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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Establishment and Aims
The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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DO WE STILL NEED ARTICLE 6(2) TEU? CONSIDERATIONS ON THE ABSENCE OF EU ACCESSION TO THE ECHR AND ITS CONSEQUENCES

JOHAN CALLEWAERT*

Abstract

Article 6(2) TEU provides that the EU shall accede to the European Convention on Human Rights. However, the EU accession project has been significantly delayed by Opinion 2/13 of the ECJ. At the same time, there appears to be some harmony in the case law of the two European Courts, which could lead to the status quo being considered as a valid alternative to EU accession. It might therefore be tempting to remove Article 6(2) altogether from the TEU at the next revision of the Treaties. This paper argues that Article 6(2) should stay in the TEU, because a closer look reveals that the current status quo is not satisfactory: it does not allow an adequate representation of the EU in the procedure before the European Court of Human Rights, nor is it capable of ensuring in the long-term comprehensive and stable consistency between EU law and the Convention. Moreover, removing Article 6(2) TEU would undermine the very idea of a collective understanding and enforcement of fundamental rights. This could initiate a process leading to the current European architecture of fundamental rights protection being unravelled altogether. Hence, there is no return from Article 6(2) TEU. Neither is there from actually implementing it.

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1. Introduction

Article 6(2) TEU provides that the EU shall accede to the European Convention on Human Rights (ECHR or "Convention"). However, the EU accession project has been significantly delayed by Opinion 2/13 in which the Court of Justice of the European Union found the draft accession agreement negotiated by the European Commission and the 47 Member States of the Council of Europe to be incompatible with the EU Treaties.[1] There was indeed general agreement among commentators[2] that the ECJ had set the bar rather high in its Opinion, especially in respect of mutual recognition[3] and the common foreign and security policy.[4] While the ECJ appears to have shown some more flexibility on mutual recognition recently,[5] which might facilitate the finding of solutions in this field, the same cannot be said about the common foreign and security policy.

Thus, while in their recent Declaration of Copenhagen, the Member States of the Council of Europe decided to keep EU accession to the Convention on

1. Opinion 2/13, *Accession of the European Union to the European Convention on Human Rights*, EU:C:2014:2454. On this agreement, its purpose and its genesis, see Callewaert, *The Accession of the European Union to the European Convention on Human Rights* (Council of Europe, 2014).

2. See, among others, Besselink, "Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13", *Verfassungsblog*, 23 Dec. 2014, available at <www.verfassungsblog.de/acceding-ECHR-notwithstanding-court-justice-opinion-213>, (all websites last visited 13 Oct. 2018); Douglas-Scott, "Opinion 2/13 on EU accession to the ECHR: A Christmas bombshell from the European Court of Justice", *UK Constitutional Law Blog,* 24 Dec. 2014, available at <www.ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-ECHR-a-christmas-bombshell-from-the-european-court-of-justice>; Jacqué, "L'avis 2/13 de la CJUE. Non à l'adhésion à la Convention européenne des droits de l'homme?", *Free Group*, 23 Dec. 2014, available at <www.free-group.eu/2014/12/26/j-p-jacque-lavis-213-cjue-non-a-ladhesion-a-la-convention-europeenne-des-droits-de-lhomme>; Jacqué, "Adhésion de l'Union à la Convention européenne des droits de l'homme: Le refus de la Cour de justice", 102 *L'Observateur de Bruxelles* (2015), 27–32; Lock, "Oops! We did it again – The ECJ's Opinion on EU accession to the ECHR", *Verfassungsblog*, 18 Dec. 2014, available at <www.verfassungsblog.de/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu-2>; Peers, "The ECJ and the EU's accession to the ECHR: A clear and present danger to human rights protection", *EU Law Analysis Blog,* 18 Dec. 2014, available at <www.eulawanalysis.blogspot.no/2014/12/the-ECJ-and-eus-accession-to-ECHR.html>; Polakiewicz, "Accession to the European Convention on Human Rights: An insider's view addressing one by one the ECJ's objections in Opinion 2/13", 36 HRLJ (2016), 10–22; Castán, "Die Öffnung des EU-Rechts für die Europäische Menschenrechtskonvention", (2016) DÖV, 12–22; Wendel, "Der EMRK-Beitritt als Unionsrechtsverstoß", (2015) NJW, 921–925.

3. Opinion 2/13, paras. 191–195.

4. Opinion 2/13, paras. 249–257.

5. *Infra* 3.2.2.3.1.

the agenda,[6] any expectation to see it happen in the near future would appear unrealistic in the circumstances, because of the complexity of some of the issues raised by Opinion 2/13 but also the many international crises which currently occupy the political agenda and require urgent action.[7] It therefore seems clear that for the next couple of years the relationship between EU law and the ECHR will have to be managed without the EU as a Contracting Party.[8]

At the same time, there appears to be some harmony in the case law of the two European Courts, which could lead to the *status quo* being considered as producing satisfactory results and therefore qualifying as a valid alternative to EU accession. After all, the Convention has been "peacefully" coexisting with EU law[9] for more than sixty years without EU accession. Under these circumstances, the question might arise whether it is still worth going through another round of negotiations on EU accession followed by another open-ended consultation of the ECJ? And whether, in case of doubt as to the usefulness of this exercise, it would still make sense to keep Article 6(2) in the TEU at the next revision of the Treaties? It could indeed be considered unsatisfactory for the TEU to contain a legal obligation on the EU which not only appears difficult to fulfil but may also have lost a great deal of its usefulness. While openly advocating removal of Article 6(2) TEU would probably appear politically incorrect today, this might change at the next revision of the Treaties, should the accession process still be stalled by then. Moreover, removing Article 6(2) from the TEU altogether might be welcomed by those who, boosted by Opinion 2/13, want to reinforce EU law autonomy *vis-à-vis* the ECHR even more.[10]

6. The Declaration issued by the High Level Conference on the Convention system held in Copenhagen on 12–13 Apr. 2018 states: "The States Parties reaffirm the importance of the accession of the European Union to the Convention as a way to improve the coherence of human rights protection in Europe, and call upon the European Union institutions to take the necessary steps to allow the process foreseen by Art. 6(2) of the Treaty of the European Union to be completed as soon as possible …", para 63.

7. There have been exchanges recently between the Secretary General of the Council of Europe and the President of the European Commission with a view to restarting the negotiations on EU accession. So far, however, they have not resulted in any concrete steps.

8. On the implications of this situation, see Callewaert, "Kontrolle ist gut, Vertrauen ist besser?" in Kadelbach (Ed.), *Die Welt und wir – Die Außenbeziehungen der Europäischen Union* (Baden-Baden, 2017), pp. 67–84.

9. The term "EU law" will be used in this paper to refer to the law of the European Union or one of its predecessors, as the case may be.

10. See e.g. Labayle, "L'avis 2/13 liste d'ailleurs la dizaine de points sur lesquels il faudra porter le fer, si tant est que le chantier soit ré-ouvert. Sur ce point déjà, l'existence ou pas d'une obligation pesant sur l'Union mérite réflexion. Là où Jean Paul Jacqué, Frédéric Sudre ou l'avocat général Kokott concluent de manière affirmative, Jean Claude Bonichot est beaucoup plus circonspect et l'on serait tenté de le suivre, l'obligation d'entamer le processus étant

In response, this paper argues that EU accession should be kept on the agenda, because a closer look reveals that the current status quo is not satisfactory and therefore no adequate alternative to EU accession, in at least three different ways. Firstly, as regards the procedure before the European Court of Human Rights ("ECtHR"), the current picture is still a distorted one, not reflecting the proper structure of the EU, with Member States having to face alone the implications of EU law under the Convention. Secondly, in terms of the substance of fundamental rights, the status quo does not seem capable of ensuring a stable level of protection and legal certainty in the long term. Last but not least, removing the legal obligation on the EU to accede to the ECHR would undermine the very idea of a collective understanding and enforcement of fundamental rights. This, in turn, could initiate a process leading to the current European architecture of fundamental rights protection being unravelled altogether.

2. Procedural shortcoming of the status quo: The structure and nature of the EU not properly reflected

The adequate representation and participation of the EU in proceedings before the ECtHR is a first major goal which EU accession is designed to achieve, the purpose being to ensure that where EU law is at issue, representation and liability under the Convention reflect the distribution of powers laid down in the Treaties. By contrast, today only the EU Member States can be held accountable for the implications of EU law under the ECHR, regardless of any responsibility of EU institutions in this respect. This does not properly reflect the nature and structure of the EU, in particular the role played by the EU institutions next to the Member States in running the EU. Moreover, it simply ignores the fact that the EU is a legal entity with its own legal personality and competences, separate from those of the Member States.[11]

As one among other EU institutions, the European Commission can of course intervene as a third party in the proceedings, as it did already in the

satisfaite", 22 Dec. 2014, available at <www.gdr-elsj.eu/2014/12/22/droits-fondamentaux/la-guerre-des-juges-naura-pas-lieu-tant-mieux-libres-propos-sur-lavis-213-de-la-cour-de-justice-relatif-a-ladhesion-de-lunion-a-la-cedh>; Meyer-Ladewig and Nettesheim, for their part, feel that as a consequence of Opinion 2/13, EU accession has become unlikely, Meyer-Ladewig, Nettesheim and von Raumer, *Europäische Menschenrechtskonvention*, 4th ed. (Baden-Baden, 2017), Art. 1, para 13.

11. Art. 47 TEU.

cases of *Bosphorus*[12] and recently *Avotiņš*,[13] but it cannot claim this status as of right. Third party status is to be granted on a case-by-case basis by the President of the Court acting upon request, thereby exercising discretionary powers in assessing whether the intervention would be in the interest of the proper administration of justice.[14] Even more importantly, there is no proper legal representation attached to third-party status.

As a result, today the EU cannot be a party to any proceedings before the ECtHR and cannot be represented in them. This means that it cannot be bound to participate in any such proceedings, it cannot be held accountable under the Convention for its own actions and it cannot be legally bound to execute a judgment of the ECtHR. Instead, the burden of the Strasbourg proceedings and their consequences rests entirely on the Member States.[15] Regardless of whether they can live with that or not, it remains highly unsatisfactory that where EU law is at issue, representation and liability under the ECHR should not reflect the distribution of powers provided for by the Treaties.

Admittedly, the negotiations on the draft accession agreement – and in particular the intensive discussions on the co-respondent mechanism[16] – have shown how difficult it can be for the procedure before the ECtHR to accommodate the distribution of powers between the EU and its Member States.[17] However, no matter how legitimate the concerns in this respect,[18] the current situation is even worse, with the EU remaining totally absent from the procedure and escaping all Convention responsibility until further notice, while at the same time the number of applications before the ECtHR involving EU law is on the rise.

But does it really matter, in the end? Can the interests of the EU not be said to be well enough represented by the Member States, after all? While in most

12. ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi* ("*Bosphorus*") v. *Ireland*, Appl. No. 45036/98, judgment of 30 June 2005.

13. ECtHR, *Avotiņš* v. *Latvia*, Appl. No. 17502/07, judgment of 23 May 2016.

14. Art. 36(2) of the Convention; Rule 44(3) of the Rules of Court.

15. Under the current system, Member States can be held responsible under the ECHR for the execution of a judgment which they do not have the competence to fully execute themselves. This can give rise to inextricable problems, as illustrated by the execution of the judgment in ECtHR, *Matthews* v. *the United Kingdom*, Appl. No. 24833/94, judgment of 18 Feb. 1999, where the respondent State was forced to come up with a solution in national law to a problem of EU law, Case C-145/04, *Spain* v. *United Kingdom*, EU:C:2006:543.

16. On this mechanism, see Callewaert, op. cit. *supra* note 1, pp. 65 et seq.

17. In this context, see Art. 1(b) of Protocol No. 8 relating to Art. 6(2) TEU which requires the accession agreement to put in place "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".

18. As expressed notably in Opinion 2/13, paras. 215 et seq.

cases they probably are, it cannot be denied that a proper EU representation in the proceedings, even as third party, represents added value in securing a correct and comprehensive understanding of EU law. This is illustrated by the *Avotiņš* case, the latest landmark case on EU law in which the European Commission participated as a third party. On the main issue in the case – the burden of proof regarding the existence of an appeal available to the applicant company in Cyprus – the respondent Government confined itself to stating that in executing the impugned Cypriot judgment of first instance, the Latvian Supreme Court had acted "in full conformity with Article 34(2) of the Brussels I Regulation as interpreted by the ECJ".[19] It was only the European Commission which explained that "Article 43 of the Brussels I Regulation did not require the court in which the declaration of enforceability was requested to automatically examine whether the circumstances enumerated in Article 34(2) applied, including the possibility of lodging an appeal in the State of origin."[20]

Even so, violations of the ECHR resulting from EU law might be considered highly unlikely anyway, with or without proper EU representation. So why bother? Here too, the *Avotiņš* judgment provides interesting reading, stating:

> "In such a situation the Senate was not entitled simply to criticize the applicant, as it did in its judgment of 31 January 2007, for not appealing against the judgment concerned, and to remain silent on the issue of the burden of proof with regard to the existence and availability of a remedy in the State of origin; . . . Hence, that point should have been examined in adversarial proceedings leading to reasoned findings. However, the Supreme Court tacitly presumed either that the burden of proof lay with the defendant or that such a remedy had in fact been available to the applicant. This approach, which reflects a literal and automatic application of Article 34(2) of the Brussels I Regulation, could in theory lead to a finding that the protection afforded was manifestly deficient such that the presumption of equivalent protection of the rights of the defence guaranteed by Article 6(1) is rebutted."[21]

It was only information collected by the ECtHR of its own motion on the actual availability to the applicant of an appeal in Cyprus which preserved the application of Article 34(2) of the Brussels I Regulation by the Latvian Supreme Court from being found in breach of Article 6(1) ECHR.

19. ECtHR, *Avotiņš* v. *Latvia*, para 82.
20. Ibid., para 92.
21. Ibid., para 121.

3. Substantive shortcoming of the status quo: Lack of stability and legal certainty

However, the main implications of the status quo are substantive in nature, resulting in the inability of the current system to ensure a stable level of protection and legal certainty in the long term. Clearly, EU accession is not the only way to achieve case law consistency between ECtHR and CJEU. If that had been the case, there would by now be jurisprudential chaos in the field of European fundamental rights.

Yet, as Spielmann and Voyatzis observe, in the absence of EU accession, which would allow an institutionalized dialogue between the two European Courts, what remains is a purely informal and jurisprudential dialogue.[22] In practice, it is built around three main axes of unequal importance: the informal dialogue between the two European Courts, Article 52(3) of the Charter of Fundamental Rights of the European Union ("the Charter"), and the ECtHR scrutiny of compliance with the Convention by Member States applying EU law. As will be discussed below, while each of these mechanisms is very useful, they also have major drawbacks which, in addition to being somewhat haphazard in their configuration, prevent them from ensuring long term stability in the European protection of fundamental rights, as EU accession to the ECHR indeed would do.

3.1. *Informal dialogue between the European Courts*

The most obvious way of ensuring jurisprudential harmony is for judges to talk to each other. As far as the two European Courts are concerned, the direct dialogue between them has set in from the very early stages of their coexistence, with annual meetings of delegations from both Courts taking place by rotation in Strasbourg and Luxembourg. The last of these meetings, which are devoted for the most part to presenting and discussing the latest case law developments, was held on 15 October 2018 in Luxembourg, with the participation of more than 40 judges. By now these meetings have become a tradition which is even relied on by the Member States, most recently in the Copenhagen Declaration, in which the States Parties "welcome the regular contacts between the European Court of Human Rights and the Court of

22. Spielmann and Voyatzis, "L'étendue du contrôle du respect des droits fondamentaux à l'aune de l'expérience judiciaire comparée", (2017) *Revue trimestrielle des droits de l'homme*, 897–951, 919.

Justice of the European Union and, as appropriate, the increasing convergence of interpretation by the two courts with regard to human rights in Europe."[23]

While it is hardly possible to quantify the effects of those meetings, traces of their impact become visible when the European Courts refer to each other's case law or indeed bring their own jurisprudence in line with that of the other Court.[24] In spite of their positive effects, though, the obvious weakness of these meetings from the point of view of the case law lies in the fact that they are entirely informal and non-committal, producing only uncertain, non-binding results. Far more constraining are the two following mechanisms.

3.2. *Article 52(3) of the Charter*

Article 52(3) of the Charter plays a major role in preserving legal certainty in the relationship between the ECHR and EU law.[25] It lays down a clear methodology in respect of those rights which the Charter and the Convention have in common, by establishing the ECHR as the mandatory minimum threshold of protection under EU law[26] while at the same time allowing the latter to exceed the Convention level, in line with Article 53 ECHR. In simple terms, Article 52(3) provides that under EU law the ECHR level can be raised but not reduced. In its recent *Avotiņš* judgment,[27] mentioned above, the

23. Copenhagen Declaration, cited *supra* note 6, para 63. See, in the same sense, the Declaration on Art. 6(2) TEU (Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon).

24. E.g. in ECtHR, *Sergey Zolotukhin*, Appl. No. 14939/03, judgment of 20 Feb. 2009 (*non bis in idem*); ECtHR, *Scoppola* v. *Italy (No. 2)*, Appl. No. 10249/03, judgment of 17 Sept. 2009 (retrospective application of the more lenient criminal law); Case C-542/13, *M'Bodj*, EU:C:2014:2452 and Case C-562/13, *Abdida*, EU:C:2014:2453 (suspensive effect of remedies against the deportation of seriously ill persons); Case C-578/16 PPU, *C.K. and Others*, EU:C:2017:127, para 68 (State responsibility for measures exacerbating the suffering due to illness).

25. Art. 52(3) of the Charter reads: "Insofar 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."

26. See e.g. Case C-528/15, *Al Chodor and Others*, EU:C:2017:213, para 37: "Insofar as the Charter contains rights which correspond to rights guaranteed by the ECHR, Art. 52(3) of the Charter provides that the meaning and scope of those rights must be the same as those laid down by that convention, while specifying that EU law may provide more extensive protection. For the purpose of interpreting Art. 6 of the Charter, account must therefore be taken of Art. 5 of the ECHR as the minimum threshold of protection."

27. ECtHR, *Avotiņš* v. *Latvia*, para 103.

ECtHR stressed the importance of actual compliance with that provision for its assessment of whether the protection of fundamental rights under EU law could still be considered equivalent within the meaning of the *Bosphorus* presumption.[28]

In fact, the approach followed by Article 52(3) of the Charter is just dictated by common sense, given that unlike the ECJ itself, the domestic courts of the EU Member States remain subject to the ECHR when applying EU law, with the consequence that domestic litigation involving EU law comes within the jurisdiction of the ECtHR.[29] It therefore does make sense to introduce the relevant ECHR standards via Article 52(3) as minimum level under EU law, with a view to protecting the Member States from being confronted with any higher Convention standards when applying EU law. The Member States have, indeed, a major interest in being guided by the EU legislature and the EU courts towards legal solutions which are compliant with the Convention standards, without prejudice to these standards being raised under EU law.

At the time the Charter was drafted, much hope was placed in the capacity of Article 52(3) to achieve long term and comprehensive legal harmony between EU law and the Convention.[30] Now, almost ten years after its entry into force,[31] there is a clearer picture of its strengths and weaknesses. While it has undeniably secured significant achievements, its limits have also become apparent.

3.2.1. *Achievements*

In terms of the substance of the rights, there can be no doubt that Article 52(3) has been helpful in ensuring considerable harmony between the Convention and the Charter, even though the latter was not always explicitly mentioned whenever it had an impact. While several recent examples offer an illustration

28. ECtHR, *Bosphorus* v. *Ireland*, establishes a presumption to the effect that for as long as the protection of fundamental rights by the EU can be considered equivalent to the protection ensured by the Convention, a State does not depart from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the EU, save in the event that the protection of Convention rights is manifestly deficient. The presumption, however, only applies to the extent that no discretionary powers have been exercised in applying EU law (ECtHR, *Bosphorus* v. *Ireland*, paras. 156–157; *Avotiņš* v. *Latvia*, para 101).

29. *Infra* 3.3.

30. See Bernsdorff and Borowsky, *Die Charta der Grundrechte der Europäischen Union. Handreichungen und Sitzungsprotokolle* (Baden-Baden, 2002), pp. 233 et seq. and 299 et seq.; Borowsky in Meyer (Ed.), *Charta der Grundrechte der Europäischen Union*, 4th ed. (Baden-Baden, 2014), Art. 52, Nos. 2–11 and 29–43; Braibant, *La Charte des droits fondamentaux de l'Union européenne* (Seuil, 2001), pp. 253 et seq.

31. Art. 6(1) TEU.

of this impact,[32] cases such as *Spasic*[33] or *G4S Secure Solutions* and *Bougnaoui*[34] – where EU law protection seems nonetheless lower than that under the ECHR – appear to be the exception.[35] Moreover, in line with the second sentence of Article 52(3) of the Charter and Article 53 ECHR, EU law protection has sometimes been raised above the Convention level, such as with access to classified information in court files,[36] the scope of freedom of religion[37] or indeed the protection of personal data.[38]

Also, the situation seems in the process of being gradually stabilized as regards the methodology applied to Article 52(3), notably on how this provision should interact with Article 52(1), which lays down a partly different test applicable to limitations of fundamental rights under the Charter. This comes after a period characterized by a variety of different approaches

32. See e.g. Case C-562/13, *Abdida*; Case C-237/15 PPU, *Lanigan*, EU:C:2015:474; Case C-398/13 P, *Inuit Tapiriit Kanatami and Others* v. *Commission*, EU:C:2015:535; Case C-601/15 PPU, *N.*, EU:C:2016:84; Case C-294/16 PPU, *JZ*, EU:C:2016:610; Joined Cases C-203/15 & C-698/15, *Tele2 Sverige*, EU:C:2016:970; Case C-578/16 PPU, *C.K. and Others*; Case C-528/15, *Al Chodor and Others*, EU:C:2017:213; Joined Cases C-217 & 350/15, *Orsi and Baldetti*, EU:C:2017:264; Case C-18/16, *K.*, EU:C:2017:680; Case C-42/17, *M.A.S. and M.B.*, EU:C:2017:936; Case C-353/16, *MP*, EU:C:2018:276; Case C-673/16, *Coman and Others*, EU:C:2018:385.

33. Case C-129/14 PPU, *Spasic*, EU:C:2014:586, ruling that Art. 54 of the Convention Implementing the Schengen Agreement, which makes the application of the *ne bis in idem* principle subject to the condition that, upon conviction and sentencing, the penalty imposed "has been enforced" or is "actually in the process of being enforced", is compatible with Art. 50 of the Charter. This is in contrast with ECtHR, *Sergey Zolotukhin* v. *Russia*, Appl. No. 14939/03, judgment of 10 Feb. 2009, para 110. For critical comment of the *Spasic* ruling, see Gazin, (2014) *Europe*, No. 296.

34. Case C-157/15, *G4S Secure Solutions*, EU:C:2017:203, and Case C-188/15, *Bougnaoui and ADDH*, EU:C:2017:204. See Daniel, "Deux petits arrêts rendus en grande chambre – À propos des arrêts du 14 mars 2017 sur le port du voile en entreprise", (2017) *Europe*, No 5. Expressing doubts as to whether they match the ECHR standards as they emerge from ECtHR, *Eweida and Others* v. *United Kingdom*, Appl. No. 48420/10, 59842/10, 51671/10 and 36516/10, judgment of 15 Jan. 2013: Dorssemont, "Niet de klant, maar de onderneming is Koning", (2017) *De Juristenkrant*, No. 347, 12; Dorssemont, "Hoofddoek op het werk: het doek is noch niet gevallen", (2018) *De Juristenkrant*, No. 363, 12.

35. An interesting consequence of such convergence of the case law is the fact that where EU law relies on comparable standards, they have the effect of qualifying domestic remedies applying them for exhaustion under Art. 35(1) ECHR; ECtHR, *Laurus Invest Hungary Kft and Continental Holding Corporation* v. *Hungary*, Appl. No. 23265/13, decision of 8 Sept. 2015.

36. Compare Case C-300/11, *ZZ*, EU:C:2013:363 with ECtHR, *Regner* v. *the Czech Republic*, Appl. No. 35289/11, judgment of 19 Sept. 2017.

37. Compare Joined Cases C-71 & 99/11, *Y and Z*, EU:C:2012:518 with ECtHR, *A.* v. *Switzerland*, Appl. No. 60342/16, judgment of 19 Dec. 2017.

38. See Christakis, "A fragmentation of EU/ECHR law on mass surveillance: Initial thoughts on the big brother watch judgment", *European Law Blog*, 20 Sept. 2018, available at <www.europeanlawblog.eu/2018/09/20/a-fragmentation-of-eu-ECHR-law-on-mass-surveillance-initial-thoughts-on-the-big-brother-watch-judgment>.

whereby Article 52(3) was sometimes applied alone, sometimes combined with Article 52(1) and sometimes ignored altogether.[39] The "Convention test" enshrined in Article 52(3)[40] now most often seems to be applied as a final check after the test laid down in Article 52(1) has been shown to be met.[41]

More generally, as illustrated by some recent judgments, such as those in *Associaçâo Sindical dos Juizes Portugueses*[42] or *Minister for Justice and Equality (LM)*,[43] it would appear that beyond all references to specific provisions, Article 52(3) can be assumed also to have a more general impact, not least in promoting the emergence of common views in European jurisprudence on such broader issues as the core values and principles underlying democracy or the rule of law.[44]

3.2.2. *Limits*

But there are also obvious limits to what Article 52(3) can achieve. They mainly flow from a combination of two factors: the exclusive assessment by the ECJ of the ECHR standards applicable under EU law (3.2.2.1) and the ECJ's restrictive interpretation of the effects of Article 52(3) (3.2.2.2). As a result, Article 52(3) is denied any impact on the scope of EU law autonomy as well as on the methodology of fundamental rights, as illustrated by recent case law concerning mutual recognition and the *non bis in idem* principle (3.2.2.3).

3.2.2.1. *Exclusive assessment by the ECJ of ECHR standards applicable under EU law*

The Charter being part of EU law, it is subject to the exclusive jurisdiction of the ECJ to determine all disputes arising between Member States on the

39. On the variety of approaches in applying Art. 52(3) of the Charter, see Callewaert, "Convergences et divergences dans la protection européenne des droits fondamentaux", (2016) *Journal de droit européen*, 166–174, 170.

40. On the impact of this test, see also *infra* 3.2.2.

41. As e.g. in Case C-237/15 PPU, *Lanigan*, paras. 55–58; Case C-528/15, *Al Chodor and Others*, paras. 37–40; Case C-524/15, *Menci*, EU:C:2018:197, paras. 60–62.

42. Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117.

43. Case C-216/18 PPU, *Minister for Justice and Equality (LM),* EU:C:2018:586.

44. See e.g. ECtHR, *Karácsony and Others* v. *Hungary*, Appl. Nos. 42461/13 and 44357/13, judgment of 17 May 2016, para 156: "The Court reiterates that the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see *Golder* v. *the United Kingdom*, 21 Feb. 1975, para 34 …; *Amuur* v. *France*, 25 June 1996, para 50, …; and *Iatridis* v. *Greece* [GC], No. 31107/96, para 58, …). The rule of law implies, inter alia, that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention (see, among other authorities, *Klass and Others* v. *Germany*, 6 Sept. 1978, para 55, … and *Malone* v. *the United Kingdom*, 2 Aug. 1984, para 67)".

interpretation or application of the Treaties,[45] including those relating to Article 52(3) of the Charter. It therefore falls only to the ECJ to determine the ECHR standards to be respected under EU law by virtue of Article 52(3), although the ECJ is not itself subject to the Convention.[46] By contrast, the courts of the Member States, which must take account of the preliminary rulings of the ECJ,[47] are also answerable in Strasbourg for their implementation of EU law,[48] thus bearing alone the risks under the Convention of the interpretation by the ECJ of Article 52(3) and its implications.

The whole ambivalence of this situation lies in the fact that while, formally speaking, the exercise by the ECJ of its interpretational monopoly in respect of the Charter remains within the remit of EU law, from a substantive point of view it extends well into Convention territory, for it entails a binding assessment of applicable ECHR standards. In other words, the ECJ has exclusive competence to set, with binding effect under EU law, Convention standards for which, unlike the addressees of its judgments, it cannot itself be made answerable. The result is a significant distortion of the Convention architecture, whose authoritative interpretation should not in principle fall to any "third party". The little attention given by the ECJ to the difficulties encountered by the domestic courts when confronted with the duty to combine diverging EU law and ECHR methodologies, as illustrated by the *Menci* case law discussed below,[49] can be seen as a concrete consequence of this "inequality before the Convention" between the ECJ and domestic courts. The problem is compounded at procedural level by the non-representation of the EU before the ECtHR, which operates to the sole detriment of the Member States.[50]

The structure of Article 6 TEU tells us, however, that this was never meant to be the final stage of the mechanism: the entry into force of the Charter,

45. Art. 344 TFEU.

46. See e.g. Case C-18/16, *K.*, para 32: "Whilst, as Art. 6(3) TEU confirms, fundamental rights recognized by the ECHR constitute general principles of EU law and whilst Art. 52(3) of the Charter provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by that convention, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law". As a consequence, according to the ECJ, the interpretation of EU law and the examination of its validity must be undertaken solely by reference to the fundamental rights guaranteed by the Charter. See also, in the same vein, Case C-617/10, *Åkerberg Fransson*, EU:C:2013:105, para 44 and Joined Cases C-217 & 350/15, *Orsi and Baldetti*, EU:C:2017:264, para 15.

47. Case C-188/95, *Fantask and Others* v. *Industriministeriet*, EU:C:1997:580, paras. 36–37.

48. *Infra* 3.3.

49. *Infra* 3.2.2.3.2.

50. See *supra* section 2.

operated by paragraph 1, was expected to be complemented by EU accession, as provided for by paragraph 2.[51] From a conceptual point of view, it indeed appears questionable whether the current scheme, if not reinforced by EU accession, can be considered compatible with the Convention and the interpretative authority of the ECtHR[52] in the long term. If it were to be accepted as a valid alternative to EU membership in the Convention system, any Contracting State could legitimately suggest withdrawal from that system on the ground that its Supreme Court will autonomously ensure compliance with the Convention without review by the ECtHR. This would be the end of the unified interpretation of the Convention standards and, consequently, of those standards themselves.[53]

3.2.2.2. *Restrictive interpretation of the effects of Article 52(3) of the Charter*

The problem described above is compounded by the ECJ's restrictive interpretation of the effects of Article 52(3) of the Charter, in two different ways: through an expansive understanding of EU law autonomy in applying Article 52(3), and by denying this provision any impact on the methodology of fundamental rights.

3.2.2.2.1. *Expansive understanding of EU law autonomy in applying Article 52(3)*

Opinion 2/13 already provided a striking illustration of the ECJ's expansive understanding of EU law autonomy in applying Article 52(3), by massively relying on EU law autonomy while ignoring this provision altogether, even

51. On this complementarity, see Callewaert, "Die EMRK und die EU-Grundrechtecharta – Bestandsaufnahme einer Harmonisierung auf halbem Weg", (2003) EuGRZ, 198–206.

52. Art. 32(1) of the Convention provides: "The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Arts. 33, 34, 46 and 47."

53. In a recent judgment, the ECJ seems to indicate that it is not prepared to accept a similar scenario whereby its own interpretative role would be "taken over" by a national constitutional court. Interrogated on whether a supreme national court is still required to refer a question for a preliminary ruling concerning the interpretation of EU law if, in the course of the same national proceedings, the constitutional court of the Member State concerned has assessed the constitutionality of national rules in the light of regulatory parameters with content similar to rules under EU law, the ECJ ruled: "The fact that the Corte costituzionale (Constitutional Court) gave a ruling on the compatibility of the provisions of national law … with the provisions of the Italian Constitution which the referring court regarded as constituting, in essence, the same regulatory parameters as Arts. 26, 49, 56 and 63 TFEU and Art. 16 of the Charter of Fundamental Rights has no bearing on the obligation, laid down in Art. 267 TFEU, to refer questions concerning the interpretation of EU law to the Court of Justice", Case C-322/16, *Global Starnet*, EU:C:2017:985, para 25.

though the relevance of Article 52(3) in the EU accession context could hardly be overestimated.[54] But the subsequent case law of the ECJ also seems to set aside the limitations to EU law autonomy which flow from Article 52(3), as illustrated by the following considerations which have frequently been repeated by the ECJ on recent occasions:

> "It is clear from the explanations relating to Article 52(3) of the Charter . . . that Article 52(3) of the Charter is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed by the ECHR, without thereby adversely affecting the autonomy of EU law and that of the Court of Justice of the European Union."[55]

There can of course be no question of challenging the autonomy of EU law, which has been one of its cornerstones ever since *Costa* v. *ENEL*.[56] Article 52(3), however, raises an issue as to how this autonomy should operate in the field of fundamental rights, notably the many rights which the Charter borrowed from the ECHR. The explanations relating to Article 52(3)[57] should provide some guidance here, but judging by the quotation above, it seems that they are the subject of a selective reading which ignores part of their message. The full text indeed reads:

> "Paragraph 3 is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorized limitations, are the same as those laid down by the ECHR. This means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR, which are thus made applicable for the rights covered by this paragraph, *without thereby adversely affecting the autonomy of Union law and of that of the Court of Justice of the European Union.*

54. This is in sharp contrast with the View of A.G. Kokott in Opinion 2/13, *Accession of the European Union to the European Convention on Human Rights,* EU:C:2014:2475.

55. Case C-294/16 PPU, *JZ*, para 50. In the same vein, among others: Case C-601/15 PPU, *N.*, para 47; Joined Cases C-203 & 698/15, *Tele2 Sverige*, para 129; Case C-18/16, *K.*, para 50; Case C-524/15, *Menci*, para 23.

56. Case 6/64, *Costa* v. *E.N.E.L.*, EU:C:1964:66.

57. Art. 52(7) of the Charter reads: "The explanations drawn up as a way of providing guidance in the interpretation of the Charter are to be given due regard by the courts of the Union and of the Member States."

> The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human Rights and by the Court of Justice of the European Union. The last sentence of the paragraph is designed to allow the Union to guarantee more extensive protection. *In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.*"[58]

The words "in any event" at the end of this quotation, after the reference to EU law autonomy, obviously suggest that while this autonomy and that of the ECJ should be preserved when applying Article 52(3), this should not have the effect of letting EU law protection fall below the ECHR level. In other words, the autonomy of EU law does not go as far as justifying a reduction of the Convention protection level under EU law. Consequently, there seems to be no other coherent way to understand the autonomy referred to by the explanations but to consider it as being *only* the autonomy provided for in the second sentence of Article 52(3), i.e. the autonomy to *raise* the Convention's level of protection, as opposed to the autonomy to *lower* it. To this extent, the EU legislature appears to have, of its own free will, reduced the scope of EU law autonomy *vis-à-vis* the ECHR by allowing higher but not lower standards, thereby implicitly expressing the view that respect for EU law autonomy and respect for the Convention standards can and should be combined. However, the ECJ does not make that essential distinction.

3.2.2.2.2. *Article 52(3) denied any impact on the methodology of fundamental rights*

As a second restriction of its effects, Article 52(3) is also being denied any effect on the methodology of fundamental rights, as opposed to their substance. As stated above, Article 52(3) of the Charter has been instrumental in achieving consistency between the ECtHR and ECJ case law, but this conclusion applies only as far as the substance of the rights is concerned. For at the same time, it has become clear that the consistency required by Article 52(3) is not only about the substance of fundamental rights. It should also encompass the methodology applied to them, which covers such aspects as the tests and criteria to be used for the assessment of compliance with the rights concerned, the competent jurisdictions to apply them or the burden of proof. While the substance of fundamental rights is about *who* or *what* they protect, their methodology is about *how* they protect, i.e. about their effects in a given

58. Emphasis added.

legal system and their interaction with other rights and interests. In this respect too, there can be differences between the ECtHR and the ECJ, with consequences which cannot just be ignored.

Identical rights applied according to different methodologies can indeed produce very different levels of protection from the point of view of the individual, which is the one which matters most under the Convention, its cornerstone being the right to individual petition. The assessment of whether a fundamental right has been given the same "meaning and scope" under EU law as under the ECHR should therefore extend to these methodological aspects with their respective effects on the individual.[59] For, as we shall see with the illustrations below, it does matter for the individual whether his situation will be considered autonomously or only as part of an assessment of the general situation, or whether he should assert his rights before or after his transfer to another Member State, or whether it is up to him to adduce evidence or not. Under these circumstances, it is hard to believe that when referring to the "meaning and scope" of the Charter rights in their relationship to the Convention rights, the EU legislature would not have wanted the comparison with the ECHR to be made by reference to the individual rather than in the abstract.

However, the ECJ seems to go for the narrowest possible interpretation of the notion of "meaning and scope", thereby limiting accordingly the scope of the limitations on EU law autonomy flowing from it. Consequently, by considering the methodology of fundamental rights as being outside the scope of Article 52(3), the same rights can be given weaker effects by the ECJ without contravening this provision, but with significant consequences for the persons concerned and the domestic courts. This is illustrated by the recent case law on mutual recognition and *non bis in idem*.

3.2.2.3. *Illustrations from recent case law*

3.2.2.3.1. *Mutual Recognition*

At the heart of the methodological issue arising in the field of mutual recognition is the presumption of compliance with fundamental rights in every Member State, which the ECJ described as follows in Opinion 2/13:

> "When implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level

59. See Callewaert, "Leur sens et leur portée sont les mêmes. Quelques réflexions sur l'article 52(3) de la Charte des droits fondamentaux de l'Union européenne", (2012) *Journal des tribunaux*, 596–597.

> of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.*"* [60]

The ECtHR indeed expressed some reservations with regard to this approach. In its landmark judgment in the *Avotiņš* case, in which it gave its general assessment of mutual recognition and mutual trust, it considered the creation of an area of freedom, security and justice in Europe, including the mutual recognition mechanisms, to be entirely legitimate in principle. At the same time, it emphasized that the methods used to create that area must not infringe the fundamental rights of the persons affected by those mechanisms.[61] The ECtHR added:

> "Limiting to exceptional cases the power of the State in which recognition is sought to review the observance of fundamental rights by the State of origin of the judgment could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient."[62]

It is significant, in this respect, that the potential violation of the right to a fair trial identified by the ECtHR in this judgment did not result from any disagreement on the substance of the right, but from a methodological point, i.e. the burden of proof with regard to the existence and availability of a remedy in the State of origin.[63]

The issue addressed in *Avotiņš* received a more drastic expression in the context of cases concerning the transfer of persons to another EU Member State pursuant to the Dublin Regulation or in execution of a European arrest

60. Opinion 2/13, para 192. On this presumption and its implications, see Lenaerts, "La vie après l'avis: Exploring the principle of mutual (yet not blind) trust", 54 CML Rev. (2017), 805–840, 813 et seq. Critical of this approach: Nettesheim, "Überdehnt der EuGH den Grundsatz gegenseitigen Vertrauens?", (2018) *Zeitschrift für Europarecht*, 4–21; Neveu, "Reconnaissance mutuelle et droits fondamentaux: Quelles limites à la coopération judiciaire pénale?", (2016) *Revue trimestrielle des droits de l'homme*, 119–159; Weiß, "The EU human rights regime post-Lisbon: Turning the ECJ into a human rights court?" in Morano-Foadi and Vickers (Eds.), *Fundamental Rights in the EU – A Matter for Two Courts* (Hart Publishing, 2015), pp. 69–89, at 83 et seq.

61. ECtHR, *Avotiņš* v. *Latvia*, paras. 113–114.

62. Ibid., para 114.

63. Ibid., para 121.

warrant. Relying on Article 4 of the Charter, which has the same "meaning and scope" as Article 3 ECHR,[64] the persons concerned opposed their transfer, invoking a serious risk of ill-treatment in the country of destination. The question thus arising was about whether the executing judicial authority deciding on their transfer could and/or should have regard to this alleged risk. This came down to inquiring about the scope of the "exceptional cases" in which the presumption of compliance with fundamental rights could be considered to have been rebutted.

The initial approach of the ECJ appeared very restrictive, limiting the notion of "exceptional cases" to situations of "systemic flaws" in the receiving Member State, such as those prevailing in 2011 in Greece in respect of Dublin asylum seekers.[65] Rather disturbingly, given the absolute nature of Article 4 of the Charter at stake in the case, the ECJ considered in the case of *N.S. and Others*:

> "… it cannot be concluded . . . that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003. At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights."[66]

As noted by Spielmann and Voyatzis, the ECJ clearly applied a collective rather than an individual test here,[67] which is of course more conducive to enhancing the efficiency of the Dublin mechanism. It nonetheless appears difficult to reconcile with the ECtHR test which focuses on the individuals concerned, as set out in, *inter alia*, *Tarakhel*[68] and *Avotiņš*. In the latter judgment, the ECtHR held:

64. Explanations relating to Art. 52(3) of the Charter.

65. Joined Cases C-411 & 493/10, *N. S. and Others*, EU:C:2011:865, para 86.

66. Ibid., paras. 82–83. See also Case C-394/12, *Abdullahi*, EU:C:2013:813, para 60.

67. Spielmann and Voyatzis, op. cit. *supra* note 22, 916. This was indeed how this case law and its translation into the Dublin III Regulation was understood by many in the legal community, including the European Commission, Case C-578/16 PPU, *C.K. and Others*, para 91. The ECJ contested this reading of its case law, (*C.K. and Others*, paras. 92–94), but with arguments which, in the light of paras. 82–83 of Joined Cases C-411 & 493/10, *N. S. and Others*, do not appear entirely convincing.

68. ECtHR, *Tarakhel* v. *Switzerland*, Appl. No. 29217/12, judgment of 4 Nov. 2014, para 104. See also ECtHR, *Mohammed Hussein and Others* v. *the Netherlands and Italy*, Appl. No. 27725/10, decision of 2 Apr. 2013, in which the ECtHR ruled that the foreseeable consequences of the applicant's removal must be considered "in the light of the general situation as well as the applicant's personal circumstances", para 69.

> "Where the courts of a State which is both a Contracting Party to the Convention and a Member State of the European Union are called upon to apply a mutual recognition mechanism established by EU law, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law."[69]

Previously, in a landmark judgment of 15 December 2015 relating to the execution of a European arrest warrant,[70] the German Constitutional Court had already warned in forceful terms that the mutual recognition mechanisms should not allow Member States, because of their automaticity, "to assist each other in committing violations of human rights".[71] It further considered:

> "The confidence between Member States, which, pursuant to recital 10 of the Preamble to the Framework Decision, is the basis of the mechanism of the European arrest warrant, can be shaken, in individual cases; considerable violations of fundamental rights can occur even if the respective national legal systems are, in principle, capable of providing an effective protection of fundamental rights that is equivalent to the protection provided under the Basic Law."[72]

Meanwhile, presumably under the pressure of these reactions, the ECJ in the case of *C.K and others* pulled back from its hardline stance on the Dublin

69. ECtHR, *Avotiņš* v. *Latvia*, para 116.

70. Bundesverfassungsgericht, Order of 15 Dec. 2015, 2 BvR 2735/14. See Classen, "Zu wenig, zu fundamentalistisch – zur grundrechtlichen Kontrolle 'unionsrechtlich determinierter' nationaler Hoheitsakte", (2016) EuR, 304–313; Nowag, "EU law, constitutional identity, and human dignity: A toxic mix?", 53 CML Rev. (2016), 1441–1453; Sarmiento, "The German Constitutional Court and the European arrest warrant: The latest twist in the judicial dialogue", *EU Law Analysis Blog,* 27 Jan. 2016, available at <www.eulawanalysis.blogspot.com/2016/01/the-german-constitutional-court-and.html>; Sauer: "'Solange' geht in Altersteilzeit – Der unbedingte Vorrang der Menschenwürde vor dem Unionsrecht", (2016) *Neue Juristische Wochenschrift*, 1134–1138. The French court of cassation (e.g. in Crim. 12.4.2016, FS-P+B, No. 16-82.175; see Goetz, "Mandat d'arrêt européen et droit au respect de la vie privée et familiale", available at <www.dalloz-actualite.fr/edition/2016-05-02>) and the UK Supreme Court (in [2014] UKSC 12, quoted in ECtHR, *Tarakhel* v. *Switzerland*, para 52) would appear to share the reservations of the German Constitutional Court.

71. German Constitutional Court, Order of 15 Dec. 2015, para 92 (English translation by the German Constitutional Court).

72. Ibid, para 85.

Regulation by accepting that even in the absence of systemic flaws in the receiving Member State, it could not "be ruled out that the transfer of an asylum seeker whose state of health is particularly serious may, in itself, result, for the person concerned, in a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter, irrespective of the quality of the reception and the care available in the Member State responsible for examining his application".[73] Thus, the ECJ's thinking had evolved towards accepting that the initially recommended collective test should be complemented by an individual test.[74]

As regards the execution of European arrest warrants, a similar development took place in *Aranyosi and Căldăraru* in which the ECJ came to interpret the "exceptional cases" so as to cover not only such flaws which are systemic or generalized, but also those which affect certain groups of people or certain places of detention, and required the national courts also to inquire about the personal situation of the persons concerned.[75] At the same time, it confirmed the premise that only in "exceptional circumstances" could it be justified not to consider all Member States as complying with the fundamental rights recognized by EU law.[76] In the recent case of *Minister for Justice and Equality (LM)*, this methodology combining a collective with an individual test was extended to a European arrest warrant being challenged under Article 47(2) of the Charter.[77]

73. Case C-578/16 PPU, *C.K. and Others*, para 73.

74. On this judgment, see Bribosia and Rizcallah, "Arrêt 'C.K.': transfert "Dublin" interdit en cas de risque de traitements inhumains et dégradants tenant à la situation particulière d'un demandeur d'asile", (2017) *Journal de droit européen*, 181–183; Rizcallah, "The Dublin system: the ECJ squares the circle between mutual trust and human rights protection", *EU Law Analysis Blog,* 20 Feb. 2017, available at <www.eulawanalysis.blogspot.com/2017/02/the-dublin-system-ecj-squares-circle.html>.

75. Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198, paras. 89 and 92–93. See Halberstam, "The judicial battle over mutual trust in the EU: Recent cracks in the façade", *Verfassungsblog*, 9 June 2016, available at <www.verfassungsblog.de/the-judicial-battle-over-mutual-trust-in-the-eu-recent-cracks-in-the-facade>

76. Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*, para 78. Meanwhile, in Case C-220/18 PPU, *Generalstaatsanwaltschaft*, EU:C:2018:589, the ECJ ruled, against the Opinion of A.G. Campos Sánchez-Bordona, that subsequent judicial review of detention conditions in the issuing Member State was not, as such, capable of averting the risk that the person concerned would, following his surrender, be subjected to treatment that is incompatible with Art. 4 of the Charter on account of the conditions of his detention, para 74.

77. Case C-216/18 PPU, *Minister for Justice and Equality*, EU:C:2018:586. Critical of the ECJ's approach: Frąckowiak-Adamska, "Drawing red lines with no (significant) bite – Why an individual test is not appropriate in the *LM* case", *Verfassungsblog*, 30 July 2018, available at <www.verfassungsblog.de/drawing-red-lines-with-no-significant-bite-why-an-individual-test-is-not-appropriate-in-the-lm-case>; see also Wendel, "Die Rechtsstaatlichkeitskrise vor Gericht: der Anfang vom Ende gegenseitigen Vertrauens", *Verfassungsblog*, 17 Mar. 2018,

By contrast, in the recent *Piotrowski* case the ECJ denied a Belgian court the right to assess, notably under Article 24(2) of the Charter, the personal circumstances (other than the age) of a juvenile offender who was the subject of a European arrest warrant which had been issued by a Polish court for the service of a six-month custodial sentence following the theft of a bicycle. In line with the orthodox doctrine on mutual recognition, the ECJ argued that the observance of fundamental rights falls primarily within the responsibility of the issuing Member State which must be presumed to be complying with EU law, in particular the fundamental rights conferred by it.[78]

However, as stated above, under the *Avotiņš* jurisprudence, which is designed to cover the whole area of mutual recognition,[79] this presumption can only apply in the absence of any serious and substantial complaint about a manifest deficiency in the protection of a Convention right. Where such a complaint has been made, the executing judicial authority is not dispensed from examining it for the sole reason that it applies EU law.[80] The *Piotrowski* judgment does not state whether such a complaint was made in the present case. At this stage, the Belgian court was obviously only inquiring about whether it could be allowed to examine the personal situation of Piotrowski. However, the ECJ does not appear to have even considered leaving the door open to such an eventuality.[81]

Overall, what is striking at the end of this quick overview are not only the methodological fluctuations of the ECJ about the test to be applied in the field of mutual recognition but also the total absence of Article 52(3) of the Charter in this debate. This is in spite of the fact that its outcome can hardly be said to have no bearing on the fulfilment of the requirement inherent in this provision that "in any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR".[82] In other words, the right test and the right methodology are part of the effort required by Article 52(3) in order not to let EU law fall below the Convention level.

available at <www.verfassungsblog.de/die-rechtsstaatlichkeitskrise-vor-gericht-der-anfang-vom-ende-gegenseitigen-vertrauens/>.

78. Case C-367/16, *Piotrowski*, EU:C:2018:27, para 50.

79. The ECtHR *Avotiņš* case concerned the execution of a foreign judgment under the Brussels I Regulation. Since then, the doctrine has been applied in respect of the European arrest warrant (in ECtHR, *Pirozzi* v. *Belgium*, Appl. No. 21055/11, judgment of 17 Apr. 2018, para 62) and the Brussels II bis Regulation (ECtHR, *Royer* v. *Hungary*, Appl. No. 9114/16, judgment of 6 Mar. 2018, para 50).

80. ECtHR, *Avotiņš* v. *Latvia*, para 116. To this extent, the *Povse* jurisprudence (ECtHR, *Povse* v. *Austria,* Appl. No. 3890/11, decision of 18 June 2013), which provides for no such exceptions, can be considered as superseded by *Avotiņš*.

81. Gazin, (2018) *Europe*, No. 109, is critical of the severity of this approach, associating it with the approach in Case C-399/11, *Melloni*, EU:C:2013:107.

82. Explanations relating to Art. 52(3) of the Charter.

Lenaerts, the President of the ECJ, pointedly indicates that mutual trust is not to be confused with blind trust and that trust must be earned through effective compliance with EU fundamental standards.[83] One should perhaps add that there will not be real trust either amongst Member States if the EU fundamental standards do not themselves properly match the ECHR standards, including on the methodology, and if the ECJ cannot be fully trusted to apply those, as required by Article 52(3) of the Charter. As an argument in support of the presumption of compliance with fundamental rights in every Member State, faithfulness to the Convention might be more convincing than a reference to such an abstract principle as the equality of the Member States before the Treaties.[84] For what is the benefit of having EU fundamental standards which are not in line with the ECHR standards if at the end of the day the Member States can be made answerable for them under the ECHR? In substance, the Council of the EU said nothing else when adopting its Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, a key document in the EU's strategy towards facilitating mutual recognition of foreign judicial decisions. This document indeed states:

> "In the European Union, the Convention for the Protection of Human Rights and Fundamental Freedoms constitutes the common basis for the protection of the rights of suspected or accused persons in criminal proceedings. . . . Furthermore, the Convention, as interpreted by the European Court of Human Rights, is an important foundation for Member States to have trust in each other's criminal justice systems and to strengthen such trust. . . . Any new EU legislative acts in this field should be consistent with the minimum standards set out by the Convention, as interpreted by the European Court of Human Rights."[85]

As rightly suggested by President Lenaerts, the ECtHR in its *Avotiņš* judgment showed willingness to recognize the importance of the principle of mutual trust.[86] It is equally clear, however, that this recognition is not unqualified. As indicated by the ECtHR, it depends not least on how Article 52(3) of the Charter is being interpreted and applied.[87] Yet, in the field of mutual recognition, its record remains rather modest. It would certainly help if the

83. Lenaerts, op. cit. *supra* note 60, 840.
84. Ibid., 807–808 and 812.
85. Resolution of the Council of 30 Nov. 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, O.J. 2009, C 295/1, Recitals 1, 2 and 13.
86. Lenaerts, op. cit. *supra* note 60, 827.
87. ECtHR, *Avotiņš* v. *Latvia*, para 103.

"exceptional circumstances" referred to by the ECJ in this context were explicitly tested against the *Avotiņš* criteria.

A relevant aspect in this context seems to have been highlighted recently by the Second Chamber of the ECJ. In a judgment relating to a request for mutual assistance for the recovery of a claim pursuant to Directive 2010/24, the ECJ, drawing on its case law on mutual recognition, acknowledged the existence of an exceptional situation allowing the authority of the requested Member State to refuse its assistance for breach by the requesting Member State of the right of the person concerned to an effective legal remedy within the meaning of Article 47 of the Charter. It held:

> "The assistance provided for in Directive 2010/24 is, as is indicated by the title and various recitals of that directive, described as 'mutual', which implies, in particular, that it is for the applicant authority to create, before it makes a request for recovery, the conditions under which the requested authority will be able to grant its assistance in a meaningful manner and in conformity with the fundamental principles of EU law."[88]

3.2.2.3.2. *Non bis in idem*

Non bis in idem, the right not to be tried or punished twice, is another illustration of the limited effects of Article 52(3) of the Charter in practice. The principle is among the most complex legal issues involving fundamental rights. Its importance in the Convention system is reflected by the fact that no derogation from it is permitted under Article 15.[89] *Non bis in idem* is protected under EU law as well, most prominently by Article 50 of the Charter,[90] but with the difference, when compared with the ECHR, that it applies not only within the jurisdiction of one single State but also between several Member States. To the extent, however, that it involves situations occurring within the same Member State, the explanations to the Charter state that it has the same "meaning and scope" as in Article 4 of Protocol No. 7 to the Convention.

Against this background, three recent Grand Chamber judgments of the ECJ, in the cases of *Menci,*[91] *Garlsson Real Estate SA*[92] and *Di Puma*,[93] all taking place within the Italian legal system, are noteworthy in that they apply

88. Case C-34/17, *Donnellan*, EU:C:2018:282, para 61.

89. Art. 4(3) of Protocol No. 7.

90. In his Opinion in Case C-524/15, *Menci*, EU:C:2017:667, A.G. Campos Sánchez-Bordona notes: "There are several variants of the principle *ne bis in idem* in EU law and the approach to these has not yet been harmonized by the Court, despite calls for it to do so by a number of Advocates General", para 27.

91. Case C-524/15, *Menci*.

92. Case C-537/16, *Garlsson Real Estate and Others*, EU:C:2018:193.

93. Joined Cases C-596 & 597/16, *Di Puma*, EU:C:2018:192.

a somewhat different methodology from the one applied only a couple of months earlier, on a similar issue, by the ECtHR in the case of *A and B* v. *Norway*.[94] In substance, these cases concern so-called dual proceedings, i.e. a combination of administrative and criminal proceedings applied in respect of the same reprehensible conduct. They are a widespread practice in some specific areas such as taxation, environmental policies and public safety. To the extent that the administrative part of such dual proceedings is to be considered, by virtue of an autonomous interpretation, as criminal for the purposes of the Convention and/or the Charter, notably because of the severity of the sanctions, an issue about *non bis in idem* may arise, as indeed happened in all four cases. It is on how to handle this issue that the ECtHR and the ECJ now seem to be parting company. While both Courts converge in seeking to apply a greater flexibility in this field, they seem to disagree on how to achieve this.[95]

In *A and B v. Norway*, the ECtHR upheld the ban on duplication of trial or punishment, but accepted that depending on the circumstances, some dual proceedings could be seen as complementing each other so as to form a single coherent whole not breaching Article 4 of Protocol No. 7. This required that they be combined in an integrated manner, notably through a sufficiently close connection in substance and in time. Such a connection will notably depend on whether (a) the proceedings at stake address different aspects of the social misconduct involved; (b) their duality is a foreseeable consequence; (c) they are conducted so as to avoid duplication in the collection and assessment of the evidence; and (d) the sanction imposed in the proceedings which become final first is taken into account in those which become final last.[96] Overall, the test is about whether, legally speaking, the proceedings involved can be considered as building one single set or not. Only if they can will *non bis in idem* not be breached. In *A and B*, this was found to be the case. Thus, under this approach, in line with the wording of Article 4 of Protocol No. 7 and the ban on derogations from this provision,[97] *non bis in idem* is not susceptible of limitations or exceptions, but can nonetheless be applied with some greater flexibility than in the past.

By contrast, in *Menci* and the two other cases decided on the same day, the ECJ appears to accept the possibility of a duality of criminal proceedings in certain circumstances, by considering such a duality as a limitation permitted under Article 52(1) of the Charter. According to this provision, limitations of

94. ECtHR, *A and B* v. *Norway*, Appl. No. 24130/11 and 29758/11, judgment of 15 Nov. 2016.

95. See also Luchtman, "The ECJ's recent case law on *ne bis in idem*: Implications for law enforcement in a shared legal order", in this *Review*.

96. Ibid., paras. 130–134.

97. Art. 4(3) of Protocol No. 7.

fundamental rights must be provided for by law, respect the essence of the fundamental right concerned, be proportionate and meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.[98] On that basis, the ECJ concluded that if those requirements were found by the domestic courts to have been met in a given case, the duality of criminal proceedings would amount to a justified limitation of Article 50 of the Charter, which would therefore not be breached.

What emerges from this brief comparative analysis are two different approaches to the same provision, based on criteria which partly overlap and partly differ from each another. For instance, a close chronological connection between the two sets of proceedings seems to be required only by the ECtHR, whereas the requirement that their cumulated effect on the accused remains proportionate is common to the ECtHR and the ECJ. On the other hand, the ECJ seems to be somewhat stricter as regards the foreseeability and necessity of the duality of proceedings. While these different criteria do not necessarily appear mutually exclusive or incompatible, their coexistence will nonetheless confront the domestic courts, who will have to combine them (in cases unfolding in one, single country), with a new source of complexity and legal uncertainty.

Admittedly, in *Menci* the ECJ closed its examination by holding that Article 52(3) of the Charter was respected, given that the approach being followed ensured "a level of protection of the *ne bis in idem* principle which is not in conflict with that guaranteed by Article 4 of Protocol No. 7 to the ECtHR, as interpreted by the European Court of Human Rights".[99] This finding, however, sounds like a statement rather than a demonstration. It presupposes that the respective levels of protection can be properly compared, in order to evaluate whether one of them is higher than the other. Yet this newly created methodological labyrinth made of partly similar and partly different criteria applying to the same right renders that comparison rather difficult and, therefore, the ECJ's conclusion rather optimistic. In fact, we don't quite know yet how the two approaches will interact in practice.

In fact, *Menci* is just another illustration of the scant attention given in the ECJ's reading of Article 52(3) to the methodological issues involved and the difficulties resulting from them, especially for the domestic courts. As suggested above, this lack of sensitivity might well be the consequence of the "inequality before the Convention" flowing from the fact that while the ECJ sets the Convention standards applicable under EU law, it cannot be made

98. Case C-524/15, *Menci*, paras. 39–41; Joined Cases C-596 & 597/16, *Di Puma*, paras. 40–44; Case C-537/16, *Garlsson Real Estate and Others*, paras. 41–59.

99. Case C-524/15, *Menci*, para 62.

answerable for them in Strasbourg, unlike the domestic courts of the Member States.[100]

The issue here is not about which approach is better or preferable but about whether this duality of approaches is necessary in the first place[101] and, if it really is, how the two approaches can be sensibly combined. At any rate, this episode aptly shows that in respect of rights which the ECHR and EU law have in common, it is not good enough, in terms of legal certainty, for the latter to offer a higher level of protection, if it comes at the price of a methodological headache for the domestic courts, having regard to the fact that they may have to ensure a result which is also compatible with the ECHR.[102] Yet, as matters currently stand, it seems that there is nothing to prevent the *Menci* story from repeating itself in other areas, thus contributing to the further fragmentation of what was initially a unified fundamental rights landscape in Europe, which Article 52(3) was – and still is – designed to preserve.

3.3. *Strasbourg scrutiny of compliance with the ECHR by Member States applying EU law*

Ultimately, the most efficient substitute for EU accession capable of ensuring some stability between Union and Convention law could well be the simple fact that, as the Court confirmed in *Bosphorus*[103] and *Avotiņš*[104] the EU Member States remain legally bound by the Convention when they apply EU law. Shortcomings in this respect, possibly to be assessed in light of the

100. *Supra* 3.2.2.1.

101. A.G. Campos Sánchez-Bordona takes the view that it is not. In his Opinion, he proposed "that the Court should carry out an interpretation of Art. 50 of the Charter which progresses along the lines of its previous case law but which does not limit the content of that right in terms of the judgment in *A and B* v. *Norway* or pursuant to Art. 52(1) of the Charter", para 94. He also observed: "rather than blur the clarity which should imbue the right protected by the principle *ne bis in idem*, by making it subject to disproportionately complex assessments, it is sufficient to retrace the steps which led to the treatment of pecuniary penalties imposed by the tax authorities as being criminal in nature", para 89. However that might be, nothing would appear to have prevented the ECJ, if it had so wished, from following the ECtHR in considering dual proceedings as capable of forming only one integrated set of proceedings, in which case the limitation issues would not even have arisen.

102. Where appropriate, this compatibility is to be assessed having regard to the *Bosphorus* presumption, cited *supra* note 28.

103. ECtHR, *Bosphorus* v. *Ireland*, paras. 153–154: "A Contracting Party is responsible under Art. 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Art. 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's 'jurisdiction' from scrutiny under the Convention … The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention".

104. ECtHR, *Avotiņš* v. *Latvia*, paras. 101–104.

Bosphorus presumption,[105] can lead to the Member States being held accountable in Strasbourg. The scrutiny thereby exercised is of course not on compliance with EU law as such, but on compliance with the ECHR when applying EU law. As the ECtHR repeatedly stated, it is not competent to apply or examine alleged violations of EU rules unless and insofar as they may have infringed rights and freedoms protected by the Convention.[106]

This principle has a far-reaching impact. With access of individuals to the EU courts being rather restricted, it can indeed be assumed that the majority of fundamental rights cases involving EU law are adjudicated by the domestic courts of the Member States, in their capacity as ordinary courts in matters of EU law. Convention issues arising at domestic level out of the application of EU law therefore in principle qualify for a Strasbourg scrutiny, which indeed constitutes the only *ex post* control of respect for fundamental rights available at European level. Examples to that effect include cases such as *Bosphorus*[107] (involving EC Regulation 990/93), *Avotiņš*[108] (involving the Brussels I Regulation), *M.S.S.,*[109] *Sharifi*[110] and *Tarakhel*[111] (involving the Dublin Regulation), *Sneerzone and Kampanella,*[112] *Povse*,[113] *M.K.,*[114] and *Royer*[115] (involving the Brussels II bis Regulation), *Thimotawes*[116] (involving the Reception Directive) and *Pirozzi*[117] (involving a European arrest warrant).

In practical terms, this means that a failure by the ECJ to have regard to the ECHR minimum standards when interpreting EU law could result in Member States being held accountable in Strasbourg for violations of the Convention which they do not have the power to avoid. Preliminary rulings must indeed be taken into account by all the courts of the Member States.[118] In the event that

105. *Supra* note 28.

106. ECtHR, *Jeunesse* v. *the Netherlands*, Appl. No. 12738/10, judgment of 3 Oct. 2014, para 110; ECtHR, *Thimothawes* v. *Belgium*, Appl. No. 39061/11, judgment of 4 Apr. 2017, para 71.

107. ECtHR, *Bosphorus* v. *Ireland*.

108. ECtHR, *Avotiņš* v. *Latvia*.

109. ECtHR, *M.S.S.* v. *Belgium and Greece*, Appl. No. 30696/09, judgment of 21 Jan. 2011.

110. ECtHR, *Sharifi and Others* v. *Italy and Greece*, Appl. No. 16643/09, judgment of 21 Oct. 2014.

111. ECtHR, *Tarakhel* v. *Switzerland*.

112. ECtHR, *Šneersone and Kampanella* v. *Italy*, Appl. No. 14737/09, judgment of 12 July 2011.

113. ECtHR, *Povse* v. *Austria*.

114. ECtHR, *M.K.* v. *Greece*, Appl. No. 51312/16, judgment of 1 Feb. 2018.

115. ECtHR, *Royer* v. *Hungary*.

116. ECtHR, *Thimothawes* v. *Belgium*.

117. ECtHR, *Pirozzi* v. *Belgium*.

118. Case C-188/95, *Fantask and Others* v. *Industriministeriet*, paras. 36–37.

the ECJ were to set a lower standard than the ECHR[119] and that Member States were denied the right to raise it in their own domestic legal order,[120] the Member States would have no other choice but to breach the Convention when applying EU law or *vice versa*. It can safely be assumed that the ECJ will want to spare the courts of the Member States this scenario.

For it is clear that an applicant is not prevented from bringing an application before the ECtHR against a domestic judgment applying a preliminary ruling of the ECJ, provided the domestic remedies have been exhausted. By way of example, this possibility could materialize in an application testing the *G4S Secure Solutions* case law of the ECJ on the wearing of an Islamic headscarf at work against the *Eweida* case law of the ECtHR.[121] In the hypothetical event of a violation of Article 9 ECHR, on freedom of religion, the respondent Member State would, by virtue of Article 46(1) of the Convention,[122] find himself under an international law obligation to execute the Strasbourg judgment, regardless of its obligations under EU law.

Thus, an external scrutiny over EU law is in fact already taking place, covering its implementation by the domestic courts. It therefore seems inconsistent not to allow it when that very same EU law is being applied by the EU courts. The autonomy of EU law is not a valid argument here, since the extent of that autonomy can hardly be assumed to vary according to whether EU law is being applied by the EU courts or those of the Member States.

Yet, this mechanism too has its limits. In terms of its scope, as stated above, it does not operate in respect of cases falling within the exclusive jurisdiction of the EU courts for adjudication on the merits,[123] as the latter currently are not subject to the jurisdiction of the ECtHR. But also in terms of its effects, the mechanism has recently shown its limits with the rulings by the ECJ in the cases of *N.S.* and *Menci* discussed above.

4. External scrutiny as necessary guarantor of a collective understanding and enforcement of fundamental rights

Important as the above considerations may be, though, the greatest added value of EU accession may well lie elsewhere. For in the final analysis, EU

119. A higher protection standard is allowed by Art. 53 ECHR, as well as Arts. 52(3), second sentence, and 53 of the Charter.

120. As in Case C-399/11, *Melloni*.

121. See Case C-157/15, *G4S Secure Solutions*, and Case C-188/15, *Bougnaoui and ADDH*.

122. Art. 46(1) of the Convention provides that "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties".

123. E.g. under Arts. 263(4) or 268 TFEU.

accession is about sending a strong political message confirming that notwithstanding all political and other difficulties confronting Europe, fundamental rights remain the ultimate benchmark for public action and require an external scrutiny of their observance, by the EU and its Member States alike.

There can indeed be no doubt that fundamental rights today are among the basic yardsticks of every democratic legal system based on the rule of law, including the EU. As the ECJ put it, respect for the fundamental rights enshrined in the Charter is a "condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable in the EU".[124] In national constitutional law too, fundamental rights are increasingly perceived as the final test which any action by public authorities has to satisfy in order for it to be legitimized.[125]

However, since fundamental rights are a common good with an impact extending beyond national boundaries, ensuring their observance cannot remain a purely domestic matter, if their fragmentation is to be avoided. Many fundamental rights indeed address needs and aspirations which most Europeans have in common. Proper respect for fundamental rights therefore requires that their domestic protection be complemented by the possibility of an international external scrutiny as part of a mechanism ensuring their collective understanding and enforcement, including their protection against domestic attempts to quash their effects. As the ECtHR consistently held:

> "[it] must have regard to the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms. Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between Contracting States. It creates, over and above a network of mutual, bilateral undertakings,

124. Opinion 2/13, para 169. See also Joined Cases C-402 & 415/05 P, *Kadi and Al Barakaat International Foundation* v. *Council and Commission*, EU:C:2008:461, para 284. Furthermore, see the Presidency Conclusions of the Cologne European Council (3–4 June 1999) which decided the drawing up of the Charter, Annex IV: "Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy", available at <www.europarl.europa.eu/summits/kol2_en.htm>.

125. See e.g. Art. 1(3) of the German Constitution: "The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law" (English translation by the German Bundestag); Art. 35(1) and (2) of the Federal Constitution of the Swiss Confederation: "Fundamental rights must be upheld throughout the legal system. Whoever acts on behalf of the State is bound by fundamental rights and is under a duty to contribute to their implementation" (unofficial translation).

> objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement.'"[126]

By inserting Article 6(2) into the Treaty on European Union, the EU and its Member States subscribed to this approach which has prevailed for almost 70 years in Europe, thereby acknowledging, on the one hand, that the differences between the EU and its Member States are not such as to justify dispensing the EU from external scrutiny and, on the other hand, that the ECJ, as a Supreme Court acting from within the EU legal system, cannot itself perform this special kind of scrutiny.

Against this background, a removal of Article 6(2) from the Treaty on European Union could have the disastrous effect of signalling that external scrutiny over fundamental rights is no longer needed, neither in the EU nor elsewhere. It would indeed not take long for this move by the EU to be replicated by (some of) its Member States and beyond, driven by the idea that if the EU can do without external scrutiny, the Member States can too. The specific characteristics of EU law invoked in Opinion 2/13 would hardly suffice as a justification for upholding external scrutiny over the Member States while letting the EU indefinitely stay away from it.

This, in turn, could easily prompt a shift from a common and shared approach to fundamental rights to a national or even nationalist one, at odds with all European achievements since World War II. It could open up an era of legal nationalism in the field of fundamental rights, in the wake of the political nationalism currently spreading in some parts of Europe. In such a context, the very notion of fundamental rights, comprising as it does many human rights considered to be universal, could even lose much of its sense.

So perhaps for this reason more than any other, the EU should remain openly committed to – and keep working on – becoming a member of the Convention system. Any other attitude would give a dangerous counter-example. This is no longer only about the EU's own interests or indeed its own autonomy. Much more is at stake here, notably the common responsibility of preserving almost 70 years of collective understanding and

126. See, among others, ECtHR, *Mamatkulov and Askarov* v. *Turkey*, Appl. Nos. 46827/99 and 46951/99, judgment of 4 Feb. 2005, para 100. This idea of a common responsibility of the States for ensuring respect for fundamental rights also finds a particularly striking expression in Art. 33 of the Convention which allows a Contracting State to "complain about general issues (systemic problems and shortcomings, administrative practices, etc.) in another Contracting Party. In such cases the primary goal of the applicant Government is that of vindicating the public order of Europe within the framework of collective responsibility under the Convention" (ECtHR, *Cyprus* v. *Turkey* (just satisfaction), Appl. No. 25781/94, judgment of 12 May 2014, para 44).

enforcement of fundamental rights. As President Macron stated when visiting the ECtHR on 31 October 2017:

> "We did not hand over our legal sovereignty to the Court! We have provided the citizens of Europe with an additional guarantee that human rights will be upheld. This is an extraordinary form of collective protection, whereby we protect the population of the Member States from intolerant trends, but also from those situations in which policy-makers promote interests that are out-of-date or practices which infringe those rights. This reality is deeply rooted in the traumatic experience of Europeans. In the feeling that democracy is a fragile asset that we must take care of, and for which we must provide safeguards. That was the experience of those who lived through the war, and specifically of René Cassin and those who worked alongside him. Seventy years later, who would be so bold as to say that they were wrong? Who could seriously claim that the worst is behind us and that we can afford to dilute the strength of the universal principles which bind us? Who could consider that these risks of illiberal democracy, an inward-looking approach and a surreptitious or assumed undermining of our values and our principles are now far behind us? The truth is that the European Convention on Human Rights was drafted by visionaries, and that this vision still protects us today, as it protects our fellow citizens, and it is incumbent on us to remain faithful to it."[127]

5. Conclusion: No return from Article 6(2) TEU

As a conclusion to this paper, its initial question as to whether Article 6(2) should stay in the Treaty on European Union is clearly to be answered in the affirmative, for the simple reason that there is no long-term alternative to extending to the EU the external scrutiny over the protection of fundamental rights. As has been demonstrated above, the current status quo does not allow an adequate representation of the EU in the procedure before the ECtHR, nor does it seem capable of ensuring in the long term comprehensive and stable consistency between EU law and the ECHR. Moreover, any move away from the idea that the EU should be made the subject of the same scrutiny as its Member States would cause significant damage, as it might be seen as calling into question the collective enforcement of fundamental rights altogether, at a time when it is most needed, with fundamental rights finding themselves under growing political pressure in some parts of Europe.

127. Speech available at <www.ECHR.coe.int/Documents/Speech_20171031_Macron_ENG.pdf>, (English translation by the ECtHR).

It follows that EU accession to the Convention remains an objective to be pursued for the sake of preserving the credibility not only of the EU,[128] but also of the collective understanding and enforcement of fundamental rights as we have known it in Europe since almost 70 years. For why should domestic supreme courts have to accept indefinitely to be subject of external scrutiny, including when they apply EU law, if the ECJ should indefinitely be allowed to avoid it? There is a tension building up here. For those reasons, there can be no return from Article 6(2) TEU.

But there equally can be no return from actually implementing Article 6(2) TEU, which can hardly be considered as being only an obligation of means rather than result. Article 6(2) TEU cannot be allowed to remain indefinitely as a non-executed or "forgotten" obligation in the Treaty on European Union without seriously affecting the EU's image in relation to its understanding of the implications of the rule of law. The current situation can therefore only be a transitional one. It remains the case, though, that while the objections expressed by the ECJ in its Opinion 2/13 are a challenge, they are not insurmountable. We are still far from having explored all the options available to address them. It is time to do so, in the interest of upholding a European collective understanding and enforcement of fundamental rights and preventing their fragmentation.

128. See the Explanatory Memorandum to the Recommendation from the European Commission to the Council for a Council Decision authorizing the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (SEC(2010)305 final, 17.3.2010, at point III): "Accession of the Union to the ECHR will … enhance the credibility both internally and externally of the strong commitment of the Union to fundamental rights by submitting the Union's legal order fully and formally to the standards of and to the external judicial control exercised by the ECHR system, thereby complementing the introduction by the Treaty of Lisbon of a legally binding Charter of Fundamental rights which affords a level of protection of fundamental rights that may never be lower than that guaranteed by the ECHR …."

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