsequently, the agreement must be ratified by all the EU Member States, as well as the Contracting Parties to the ECHR which are not Member States to the EU, in accordance with their respective constitutional requirements.[188]

4.6 External control by the ECtHR

The fact that the ECtHR will be able to scrutinize EU law as a result of accession raises the question of whether the ECtHR will interpret EU law in a binding manner. Moreover, it raises the question of whether the ECtHR will be able to declare EU acts to be invalid.

With regard to whether the ECtHR will interpret EU law in a binding manner, the ECtHR considers the domestic provisions of the states that are parties to the case facts. It is for the national court to interpret and apply national law once it has received necessary guidance by the ECtHR with regard to the convention, see e.g. the *Huvig*-case.[189] Similarly, the ECtHR would interpret EU law in a binding manner. Nevertheless, the ECtHR might need to assess legal provisions under certain circumstances, e.g. in order to decide whether a remedy is effective in accordance with Art. 13 ECHR. But even so, the autonomy of the EU legal order would not be threatened, as the ECtHR would only rule on whether there was a violation of the ECHR in the concrete scenario.

As for the question of whether the ECtHR will be able to declare EU acts to be invalid, the ECtHR's judgments are of declaratory nature and are only binding under international law. They have no automatic direct effect for the domestic legal orders of the parties to the ECHR; their domestic effect depends on the parties to the case. This is evident from an examination of the provision on "Binding force and execution of judgments," Art. 46 ECHR. Paragraph 1 to this provision states that "the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties." The article says nothing about the effects of the ECtHR's judgments on national law.[190] Thus, the ECtHR, will obviously not be able to declare EU measures void, in the same way that it has never been able to declare acts of any of the other Contracting Parties to be invalid. The ECtHR does not have the objective of deciding on what the substantive content of EU law in general should be.[191] Hence, also the answer of the second question is that it would have no substantial effects for the autonomy of the legal order and the CJEU is the remains the only court that can declare EU measures invalid.

[188] Press release, 545(2010), Strasbourg, 7 July 2013.
[189] *Huvig v. France*, Appl. No. 11105/84.
[190] Lock, 2011, p. 1034 ff.
[191] Baratta, 2013, p. 1325 f.

4.7 Other issues with regard to the autonomy of EU law

The negotiations have also involved many other complex legal issues with regard to the autonomy of EU law. Who will be the correspondent before the ECtHR in a case concerning a EU measures violation of the ECHR? Should inter-state complaints be excluded from the ECtHR's jurisdiction in order to preserve the autonomy of EU law? Will it be possible for the ECtHR to ask for a preliminary ruling from the CJEU?[192] As the negotiators have finalized the Draft agreement on accession of the EU to the ECHR, the solutions provided for by the draft to these problems are final[193]. The scope of accession has also been defined. According to Art. 1 of the Draft agreement, the EU will accede to the ECHR, to the Protocol to the Convention and to Protocol No. 6.[194] This means that the EU will accede to the protocols that are ratified by all EU Member States.[195] Consequently, it will *inter alia* not ratify Art. 4 to Protocol 7 ECHR. The issues described below are some of the most problematic and contentious issues of accession with regard to the autonomy of the EU legal order. Certain questions are left to the ECtHR to decide the future upon.[196]

4.8 The Draft agreement's solutions

4.8.1 The prior involvement mechanism

The prior involvement mechanism is set out in Art. 3.6 of the Draft agreement and stipulates the following:

> 6. In proceedings to which the European Union is co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the Convention rights at issue of the provision of European Union law…sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment and thereafter for the parties to make observations to the Court…[197]

The mechanism is designated to allow "internal control by the CJEU over the ECtHRs external supervision." The CJEU will rule on the interpretation of EU primary law and the validity of EU acts alleged of violating the ECHR while the case is still pending in the ECtHR. The aim of this mechanism is to preserve the final jurisdictional role of the ECtHR as well as the key function of the CJEU in the European integration process. The prior involvement mechanism has been a controversial element of the negotiations. It is questionable whether it contradicts the nature of the ECHR's judicial control. Moreover, it is necessary to find its relevant

[192] Lock, 2010, p. 778 ff.
[193] 47+1(2013)007, Strasbourg, 2 April 2013
[194] CDDH-UE(2011)16, p. 52
[195] Baratta, 2013, p. 1311.
[196] Lock, 2010, p. 798.
[197] CDDH-UE(2011)16, p. 4.

justification within the EU legal framework. As the prior-involvement mechanism would have to be added to the CJEU's functions set out in the Treaties, it might require revision of the EU Treaties.

The mechanism has been subject to substantial criticism. For instance, the mechanism is alleged of privileging the EU over the other parties to the ECHR, as there is no similar mechanism that allows their constitutional courts to assess a national law alleged of violating the ECHR before the ECtHR rules on the matter. Moreover, the prior mechanism has been alleged of endangering the autonomy of the ECtHR as it is unlikely to contradict a previous ruling by the CJEU.[198] Besides the fact that it would privilege the EU legal order over national legal orders, the prior involvement mechanism would in all likelihood result in delays to the proceedings before the EctHR, which are already considerably long. In addition, it would be difficult for the ECtHR to assess which cases that ought to be referred to the CJEU without pre-judging the outcome of the case.[199]

Roberto Baratta is of the opinion that the prior involvement mechanism "matches the ECHR's features" as well and the conditions set out in EU law. In addition, he considers that it does not require revision of the EU Treaties.[200] It is coherent with the ECHR due to the subsidiary character of the ECtHR set out in Art. 1, 13 and 53(1) ECHR. As explained in chapter 4.5.1, the ECtHR would simply consider the EU law provision at hand as part of the facts and determine whether there was a violation of a right guaranteed by the ECHR in the case at hand. Moreover, it is an apt solution considering that the parties to the ECHR enjoy a margin of discretion which allows them to give due regard to their local specificities when implementing provisions of the ECHR. In the same way, this "margin of appreciation"-doctrine would apply for the EU. As the CJEU would be able to rule on a matter before it reaches the ECtHR, the latter would be able to take into account the CJEU's perspective.

Similarly, it is coherent with the EU legal order, in which the preliminary ruling procedure is one of its founding principles that constitutes an essential part of the features of the EU legal order and a "cooperative instrument" for protecting individual rights. The prior involvement mechanism appears to reflect the preliminary ruling procedure and is therefore an important contribution to the Draft agreement with the aim of preserving the "specific characteristics of the Union and Union law" as set out in Protocol No. 8 TEU. It safeguards the CJEU's role as the only court that can declare EU measures to be invalid. It allows the ECtHR to apply EU law on the basis of the previous interpretation by the CJEU, which remains the ultimate interpreter of EU law. To reject the prior involvement mechanism would undermine the specificity of the EU legal order and the hierarchical relationship between the national courts and the CJEU, as it would deprive the CJEU of the possibility to assess the contested EU law (and if necessary declare it invalid) before it reaches the ECtHR.[201] The Treaties need not to be revised in order to include he prior involvement mechanism, as the CJEU would not be called upon by the national courts,

[198] Baratta, 2013, p. 1312 f.
[199] Lock, 2010, p. 793
[200] Baratta, 2013, p. 1306.
[201] Baratta, 2013, p. 1316 ff.

but by the Member State(s) or the Commission. The fact that the Member State(s) or the Commission are sued before the ECtHR as defendants or co-defendants is irrelevant. As declared by the CJEU in its Opinions 1/00 and 1/09, international agreements may confer new powers on the EU institutions, provided that they do not change the nature of the powers conferred on the institutions by the Treaties. Arguably, the prior involvement mechanism is merely resuming a power already conferred to the CJEU; the power to give preliminary rulings in cases which calls into question the interpretation or validity of EU law. The fact that the ECtHR would be able to ask the CJEU for a preliminary ruling in the same way as national court does not alter the essential character of Art. 267 TFEU. Moreover, Art. 19(1) TEU stipulates that the CJEU "shall ensure in the interpretation and application of the Treaties the law is observed." The aim of the prior involvement mechanism is to ensure that the CJEU's key function in the EU legal order is preserved in the Draft agreement. By virtue of the prior involvement mechanism, the Draft agreement, as it stands, strikes the right balance of the conditions set out in Protocol No. 8.[202]

4.8.2 The correct respondent

The majority of the complaints brought before the ECtHR are applications by individuals under Art. 34 ECHR. Following accession, as the EU could be held responsible before the ECtHR, it will be crucial for the individual to know whether to address a complaint against the EU or the Member State. He or she might not be aware of "the intricacies surrounding implementation of EU law" and even so, it might be difficult to locate where the alleged violation of ECHR occurred.[203] Prior to accession, the EU could not be held responsible before the ECtHR. Consequently, any application against the EU was declared inadmissible *rationae personae.* By contrast, EU Member States, being Contracting Parties to the ECHR, could not escape its responsibilities under the ECHR by transferring competences to the EU. This became clear in *Matthews,*[204] which concerned the violation of free elections under Art. 3 in Protocol 1 ECHR. Elections to the European Parliament were regulated by the EC act on direct elections of 1976. However, this act applied only to the UK and citizens of Gibraltar were excluded from the right to vote and stand as candidates. The ECtHR held the UK responsible for violating the right to free elections as enshrined in the ECHR *in lieu* of the EU. Similarly, in Bosphorus, a case concerning violation of the ECHR, which had its origin in a EU regulation, the Member State was held responsible *in lieu* of the EU for breach of ECHR. However, the Member States responsibility for violation of the ECHR that has its origin in an EU action can only arise if the Member States authorities have acted in some way, or else the EU action would not be within the ECtHR's jurisdiction as set out in Art. 1 ECHR. This became apparent in *Conolly*[205].

[202] Baratta, 2013, p. 1329 f.
[203] Lock, 2011, p. 1039.
[204] *Matthews v. UK,* 1999, Appl. No 24833/94
[205] *Conolly v. 15 Member States of the European Union,* 2008, Appl. No. 73274/01

In this case, which concerned a labour law dispute between the EU and one of its employees, there had been no action by any Member State. Consequently, the case was declared inadmissible by the ECtHR.

Accession would clearly change the outcome of cases such as *Conolly*. In such a scenario, where none of the Member States have acted, the EU would be held directly responsible. However, it is uncertain who would be responsible in cases such as *Matthews* and *Bosphorus*, where violation of the ECHR has its origin in an EU act that the Member State has implemented, in other words, where both the EU and the Member States could be responsible of the violation. The drafters of the Lisbon Treaty foresaw this problem, which explains the wording of Art. 1(b) of Protocol No. 8 according to which the accession agreement shall make provision for preserving "the specific characteristics of the EU and EU law," particularly with regard to (b) "the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate." It is crucial that the solution provided for by the agreement on accession does not conflict with the principle of autonomy of EU law. For instance, it must not enable situations where a Member State would claim not to be responsible for the violation because the alleged action had its origin in EU law. Furthermore, in cases where the EU act is a directive, the solution cannot entail the ECtHR's assessment of the responsible party of the violation, which would mean that it would have to interpret EU law in a binding manner.[206] Against that backdrop, in cases where both the EU and the Member State could be held responsible, who should be the correct respondent? Should the Member State remain responsible? And if so, should it be responsible alone or alongside the EU? Or should the EU be the sole respondent, as it will be an EU institution that has adopted the EU act alleged of violating the ECHR?[207] The solution provided by the Draft agreement is the co-respondent mechanism. The mechanism was introduced by the CCDH in 2002 and the various draft agreement has treated this provision rather differently. In the latest version, it is set out in Art. 3 of the latest Draft agreement. It amends Art. 36 ECHR so that the EU can become part of the proceedings. It stipulates the following:

> […] 2. Where an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of European Union law, notably where that violation could have been avoided only by disregarding an obligation under European Union law.
>
> 3. Where an application is directed against the European Union, the European Union member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments,

[206] Lock, 2011, p. 1038 ff.
[207] Lock, 2010, p. 779 f.

> notably where that violation could have been avoided only by disregarding an obligation under those instruments […] [208]

In contrast to the first version, the latest version requires only that court assess whether it appears that the compatibility of primary EU law with the ECHR was at issue. Hence, it would not involve a binding interpretation of EU law by the ECtHR. Moreover, the latest draft appears to succeed in circumventing situations the ECtHR would have to define the EU Member States obligations under EU law, which would conflict with the principle of autonomy of EU law. However, in Tobias Lock's view, the best solution would be to re-define the co-respondent mechanism. According to him, a co-respondent should only join the proceedings by demand of the other respondent. As the first respondent would have to prepare its defence in the proceedings, it is more apt than the ECtHR to assess whether the EU or one or several Member State(s) should join the proceedings as co-respondent(s). Consequently, the ECtHR would not need to interpret EU law. Moreover, a specification of the responsibilities of the Member States under the Treaties would help preserve the autonomy of EU law.[209]

An argument against the co-respondent mechanism has been that if it was introduced, the EU would be convicted of human rights violation disproportionately often. Moreover, it has been implied that any conviction of the EU would mean conviction of all the Member State. For these reasons, some scholars have argued that the Third party intervention provided for by Art. 36 ECHR is a more apt solution. However, this argument does not take into account the legal personality of the EU, which is not a mere "union of states." Moreover, why is conviction of one Member State worse than conviction of all the Member States when, in reality, it is the EU measure that is being condemned? Last but not least, relying on the Third party intervention is a poor substitute for the co-respondent mechanism, as the former does not contain any obligation to intervene.

As the EU and its Member States are not entirely separated from one other in the case of a Member State implementing EU law, possibility of holding the other non-acting party responsible as a co-respondent is a convenient mechanism in order to avoid gaps in accountability for violations of the ECHR and would enhance the effective protection of human rights in cases involving EU law.[210]

4.8.3 Inter-Party complaints

The previous two chapters refer solely to applications by individuals under Art. 34 ECHR. This chapter is about complaints by states under the provision on Inter-State cases, Art. 33 ECHR, according to which **"**Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party." Even though there has never been any inter-state complaints between EU Member States since the establishment of the EU and

[208] CDDH-UE(2011)16, p. 4.
[209] Lock, 2011, p. 1038 ff.
[210] Lock, 2010, p. 785 f.

that the mechanism plays a minor part the ECtHR's "human rights protection machinery" considering that the Contracting Parties hardly ever employ the procedures to enforce human rights, Inter-state complaints constitute an important part of the ECHR which must be taken into account in the Draft agreement.[211] Should such complaints be excluded from the ECtHR's jurisdiction in order to preserve the autonomy of EU law and the CJEU's exclusive jurisdiction to rule on EU law? In the latest Draft agreement, the issue of inter-state complaints is dealt with very briefly. Art. 4 stipulates that "A Chamber shall decide on the admissibility and merits of inter-Party applications submitted under Article 33." Consequently, "The heading of Article 33 of the Convention shall be amended to read as follows: Article 33 – Inter-Party cases."[212]

The change of name demonstrates that the EU, as a non-state entity, will be a full-fledged party to the ECHR after accession. The fact that, after accession, the EU and its Member States can be applicants as well as respondents to proceedings before the ECtHR, causes problems with regard to the exclusive jurisdiction of the CJEU, the autonomy of EU law and, arguably, Art. 35(1) ECHR.[213] According to Tobias Lock, the EU and its Member States should be excluded from the ECtHR's jurisdiction with regard to Art. 33 ECHR for the purposes of preserving the autonomy of EU law and the autonomy of the CJEU (Art. 344 TFEU). As far as the autonomy of EU law is concerned, issues between EU Member States or the EU and its Member State(s) "should not be dealt with outside the EU judiciary."[214] Moreover, there are already possibilities of judicial recourse for Member States. If a dispute relates to violation of the ECHR as well as interpretation and application of EU law, several internal dispute settlement mechanisms are applicable for the Member States and the EU institutions; infringement proceedings for failure to comply with the Treaties (Art. 258-259 TFEU); action for annulment (Art. 263 TFEU) and; action for failure to act (Art. 265 TFEU).[215] With regard to infringement proceedings, among the obligations arising from the Treaties is the obligation to comply with fundamental rights as guaranteed by the ECHR (Art. 6.3 TEU). With regard to actions for annulment, Member States are privileged applicants under Art. 263(2) TFEU; they can challenge any EU act without having to show that violation of rights guaranteed by the ECHR has occurred.[216]

As of today, Art. 33 ECHR would be incompatible with Art. 344 TFEU which stipulates that "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." This explains why the requirement set out in Protocol No. 8 TEU, was included to preserve the role of the CJEU and its exclusive jurisdiction. However, not every dispute between the Member States and between the Member States and the EU about the ECHR relate to EU law. Thus, in such cases, Article 344 TFEU and the exclusive jurisdiction of the CJEU will not apply; Member States and the EU

[211] Gragl, 2013, p. 20 ff.
[212] CDDH-UE(2011)16, p. 5.
[213] Gragl, 2013, p. 20 ff.
[214] Lock, 2010, p. 785 f.
[215] Gragl, 2013, p. 20 ff.
[216] Lock, 2010, p. 785 f.

will be able to submit cases to the ECtHR.[217] In the case *MOX Plant*,[218] the CJEU emphasised the importance of Art. 344 TFEU, which precludes Member States from initiating proceedings before other courts than the EU Courts, for the purpose of settling disputes relating to EU law. Similarly, the principle of sincere cooperation, Art. 4(3) TEU, prohibits the EU institutions from submitting disputes concerning the interpretation or application of EU law to an external court. After accession, the ECHR will become an integral part of the EU legal order. Consequently, according to Art. 19(1) TEU, the CJEU will have the exclusive jurisdiction to interpret and apply the provisions of the ECHR in disputes between the Member States and between a Member State and the EU, provided that the dispute relates to EU law. Proceedings between Member States and the EU should therefore be excluded from the jurisdiction of the ECtHR.[219]

Arguably, the exclusion of disputes between the EU and its Member States from the ECtHR's jurisdiction is needed not only in relation to the autonomy of EU law and the CJEU's exclusive jurisdiction, but also with regard to the ECtHR. According to Art. 35(1) ECHR, the involvement of the CJEU is necessary in Inter-party cases between EU Member States and between the EU and its Member State(s). As the ECtHR is a subsidiary jurisdiction (Art. 35(1) ECHR), the domestic courts, which will include the CJEU after accession, must be given sufficient opportunity to remedy these violations themselves before ECtHR may decide on them. In cases of non-exhaustion of domestic remedies, the case would be declared inadmissible by the ECtHR. Disputes between EU Member States or between the EU and its Member States must consequently be brought before the CJEU for two reasons. Firstly, due to the EU-internal provision of Art. 344 TFEU, and secondly, due to the international obligations under the Convention itself, namely Article 35 (1) ECHR. If the Draft agreement contained an express provision contradicting the requirement in Art. 344 TFEU, it would certainly infringe the exclusive jurisdiction of the CJEU and the autonomy of EU law. Interestingly, the Draft agreement has left it open for the EU to decide on how to deal with inter-Party cases.[220] Inter-states complaints can be excluded from the ECtHR's jurisdiction by way of agreement under the provision on "Exclusion of other means of dispute settlement," Art. 55 ECHR. According to this provision,

> "The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention."

Art. 55 ECHR grants the ECtHR exclusive jurisdiction and priority in settling inter-State complaints between the Contracting Parties to the ECHR pursuant to Art. 33 ECHR and could possibly clash with its counterpart in Art. 344 TFEU. It is obvious that Art. 55 ECHR and Art. 344 TFEU are "diametrically opposed provisions," as they both entitle the respective courts to exercise exclusive jurisdiction over the same source of law - the ECHR. However, in contrast to Art.344 TFEU, Art. 55 ECHR is a flexible exclusive jurisdiction clause, which

[217] Gragl, 2013, p. 20 ff.
[218] Case 459/03 *MOX Plant*, paras. 133 and 135.
[219] Lock, 2010, p. 785 f.
[220] Gragl, 2013, p. 20 ff.

explicitly acknowledges that the Contracting Parties to the Convention may choose to waive the ECtHR's jurisdiction and settle their disputes before another court. Similarly, the Draft agreement accommodates the exclusive jurisdiction of the CJEU under Art. 344 TFEU and solves the jurisdictional conflict between ECtHR and CJEU as it indicates that proceedings before the CJEU do not constitute means of dispute settlement within the meaning of Art. 55 ECHR. Accordingly, Art. 55 does not prevent the operation of the rule laid down in Art. 344 TFEU; neither the EU nor its Member States violate the ECHR if they submit disputes concerning the interpretation or application of the ECHR, which will form an integral part of EU law, to the CJEU *in lieu* of the ECtHR.[221] The EU and its Member States would have to conclude a special agreement explicitly referring to the ECHR stating that the ECHR will be interpreted by the CJEU in cases between the Member States or between a Member State and the EU. Such an agreement would preserve the exclusive jurisdiction of the CJEU while simultaneously being in accordance with the requirements of the ECHR.[222]

This leaves the EU and its Member States with the procedures provided for by the Treaties to settle disputes concerning the interpretation and application of the ECHR between them, before they may bring a case to the ECtHR. The Member States may use infringement proceedings under Art. 259 TEU in disputes between them and the action for annulment under Art. 263(2) TFEU or the action for failure to act under Article 265(1) TFEU against the EU. The only solution open to the EU in order to settle disputes with its Member States before it may submit an Inter-party complaint to the ECtHR is the provision on infringement proceedings under Art. 258 TFEU. However it can only do so, if the Member State in question has in fact implemented EU law. To conclude, all Contracting Parties will be able to bring a case against the EU and *vice versa*. However, the CJEU may determine that a Member State has failed to fulfill its obligations under Art. 344 TFEU - to not submit disputes concerning the interpretation of the treaties to another court, if it has submitted an Inter-party application before the ECtHR. Additionally, pursuant to Art. 35(1) ECHR, the CJEU must be given a chance to remedy alleged violations of the ECHR before the ECtHR may rule on any applications. Thus, the ECHR enables CJEU to interpret and apply EU law in order to preserve the autonomy of the EU legal order. The Member States and the EU are obliged to settle their disputes via the internal mechanisms such as infringement proceedings, action for annulment and action for failure to act before they make take their applications to the ECtHR.[223]

[221] Gragl, 2013, p. 20 ff.
[222] Lock, 2009, p. 391 ff.
[223] Gragl, p. 23 f.

4.9 The overlap in jurisdictions and the Bosphorus presumption

Whether the *Bosphorus* presumption will survive accession has never been a matter for the drafters of the Accession agreement. As the presumption was created by ECtHR in its case law, the Draft agreement cannot foresee its future. However, due to the emphasis in the Draft agreement's preamble that the EU will be on equal footing with the other Contracting Parties of the Council of Europe, it is highly unlikely that the ECtHR will continue to privilege the EU with the *Bosphorus* presumption.

As of today, the CJEU's and the ECtHR's jurisdictions overlap in two aspects. Firstly, the CJEU has developed a jurisdiction within the field of human rights from *Internationale Handelsgesellschaft*[224] and onwards. Secondly, despite the fact that the CJEU is the only court that can declare EU measures invalid according to the *Foto-frost*-doctrine,[225] there have been a number of challenges in the ECtHR of EU measures' compatibility with the ECHR.[226]

Hitherto, the two courts have managed a deferential relationship. The CJEU has never openly challenged the ECtHR's interpretation of the ECHR. Moreover, it has frequently taken the relevant provisions of the ECHR into consideration when interpreting the Charter. Arguably, the CJEU has not only maintained the ECHR standard, but also helped in enhancing it. In the joint cases *NS* and *M.E.* and in the case *MSS v. Belgium and Greece*,[227] it is apparent how the two European courts are staking their ground in the field of fundamental rights. Their relationship has become so internalized that one can hardly talk of the two courts' cooperation as an external "policy matter." In that sense, Art. 52(3), 52(7) and the related explanatory notes to the CFREU are a key provision that governs the relationship between the ECHR and the CFREU. However, in light of the CJEU's interpretation of the provision in its recent case law, and the absence of explicit reference to the ECtHR's case law, one can hardly assert that the CJEU strictly follows the ECtHR's case law from the Lisbon Treaty's entry into force. It appears rather as if the CJEU reflects an "eclectic and unsystematic" use of the ECtHR's case law.[228]

The *Bosphorus* ruling[229], from 30 June 2005, is without doubt the most important ruling on the ECtHR's jurisdiction over EU acts.[230] In this case, the ECtHR ruled that it presumed that the Member State, when implementing EU law, complied with its obligations arising from the ECHR, on the basis that the EU provided a level of protection of human rights that was equivalent to that guaranteed by the ECHR. The ECtHR stipulated that "However, any such a presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of the

[224] Case 11/70, *Internationale Handelsgesellschaft*
[225] Case 314/85 *Foto-frost*
[226] Douglas-Scott, 2006, p. 629 ff.
[227] *MSS v. Belgium and Greece*, 2011, Appl. No. 30696/09
[228] Groussot and Olsson, 2013, p. 16.
[229] *Bosphorus v. Ireland*, 2005, Appl. No. 45063/98
[230] Craig and de Burca, 2011, p. 400 ff.

Convention rights was manifestly deficient."[231] In the case at hand, there was no such dysfunction in the EU's control system in order to rebut that presumption.[232] The *Bosphorus* case called for concurring opinions, in which the judges expressed various concerns with regard to abandoning the case-by-case review of compliance for this quite abstract presumption. While agreeing that there had been no violation of the protection of property Art. 1Protocol No. 1 ECHR, they did not agree on certain parts of the Courts the reasoning.[233]

The ECtHR's reason for granting the EU with such a generous presumption is substantive; it is an acknowledgement by the Court that the protection of fundamental rights in the EU – and by the CJEU – is of such high quality that the ECtHR need not exercise its jurisdiction, unless in the unexceptional event when the protection is manifestly deficient.[234] Even though the judgment in *Bosphorus* was made two years before the Charter became legally binding, it had already existed for five years and was frequently cited by the CFI, AGs and the CJEU.[235] The Charter contains a number of rights not enshrined in the ECHR, and for several rights it provides for more extensive protection than the corresponding rights in ECHR. Art. 52(3) allows for the CFREU to provide a more extensive protection for the rights that correspond to rights in ECHR. For instance, there is no possibility to restrict political activity of foreign nationals to a greater extent than the same activities of nationals in CFREU, while such a restriction is possible under Art. 16 ECHR. Another example is that the Charter doesn't restrict the right to marriage between women and men, whereas the ECHR does so.

However, it has been argued that this is not the real reason for the Bosphorus presumption. Firstly, it has been argued that the ECtHR wants to show comity towards the CJEU.[236] It acknowledges the CJEU's monopoly on declaring EU measures invalid and the fact that the EU is not bound by the ECHR. The Bosphorus presumption is the ECtHR's way of avoiding conflict and showing respect towards the CJEU (arguably in return for the CJEU's receptiveness towards the ECtHR's case law over the years). Secondly, the Member States, all of whom are being parties to the ECHR, can *i*n most cases be held responsible *in lieu* of the EU.[237]

In contrast to *Bosphorus,* the ECtHR found that the Member States had violated Art. 3 ECHR in the case *MSS v. Belgium and Greece.* This case concerned an asylum seeker who had entered the EU via Greece, subsequently residing in Belgium. The latter had exercised *a margin of appreciation* when sending the person back to the country of first entry. Belgium should have ensured that, when sending the asylum seeker back to Greece, the standard of the asylum seeking system in the state of entry

[231] *Bosphorus v. Ireland*, 2005, Appl. No. 45063/98, paras. 155-156.
[232] *Bosphorus v. Ireland*, 2005, Appl. No. 45063/98, para. 166.
[233] *Bosphorus v. Ireland*, 2005, Appl. No. 45063/98, *Joint concurring opinion of judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki*, p. 50 ff.
[234] Lock, 2010, p.797.
[235] Craig and de Burca, 2011, p. 394.
[236] Douglas-Scott, 2006, p. 629 ff.
[237] Lock, 2010, p.797.

complied with the rights guaranteed by ECHR. Due to the inadequacy of the Greek asylum seeking system, the *Bosphorus* presumption did not apply.[238]

While awaiting accession, it appears that the ECtHR will continue to indirectly review EU acts, when they leave certain discretion to the Member States. By contrast, when the EU act at issue is e.g. a regulation, which leaves no discretion when implementing it the Member State will be presumed to have acted in compliance with the ECHR, in absence of contrary evidence of manifestly deficient protection of the rights guaranteed by the ECHR.[239]

However, once accession has taken place, the two reasons outlined above can no longer justify the presumption. Following accession, there will be no formal limits to the ECtHR's jurisdiction of scrutinizing EU measures and the CJEU will be a domestic court to the ECtHR. The EU will be a party to the ECHR on equal footing with the other Member States of the Council of Europe. As the EU pursuant to the co-respondent can be a party to proceedings before the ECtHR, it can obviously not receive such special treatment. Thus, there is no reason why the EU should be privileged with a presumption that its acts are compatible with the ECHR.

To conclude, The *Bosphorus* presumption will be hard to accept for the other parties to ECHR. They may claim similar treatment for their constitutional courts, or might even go as far as to refuse to sign the Accession agreement unless a specific provision is included in the Draft agreement, stating that the Bosphorus presumption must be abandoned following accession. Considering the fact that discussions on the EU's accession to the ECHR have already been continuing for over thirty years, it is in everyone's interest to not prolong the thirty-year long process to prolong further.[240]

[238] *MSS v. Belgium and Greece*, 2011, Appl. No. 30696/09
[239] Craig and de Burca, 2011, p. 400 ff.
[240] Lock, 2010, p.797.

5 Analysis

Part I. The Charter

5.1 Pre-Lisbon: Level of protection of fundamental rights and the autonomy of the EU legal order

Prior to the existence of an EU fundamental rights catalogue, the CJEU elaborated an EU fundamental rights standard via general principles through *inter alia* 220 TEC (compare Art. 19 TEU). The considerable disadvantage of this strategy was that the CJEU was confined to the case in point. Thus, it could not elaborate the scope of and limits to the rights protected through general principles as distinctly and generally as needed. Due to the uncertainty of which right was protected in the EU fundamental rights standard, and the exact scope of and limits to those rights, the EU institutions could be unaware of the fact that they might be infringing these rights and, most importantly, it was difficult for individuals to know, had their rights been violated, whether they were guaranteed by fundamental rights within EU legal order. As a result of the entry into force of the Lisbon Treaty, general principles acquired constitutional recognition by virtue of Art. 6(3) TEU. Simultaneously, by virtue of Art 6(1), the Charter acquired legal status. Henceforth, the rights and principles guaranteed in the Charter coexist with the rights guaranteed by general principles through recognition of the CJEU. Even though the protection of general principles might appear superfluous now that the EU has a legally binding fundamental rights catalogue which encapsulates the developments of the society up until this point, general principles will become useful in the future, when the society develops further and there is need for protection of fundamental rights not contained in the Charter. In my view, the Charter has contributed to the enhancement of protection of fundamental rights and the inclusion of the provision on general principles in Art. 6(3) TEU will allow the CJEU to enhance the fundamental rights protection further in the future.

With regard to the internal dimension of the autonomy of EU law, the elaboration of fundamental rights through general principles was a means of protecting the principle of supremacy. Constitutional fundamental rights could not override EU law, therefore the EU needed to provide an equal standard of fundamental rights protection. However, it has been difficult for the national courts, in particular the German and Italian Constitutional Courts, to accept the fact that EU law was supreme to their national constitutions, particularly as the EU ultimately derives its legitimacy from the national constitutions. As far as the external dimension of the autonomy of EU law is concerned, prior to the Lisbon Treaty's entry into force, the EU had no binding catalogue of fundamental rights. When elaborating an EU fundamental rights standard through general principles, the CJEU drew

inspiration from the ECHR as an informal source. Thus, before the CFREU became legally binding, the relationship between the Charter and international law was not an issue.

5.2 Post-Lisbon: Level of protection of fundamental rights

By virtue of the Lisbon Treaty, the EU received its own legally binding fundamental rights catalogue that takes into account a number of developments and changes in the society and constitutes the most modern catalogue of fundamental rights in the world. By review of the line of case law in e.g. *DEB* and *NS* and *M.E.*, it is apparent that the CJEU strives for its case law to be in line with that of the ECtHR. These cases contain considerable reviews of the explanatory remarks to the Charter, the corresponding provisions enshrined in the ECHR and the ECtHR's case law. The joined cases *NS* and *M.E.* concerned the prohibition of torture and inhuman or degrading treatment. The wording of the relevant provision, Art. 4 CFREU, is identical to the corresponding Art. 3 ECHR. Thus, the CJEU had no reason to deviate from the ECHR standard. The *DEB*-case concerned the right to a fair trial, enshrined in articles 47-48 CFREU and Art. 6 ECHR. According to the first list of the explanatory remarks, Article 48 corresponds to Art. 6(2) and (3) of the ECHR. According to the second list, Art. 47(2) and (3) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards EU law and its implementation. Thus, even though the wording of the provisions was not identical, the rights concerned partly belonged to the second list of the explanatory remarks and the fact that there were specific EU limitations to the CFREU rights, in the case at hand, there was no reason for the CJEU to not apply the ECHR standard.

Even though the CJEU did not refer to the ECHR in *Toshiba Corporation* and *Åkerberg Fransson*, it is doubtful that this absence of reference will have any substantial effects for the level of fundamental rights protection in Europe. Art. 53 ECHR constitutes a minimum standard. Moreover, the Convention is by now over sixty years old whereas the Charter is a modern fundamental rights catalogue that encapsulates the changes in the society over the last sixty years and offers in many aspects a higher level of protection than the ECHR. When estimating the risk of diverging interpretations, one must remember that both Art. 53 ECHR and Art. 53 CFREU are provisions on the minimum level of protection. Thus, the CJEU and ECtHR may interpret certain corresponding rights differently without compromising the level of protection of the respective fundamental rights catalogues. Moreover, for the great majority of rights that have been subject to proceedings before the CJEU, the Court has ensured that the rights enshrined in the Charter are interpreted in light with the corresponding provisions of the ECHR and the ECtHR's related case law; resulting in a high level of protection of fundamental rights.

5.3 Post-Lisbon: the internal dimension of the autonomy of the EU legal order

The general provisions on the application and interpretation of the Charter in Art. 51 and 53 have raised questions with regard to the internal dimension of the autonomy of EU law. The CJEU interpreted the phrase "only when implementing EU law," in Art. 51 extensively, basically meaning "within the scope of EU law." In my view, it should have interpreted Art. 51 to mean implementation in the strictest sense, as that clearly was the intention of the drafters, particularly because of the choice of the word *only*. It appears strange that the fact that an EU law that precludes breaches of obligations to declare value added tax that is partly connected to the contested Swedish administrative penalty *taxeringslagen* (which was not a result of implementation itself) can be conceived as "implementation of EU law." Similarly, the fact that EU law obliges Member States to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion, *inter alia* enshrined 4(3) TEU, serves as a fragile argument in support of the notion that the administrative penalty constituted implementation of EU law. Lastly, the fact that the Member States are under obligation to counter illegal activities affecting the financial interests of the European Union as enshrined in Art. 325 TFEU is not a convincing argument supporting that the contested law was a result of implementation of EU law. In my view, the approach adopted by the CJEU is a far too extensive interpretation of the field of application of the Charter that demonstrates where the EU's interests truly lie. As far as I am concerned, the Charter should apply in situations of strict implementation of EU law, or else the wording of the provision should be different." I agree with AG Cruz-Villalón in the sense that it appears dangerous to assert that, by means an EU directive, the legislature envisaged the transfer of all the constitutional guarantees governing the exercise of the Member States' power to impose penalties (including the collection of VAT) from the Member States to the EU. The *Åkerberg Fransson*-case should in my opinion not have been considered a situation involving the implementation of EU law within the meaning of Art. 51(1) and the CJEU should have declared that it lacked jurisdiction to rule in the proceedings. The extensive approach with regard to the Charter's application was a re-enforcement of the previous case law of the CJEU, notably the cases *ERT* etc. in which the CJEU proclaimed that Member States must act in accordance with the fundamental rights enshrined in EU law in situations governed by EU law. Where national legislation falls within the scope of EU law, situations cannot exist where the Charter doesn't apply. The combination of the administrative and criminal penalties was accepted in EU law by virtue of the CJEU's interpretation of Art. 50 CFREU. By contrast, it would not have been accepted according to Art. 4 Protocol 7 (which Sweden has ratified) if the case had reached the ECtHR, which has been the outcome of other disputes concerning the same combination of penalties that has been subject to review by the ECtHR. In this sense, the level of protection of the right not to be punished twice for

the same offence has been comprised by the interpretation chosen by the CJEU. However, as conceived by Rosas and Kaila, in acquiring legal status, the Charter should not lead to a rupture between the past and present. Arguably, the CJEU's extensive approach with regard to Art. 51 CFREU was needed in order to not disrupt the internal dimension of the autonomy of the EU legal order and leads in fact, as conceived by judge Safjan, to an enhancement of the unity and coherence of EU fundamental rights.

With regard to the questions brought about by Art. 53 for internal autonomy, even though it is still uncertain exactly how certain expressions in the provisions should be interpreted, it is clear by review of the *Melloni*-ruling that it does not allow any deviation of the principle of supremacy. Hence, the provision has not brought about any changes in the internal distribution of powers between the EU and its Member States. If the Spanish Constitutional Court had been allowed to apply the constitutional fundamental right *in lieu* of the contested EU directive, it would disrupt the well-established principle that the EU legal order was built on, and prevent EU law form applying uniformly throughout the EU. Given that the national court was prevented from applying the higher level of protection of fundamental rights protection guaranteed by the Spanish constitution, the Charter has in this sense not enhanced the level of protection of fundamental rights. However, the European Arrest Warrant (and the principle of *ne bis in idem*) belongs to fully regulated areas of EU law. For such areas, the Charter should be looked upon as a purposive document that allows the EU to set its own standard of protection between the EU Member States. Consequently, provided that the minimum level of protection guaranteed by ECHR is respected, the ECHR-standard will not necessarily apply in these areas.

Even though the CJEU was clear on what the provision doesn't entail, it failed to clarify the meaning of Art. 53. The provision seems to repeat what is already stated in Art. 51 and 52 (3-4). An interpretation of Art. 53 where it aims to govern the Charter's relationship with ECHR and the national constitutions would deprive these provisions of their *effet utile.* Art. 53 has also been conceived as being specifically directed to one of the two. On the one hand, it has been interpreted as a provision encouraging the CJEU to engage in dialogue with the national courts. Arguably, it aims to mandate the CJEU to, when departing from or following the level of fundamental rights as preserved in the Member State's national constitutions, provide reasons therefore. In this sense it is a reinforcement of the statement from the landmark-case *Internationale Handelsgesellshaft,* in which the CJEU proclaimed that it is bound to draw inspiration from the constitutional traditions common to the Member States, while simultaneously it reinforces the autonomy of EU law. On the other hand, it has been interpreted as particularly seeking to prevent diverging interpretations of provisions contained in the Charter as well as the ECHR. If one rejects an interpretation where Art. 53 aims to monitor the Charter's relationship with the ECHR and the national constitutions, it seems to be a general "minimum level of protection clause" almost identical to Art. 53 in the ECHR. In my view, one should not read in too much into Art. 53, as interpretations according to which it seeks to regulate the Charter's

relationships with the ECHR or the Member States' national constitutions renders Art.52(3) and 52(4) without purpose. As far as I am concerned, it simply seeks to ensure a minimum level of protection of the rights guranteed in the Charter, without for that matter allowing national Constitutional Courts to undermine the supremacy of EU law in relation to constitutional fundamental rights.

5.4 Post-Lisbon: the external dimension of the autonomy of the EU legal order

The CJEU's treatment of the requirement set out in Art. 52(3) CFREU and its related explanatory remarks in *Toshiba* and *Åkerberg Fransson* appears to be the CJEU's attempt to not interfere with the ECtHR's case law on Art. 4 to Protocol 7, a number of EU Member States non-reservations or ratifications in relation to this provision, to not open up for an interpretation of Art. 50 that would undermine the effectiveness of EU competition law and to not make the rights enshrined in the Charter (and accordingly the autonomy EU law) dependent on reservations and non-ratifications under national law. Naturally, achieving all these objectives was a difficult task, which may explain the ambiguity of the CJEU's reasoning and why the Court never provided for a clear meaning of the *ne bis in idem* principle as enshrined in EU law. In *Åkerberg Fransson*, the CJEU applied the *Engel* criteria, but without explicitly referring to the *Engel*-case and other cases on *ne bis in idem* in which the ECtHR had already, through application of these criteria, recognized the criminal nature of the contested Swedish tax penalty. The Court stipulated that Art. 50 CFREU does not preclude a Member State from imposing a combination of tax penalties and criminal penalties for the same acts of non-compliance with declaration obligations in the field of VAT, an interpretation of Art. 50 that conflicts with the interpretation adopted by the ECtHR on Art. 4 to Protocol 7 ECHR. However, given that it is for the national court to decide the outcome of the *Åkerberg Fransson* case, it is still uncertain whether Art. 50 CFREU does in fact preclude the combination of tax and criminal penalties at issue. Consequently, one can not draw the conclusion that Art. 50 CFREU offers a lower level of protection than the ECHR. Had the CJEU interpreted Art. 50 CFREU in line with Art. 4 to Protocol 7 ECHR and the ECtHR's case law, it would have made the provision conditional upon the non-ratifications or reservations of certain EU Member States in relation to the ECHR which would endanger the autonomy of EU law and the level of protection of the rights enshrined in the Charter. However, the partially autonomous interpretation of Art. 50 has the effect of nullifying the non-ratifications or reservations by certain Member States and is therefore arguably an extension of the field of application of the Charter and in breach of Art. 51 CFREU. To conclude, the CJEU's ruling in *Åkerberg Fransson* does not provide much guidance on how the *ne bis in idem* principle as enshrined in EU law should be understood. Moreover, it does not clarify the Court's exact duties pursuant to Art. 52(3) and the related explanatory marks. It appears that the CJEU does not necessarily need to follow the ECtHR's case law or interpret rights

enshrined in the Charter in line with their corresponding provisions in the ECHR. At least, this appears to be the case for "non-core rights" in the second list of the explanatory remarks relating to Art. 52(3). However, the CJEU is likely to continue with the line of case law discerned in e.g. *DEB* and *NS* and *M.E.* for the vast majority of rights. This resembles the Courts habit of drawing inspiration from the ECHR prior to the Lisbon Treaty's entry into force. It appears that the CJEU still, to some extent, reflects an eclectic and unsystematic use of the ECHR. But as the EU is eager to demonstrate its achievements in the field of fundamental rights, and as it is about to become a Contracting Party to the ECHR, the fact that the CJEU did not refer to Art, 52(3) or explicitly referred to the ECtHR's case law, is not an imminent threat against the level of protection of fundamental rights in the EU.

Part II. Accession

5.5 Effects of accession for the level of protection of fundamental rights

Accession of the EU to the ECHR would clearly have the effect of enhancing the level of protection of fundamental rights. The CJEU has frequently been criticized of not having a genuine commitment to protect human rights; being more interested in advancing other objectives of economic or political character. The CJEU was never intended to be a "human rights court," which has never been part of its key functions under the Treaties. The ECtHR is better suited for this task as it was established for that purpose and has acquired an expertise that the CJEU lacks. Moreover, the CJEU's expanding jurisdiction in the field of fundamental rights has increased the risk of conflict of interpretation between the CJEU and the ECtHR. Accession would have the effect of enhancing the uniform protection of fundamental rights in a way that the Charter alone could never achieve, since it diminishes the risk of diverging interpretations of the CJEU and the ECtHR for corresponding rights, but more importantly, as it fills a judicial gap enabling individuals to address the EU for violations of the ECHR in front of the ECtHR, which would as a result of accession be able to scrutinize EU acts.

5.6 The Draft agreement and its effects for the specific characteristics of the EU and EU law

5.6.1 The prior involvement mechanism

The prior involvement mechanism appears to strike the balance of preserving the specific features of the ECtHR as well as the CJEU. In my view, the allegation that here is no similar mechanism for the domestic courts appears odd, as the preliminary ruling procedure is a unique feature of the EU legal order and applies only when a question regarding the interpretation or validity of EU law is at issue. The argument that it endangers the autonomy of the ECtHR as it is unlikely to contradict a CJEU-ruling is weak, as its jurisdiction is of subsidiary character. Thus, the ECtHR only have jurisdiction in disputes concerning violations of the ECHR once the applicant has exhausted all domestic remedies pursuant to Art. 1, 13 and 53(1). In that sense, the fact that the CJEU can clarify and if needed declare an EU-measure alleged of violating the ECHR invalid before it reaches the ECtHR is similar to the situation where national courts declare national law in breach of ECHR before it reaches the final jurisdiction.

The prior involvement mechanism preserves the autonomy of the EU and the CJEU's role as the sole interpreter of EU law. In fact, the preliminary ruling procedure provided for in Art. 267 TFEU constitutes an essential feature of the EU legal order and the requirement to preserve the specific characteristics of the EU set out in Protocol No. 8 is arguably aimed at this mechanism. Moreover, the prior involvement mechanism safeguards the CJEU's key functions as defined in Art. 19 TEU and 267 TFEU. Due to this mechanism, accession need not lead to a breach of the *Foto-Frost* doctrine, according to which the CJEU is the only court that can declare EU measures invalid. Arguably, revision of the Treaties is not needed as the prior involvement mechanism is not necessarily to be considered a new function of the CJEU, but merely resumption of a power already conferred to it in 19(1) TEU, according to which the CJEU shall "ensure that in the interpretation and application of the Treaties the law is observed," and Art. 267 TFEU according to which it shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of EU-acts. In my view, the only negative result of the prior involvement proceedings is the long delays they may entail for the proceedings before the ECtHR which are already considerably long. The mechanism must not unjustifiably complicate the procedures before the ECtHR or make individual applications so burdensome that individual applicants are prevented in practice from seeking judicial relief in ECtHR.

5.6.2 The co-respondent mechanism

The co-respondent mechanism is an important contribution to the Accession Agreement as hitherto, there has been a substantial judicial gap insofar as the EU can not be held responsible for violations of the ECHR. For cases like *Conolly*, where no Member State had acted, accountability could not arise even though an individual's rights had been adversely affected. As far as I am concerned, it is strange that the ECtHR has been content with holding a Member State responsible *in lieu* of the EU. It seems unjust to hold the Member State responsible if it was clear that the violation had its origin in an EU act that the Member State had to implement according to its obligations set out in the EU Treaties. However, the ECtHR could obviously not have held a non-Contracting Party to the ECHR responsible for violations thereof. The argument that the EU would be held accountable more often than it should if it could join the proceedings as a co-respondent is weak. First and foremost, it would join alongside the Member State that had implemented the alleged EU act (or vice versa). Hence, the ECtHR would never decide on which of the two that was to blame or where the violation occurred. Secondly, as the Member State(s) that had implemented the alleged act would be parties to the proceedings, why would conviction of the EU mean conviction of all the EU Member States? Therefore, the solution currently provided for by the ECHR in Art. 36 (Third party intervention) is not enough, particularly because it doesn't oblige the third party to participate in the proceedings before the ECtHR. If a EU measure was accused of violating the ECHR, and the EU was the respondent in proceedings before the ECtHR, it seems unlikely that the Member State that had implemented that EU measure would step forward unless obliged to do so. Similarly, it appears unlikely that the EU would intervene when its Member State(s) was respondent(s) to proceedings before the ECtHR. With regard to the question of whether it should be the ECtHR or the first respondent to the proceedings that should to ask the second party to join the proceedings as co-respondent, the fact that the ECtHR neither undertakes a binding interpretation of the alleged EU law, nor defines the Member State's obligations under the Treaties, renders it unproblematic with regard to the autonomy of EU law for the Court to determine whether a third party should join the proceedings as co-respondent. Even though it is easy for the respondent already party to the proceedings to assess whether the other party ought to join the proceedings as co-respondent as it would be preparing its defense, it could easily lead to situations where the EU and its Member States would blame each other and debate on where exactly the violation of ECHR occurred. Therefore, it is more suitable that the ECtHR should decide on whether a third party should join the proceedings.

5.6.3 Inter-Party complaints

The choice to include the EU in the inter-state proceedings under Art. 33 ECHR, or as the provision will be named after accession "Inter-Party proceedings," is a suitable solution that preserves the autonomy of EU law while simultaneously placing the EU on equal footing with the other

Contracting Parties. This is because it will possible for the EU and its Member States to exclude such complaints from the ECtHR's jurisdiction by way of agreement pursuant to Art. 55 ECHR, which is a solution open to all the Contracting Parties. If an Inter-party complaint is referred to the ECtHR that does not contain an element of EU law, the autonomy of the EU legal order and Art. 344 TFEU would not be negatively affected. If a EU Member State directed an Inter-Partly complaint towards the EU or another EU Member State for violation of the ECHR, that Member State could be sued before the CJEU for failure to fulfill its obligations under Art. 344 TFEU. Last but not least, even though Inter-Party Complaints in theory could undermine the autonomy of EU law it should be noted that proceedings under Art. 33 ECHR was never likely to be an issue in the negotiations on accession as there has never been any Inter-State complaints among the EU Member States. Similarly, it is not a mechanism that is frequently used by the Contracting Parties to the ECHR.

5.7 Is the *Bosphorus*-presumption likely to survive accession?

As all the reasons for the ECtHR's privileging the EU with the presumption that its fundamental rights protection is equivalent to that of the ECHR will no longer exist once accession has taken place, there is obviously no reason to continue with the presumption that has already faced substantial criticism. In my view, although the EU had a dignified fundamental rights standard in 2005, it entailed risks and was unjust of the ECtHR to abandon the case-by-case review in the Bosphorus-ruling. After accession, it would be even stranger to continue with the presumption as all arguments for granting the EU with it in the first place will have been removed. The ECtHR need not show comity towards the CJEU as after accession, which will become a domestic Court in relation to the ECtHR and there will no longer be any formal limits to the ECtHR's ability to scrutinize EU measures. To continue with the Bosphorus presumption, would not only contradict the explicit statement in the Draft agreement, that the EU will accede on equal footing with the other Contracting Parties, but it would also be highly unjust to grant one of the parties with such as presumption as the EU could be a co-respondent before the ECtHR.

6 Conclusion

6.1 Effects of Art. 6(1) TEU

As the EU fundamental rights protection solely based on the CJEU's development of general principles in its case law proved insufficient, a legally binding catalogue of fundamental rights was necessary for a more reliable standard of EU fundamental rights. The Charter demonstrates the EU's achievements in the field of fundamental rights being the most modern catalogue of fundamental rights in the world. In this sense, the EU has helped enhancing fundamental rights protection. It has made the fundamental rights guaranteed within the EU legal order more visible for the EU citizens as the rights are no longer scattered over a vast array of judgments, but summarized in a full-fledged legally binding catalogue with defined scopes and authorized limitations. The general provisions on governing the interpretation and application have been clarified to some extent in the CJEU's recent case law. Art. 51 CFREU on the Charter's field of application has been given a broad interpretation, similar to the application of general principles prior to the Lisbon Treaty's entry into force. Apparently, the CJEU will have jurisdiction in any case falling within the scope of EU law, as stipulated of the explanatory remarks to Art. 51. Art. 52(3) on corresponding rights appears to have been given a partially autonomous interpretation, in the sense that the CJEU can chose to not apply this provision and not take account of the corresponding ECHR provision and the ECtHR's case law for rights that fall within in fully regulated areas of EU law. However, for the majority of cases concerning fundamental rights, the CJEU refers to Art. 52(3), the ECHR and the related case law by the ECtHR. Art. 53 on the level of protection appears to be a general minimum standard clause that reinforces the autonomy of EU law but encourages the CJEU to provide for reasons when departing from national standards. In this sense, it is also a reinforcement of the *Internationale Handelsgesellschaft*-doctrine*;* the CJEU is bound to draw inspiration from the constitutional traditions common to the Member States. The Charter constitutes a substantial collection of rights derived from a number of different fundamental rights instruments. It takes into account the developments of and changes in the society and has therefore modernized fundamental rights as it contains a great deal of rights that are not enshrined in the ECHR and other fundamental rights instruments from the 1950's. It is a creditable summary of the fundamental rights that should be guaranteed in a fundamental rights catalogue of the 21st century and demonstrates that the EU is not only interested in advancing political and economic objectives but is a front player when it comes to enhancing the level of protection of fundamental rights in the world.

6.2 Effects of Art. 6(2) TEU

The EU's accession to the ECHR enhances the level of fundamental rights protection in Europe as it enables the ECtHR to scrutinize EU-acts and to hold the EU responsible for violations of the ECHR. Accession fosters the EU's credibility in the field of fundamental rights. As the EU requires that States that want to enter the EU are Contracting Parties to the ECHR, it seems odd that the EU is not a Contracting Party to the Convention itself. In my view, the finalized version of the Draft agreement succeeds in preserving the autonomy of EU law as well as the autonomy of CJEU and the ECtHR's jurisdictions. Firstly, the prior involvement mechanism is an apt solution to allow the CJEU to assess (and if necessary, declare invalid) EU acts before the ECtHR declare EU law in violation of the ECHR. This mechanism resembles the preliminary ruling-procedure between the domestic courts of the EU Member States and the CJEU. The preliminary ruling-procedure constitutes a key feature of the EU's legal setup and the prior involvement mechanism therefore seems to match the requirements set out in Protocol 8. TEU relating to Art. 6(2). Moreover, the prior involvement mechanism succeeds in preserving the CJEU's key functions, as defined in Art. 19 TEU and 267 TFEU. Due to this mechanism, accession will not lead to disruption of the *Foto-Frost* doctrine, according to which the CJEU is the only court that can declare EU measures invalid. As far as I am concerned, it is not unjust that no similar solution is available for the courts of the other Contracting Parties, as the preliminary ruling procedure constitutes a unique element of the EU legal order, which is necessary in order to preserve the CJEU's key functions. However, it is important that the proceedings before the ECtHR, which are already extremely time-consuming, are not disproportionately prolonged. Secondly, the co-respondent mechanism is also an acceptable solution that preserves the autonomy of the EU legal order, as it doesn't require the ECtHR to assess the content of EU law, the EU Member States responsibilities under EU law or decide exactly where the alleged violation occurred. Moreover, it is preferable to the existing Art. 36 ECHR on Third-Party interventions as it requires the co-respondent to intervene, which Art. 36 ECHR does not. Thirdly, the choice to include the EU and its Member States in the current Inter-party-state clause set out in Art. 33 ECHR, is a convenient solution, as it places the EU on equal footing with the other Contracting Parties. At the same time, it preserves the autonomy of the EU legal order as the EU and its Member States will be able to exclude such complaints from the ECtHR's jurisdiction by way of agreement under Art. 55 ECHR, a solution is open to all Contracting Parties. Hence, it does not favour the EU above the other 47 Member States. Additionally, the solution provided for in Inter-Party complaints is compatible with Art. 344. TFEU which precludes Member States from initiating proceedings before other courts than the EU Courts, for the purpose of settling disputes relating to EU law. Lastly, the ECtHR is highly unlikely to continue to grant the EU with the *Bosphorus*-presumption as it would be extremely unjust to the other Contracting Parties, complicate proceedings to which the EU is co-respondent and it contradicts the explicit requirement in the Accession agreement that the EU shall accede on equal

footing with the other Contracting Parties. The finalized version of the Draft agreement is currently subject to an opinion by the CJEU. It will indeed be interesting to see whether the CJEU, the institution that is the most fanatical defender of the autonomy of EU law and, naturally, its own jurisdiction, has to say on whether the latest version of the Draft agreement comply with the Treaties. Considering that the negotiations on accession have been going on for over thirty years, one must hope that the Court considers the last Draft agreement compatible with the Treaties so the thirty year long negotiations on the EU's accession to the ECHR are not delayed further.

Bibliography

Legislation

EU
Charter of fundamental rights of the European Union, Official Journal of the European Union, C 326/391, 26/10/2012

Consolidated version of the Treaty on European Union, Official Journal of the European Union, C 326/13, 26/10/2012

Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union, C 326/47, 26/10/2012

Protocol (No. 8) 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, Official Journal of the European Union, C 326/273, 26/10/2012

The European Social Charter (revised), Strasbourg, 3.V.1996

The Community Charter of the Fundamental Social Rights for Workers, adopted on 9 December 1989

Texts adopted by the European Parliament, Declaration of fundamental rights, Official Journal of the European Communities, C 120/51, 1989

Opinion 2/94 by the CJEU under Art. 228 TEC [1996] ECR I-1759

Opinion 1/91 by the CJEU under Art. 228 TEC 1991] ECR I-6079

Opinion 1/00 by the CJEU under Art. 228 TEC [2002] ECR I-3493

Opinion 1/09 by the CJEU under Art. 218(11) TFEU [2011] ECR I-1142

International human rights instruments
European Convention on Human Rights, Rome, 1950, as amended by Protocols No. 11, 14, supplemented by Protocols No. 1, 4, 6, 7, 12 and 13

The 1951 Convention relating to the Status of Refugees and its 1967 Protocol, UNHCR, Geneva, 1967

The Convention on Human Rights and Biomedicine, Ovideo, 4.IV.1997

The Convention of the Rights on the Child, New York, 20 November 1989

Travaux préparatoires

Explanatory remarks
Explanations relating to the Charter of Fundamental Rights, Official Journal of the European Union, C 303/17 14/12/2007

Working documents on the EU's accession to the ECHR
Final report to the CDDH, 47+1(2013)008rev2, Strasbourg, 10 June 2013

Draft Explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms47+1(2013)007, Strasbourg, 2 April 2013

Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights, CDDH(2011)009, Strasbourg, 14 October 2011

Final version of the draft legal instruments on the Accession of the European Union to the European Convention on Human Rights, CDDH-UE(2011)16, Final Version, Strasbourg, 19 July 2011

All working documents are available on the official website of the Council of Europe, http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents_en.asp

Literature

Bernitz, U. and Kjellgren A., Anders, *Europarättens grunder,* Nordsteds juridik, 4th edition, 2010

Craig, P. and de Burca, G., *EU Law, text, cases and materials,* Oxford University Press, 4th edition, 2011

Hettne, J. and Otken-Eriksson, I., *EU-rättslig metod, teori och genomslag i svensk rättstillämpning,* Nordsteds juridik, 2nd edition, 2011

Borchardt, K.D., *The ABC of European Union Law*, Publications Office of the European Union, Luxembourg, 2010

Journal articles

Lenaerts, K., and de Smijter, E., "A 'bill of rights' for the European Union," *Common Market Law Review,* volume 38, issue 2, 2001, p. 273-300

Douglas-Scott, S., "Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland," *Common Market Law Review,* volume 43, issue 1, 2006, p. 243-254

Douglas- Scott, S., "A tale of two courts: Luxembourg, Strasbourg and the Growing European Acquis," *Common Market Law Review* volume 43, issue 3, 2006, p. 629-665

Lock, T., "Walking on a legal tightrope: the draft ECHR accession agreement and the autonomy of the EU legal order," *Common Market Law Review,* volume 48, issue 4, 2011, p. 1025-1054

Sarmiento, D., "Who's afraid of the Charter?," *Common Market Law Review*, volume 50, issue 5, 2013, p. 1267-1304

Baratta, R, "Accession of the EU to the ECHR: the rationale for the ECJ's Prior involvement mechanism,"*Common Market Law Review*, volume 50, issue 5, 2013, p. 1305-1332

Gragl, P., "A giant leap for European Human Rights? The final agreement on the European Union's accession to the European Convention on Human Rights," *Common Market law Review,* Forthcoming, 2013.
Available at papers.ssrn.com

Rosas, A. and Kaila, H., "L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice: un premier bilan," *Il diritto dell'Unione Europea*, XVI: 19−20, 2011

Lenaerts, K., "Exploring the limits of the EU Charter of Fundamental Rights," *European Constitutional Law Review,* Volume 8, Issue 03, 2012, p. 375-403

Lock, T., *"*EU accession to the ECHR: Implications for judicial review in Strasbourg," *European Law Review,* volume 35, issue 2, 2010, p. 775 ff.

Lock, T., "The ECJ and the ECtHR: The Future Relationship between the Two European Courts," *The Law and Practice of International Courts and Tribunals,* volume 8, 2009, p. 375-398

Groussot, X., and Olsson, I., "Clarifying or Diluting the Application of the EU Charter of Fundamental Rights? – The Judgments in Åkerberg and Melloni,"*Lund Student EU Law Review*, volume 2, 2013, p. 7-35.
Available at papers.ssrn.com

Vervaele, J.A.E., "The Application of the EU Charter of Fundamental Rights (CFR) and its Ne bis in idem Principle in the Member States of the EU," *Review of European administrative law,* volume 6, no. 1, 2013, p. 113-134

Ritleng, D., "De l'articulation des systèmes de protection des droits fondamenteaux dans l'Union," *Revue trimestrielle de droit européen,* No. 2, April/June, 2013, p. 267 ff. Available at dalloz-revues.fr

Other

EU reports
"2012 Report on the Application of the EU Charter of Fundamental Rights," Publications Office of the European Union, Luxembourg, 2013

Working papers
Safjan, M., "Areas of Application of the Charter of Fundamental Rights of the European Union: Fields of Conflict?" *EUI Working Paper Law*, issue 22, 2012

Joint communications
Presidents Costa and Skouris, *Joint communication from Presidents Costa and Skouris,* Strasbourg and Luxembourg, 24 January 2011

Press releases
Press release, 545(2010), Strasbourg, 7 July 2013
Available at http://europa.eu/rapid/press-release_IP-10-906_en.htm

Table of Cases

Judgments by the Court of Justice of the European Union

Case C-26/62 *Van Gend & Loos*, Judgment of the Court of 5 February 1963, ECR English special edition p. 1
Case C-6/64 *Costa v. E.N.E.L*, Judgment of the Court of 15 July 1964, ECR English special edition p. 585
Case C-29/69 *Stauder*, Judgment of the Court of 12 November 1969, ECR p. 419
Case C-11/70 *Internationale Handelsgesellschaft*, Judgment of the Court of 17 December 1970, ECR 1125
Case C-4/73 *Nold*, Judgment of 14 May 1974, ECR 491
Case C-43/75 *Defrenne*, Judgment of the Court of 8 April 1976, ECR 455
Case C-44/79 *Hauer*, Judgment of the Court of 13 December 1979, ECR3727
Case C-222/84 *Johnston*, Judgment of the Court of 15 May 1986, ECR 1651
Case C-314/85 *Foto-Frost*, Judgment of the Court of 22 October 1987, ECR 4199
Case C-5/88 *Wachauf*, Judgment of the Court [Third Chamber] of 13 July 1989, ECR I-2609
Case C-260/89 *ERT*, 18 June 1991 ECR I-2925
Case C-279/09 *DEB*, Judgment of the Court [Second Chamber] of 22 December 2010, ECR I-13849
Joined cases *Aalborg Portland A/S* (C-204/00 P), *Irish Cement Ltd* (C-205/00 P), *Ciments français SA* (C-211/00 P), *Italcementi - Fabbriche Riunite Cemento SpA* (C-213/00 P), *Buzzi Unicem SpA* (C-217/00 P) and *Cementir - Cementerie del Tirreno SpA* (C-219/00 P) *v Commission of the European Communities*, Judgement of the Court [Fifth chamber] of 5 January 2004, ECR I-00123
Case C-144/04 *Mangold*, Judgment of the Court [GC] of 22 November 2005, ECR I-9981
Case C-275/06 *Promusicae*, Judgment of the Court [GC] of 29 January 2008, ECR 1-271
Case C-10/109 P *Solvay*, Judgment of the Court [GC] of 25 October 2011, ECR I-10329
Joined Cases C-411/10 and C-493/10 cases *N.S.* and *M.E*, Judgment of the Court [GC] of 21 December 2011, ECR I-0000
Case C-489/10 *Bonda*, Judgment of the Court [Fifth Chamber] of 5 June 2012, ECR I-0000
Case C-17/10 *Toshiba Corporation*, Judgment of the Court [GC] of 14 February 2012, ECR I-0000
Case C-617/10 *Åkerberg Fransson*, Judgment of the Court [GC] of 26 February 2013, ECR 2013 I-0000
Case C-399/11 *Melloni*, Judgment of the Court [GC] of 26 Febuary 2013, ECR 2013 I-0000

Opinions by the Advocates General

Opinion of Advocate General Jacobs delivered on 9 December 1992 in Case C-168/91 *Konstantinidis*, ECR I-01191
Opinion of Advocate General Kokott delivered on 14 April 2011 in Case C-109/10 P *Solvay*, ECR I-10329
Opinion of Advocate General Kokott delivered on 8 September 2011 in Case C-17/10 *Toshiba Corporation*, ECR 2010 I-0000
Opinion of Advocate General Cruz-Villalón delivered on 12 June 2012 Case C-617/10 *Åkerberg Fransson*, ECR 2013 I-0000
Opinion of Advocate General BOT delivered on 2 October 2012 in Case C-399/11 *Melloni*, ECR 2013 I-0000

Judgments by the European Court of Human Rights

Engel and Others v. the Netherlands, 8 June 1976, Application No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72
Airey v. Ireland, 9 October 1979 Application No. 6289/73
Ahmed v. Austra 17 December 1996, Application. No. 25964/ 94
Soering v. the UK, 7 July 1989, Application No. 14038/88
Västberga Taxi Aktiebolag and Vulic v. Sweden, 23 July 2002, Application No. 36985/97
Janosevic v. Sweden, 23 July 2002, Application No. 34619/97
Matthews v. UK, 18 Februrary 1999, Application No. 24833/94
Bosphorus v. Ireland, 30 June 2005, Application No. 45063/98
Conolly v. 15 Member States of the European Union, 9 December 2008, Application No. 73274/01
Zolotukhin v. Russia, 10 February 2009, Application No. 14939/03
MSS v. Belgium and Greece, 21 January 2011, Application No. 30696/09
Huvig v. France, 24 April 1990, Application No. 11105/84