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A Council of Europe perspective on the European Union: Crucial and complex cooperation

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Abstract

The article addresses the institutional role of the EU in the Council of Europe, with particular emphasis on EU participation in Council of Europe treaties and EU accession to the ECHR. While recognising the joint effort to achieve greater unity in the region of Europe through respect for the shared core values of pluralist democracy, human rights and the rule of law, the concerns raised by non-Member States of the EU about the impact of EU law and policies on the Council of Europe's standards are examined. It is argued that the Council of Europe and the EU have a shared responsibility for upholding the effectiveness of their respective frameworks and ensuring that any overlapping competences do not create conflict. This is particularly evident when it comes to the European system for the protection of fundamental rights, which is characterised by overlapping standards and procedures. The existing cooperation between the Council of Europe and the EU should be strengthened through a more rational, rules-based approach. In particular, it is suggested that the two systems should jointly agree on a series of basic principles on the treaty-making process, providing for horizontal application by the introduction of specific rules on, for example, voting and speaking rights of the EU, the sharing of reporting obligations between the EU and its Member States under Council of Europe monitoring mechanisms, and financial arrangements. The EU's participation and financial contribution to monitoring follow-up should always be considered on a case-by-case basis, taking into account the specificities of each mechanism.

Keywords: Council of Europe; European Union; European Convention on Human Rights; international organisations; treaty interpretation; good faith; monitoring mechanisms

1. Introduction

This article examines the interaction between the Council of Europe and the European Union (EU). Both seek to achieve greater unity between the States of Europe through respect for the shared values of pluralist democracy, the rule of law and human rights. The Council of Europe was the first European political organisation, founded in 1949, with a view to achieving closer unity among its members.¹ It is probably best known for its work on the protection of human rights, based on the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (European Convention on Human Rights or ECHR)² and its protocols. They set out inalienable rights and freedoms and established international enforcement machinery built around the European Court of Human Rights (ECtHR). Numerous Council of Europe treaties are part of the EU's *acquis*, on the basis of which closer cooperation within the EU has been developed.³ The Council of Europe has been, and continues to be, instrumental in preparing applicant countries for EU accession, in particular through its assistance in the fields of institution building, human rights and justice.

Despite many years of cooperation, the institutional role of the EU in the Council of Europe is still not clearly defined. Without being formally a member of the Council of Europe, the EU's impact on the Council's activities has been considerable. Given the breadth of its activities in the area of human rights, democracy and the rule of law, the Council of Europe has become a strategic partner of the EU, which was officially acknowledged through the conclusion, in 2007, of a Memorandum of Understanding (MoU).⁴ The EU provides important and very welcome political and financial support to the activities of the Council of Europe. At the same time, the overlapping geographical scope and convergence in mandates of both institutions have created a dual system of rights, actors and legal instruments, which has given rise to interesting legal questions.

The emphasis in this article will be on the participation of the EU in the drafting, conclusion and implementation of Council of Europe treaties. While the instruments and activities of the Council of Europe are exclusively governed by public international law, the Court of Justice of the European Union (CJEU) qualified the Union's separate legal order as early as 1986 as 'constitutional' in nature.⁵ The coexistence of Council of Europe and EU standards and mechanisms operating within an ever more overlapping membership offers opportunities and presents challenges at the same time.⁶ Challenges result in particular from overlapping human rights standards, the ECHR on the one hand and the EU Charter of Fundamental Rights⁷ on the other. The EU provides a dynamic framework for the participation of 27 Member States in the Council of Europe. At the same time, non-Member States of the EU (NEUMS) have raised genuine concerns about the impact of EU law and policies on the Council of Europe's role

¹Statute of the Council of Europe, UNTS Vol 87, 103; European Treaty Series (ETS) 1, 1949. Conventions and agreements opened for signature between 1949 and 2003 were published in the 'European Treaty Series' (ETS Nos 001 to 193 included). Since 2004, this Series has been continued by the 'Council of Europe Treaty Series' (CETS No 194 and following).

²UNTS, Vol 213, 221; ETS 5, 1950.

³Besides the ECHR and the European Social Charter, these are in particular the Conventions in the area of legal cooperation (administrative, civil and criminal law), cybercrime and data protection, see L Azoulai, 'The Acquis of the European Union and International Organisations' (2005) 11 *European Law Journal* 196.

⁴Memorandum of Understanding between the Council of Europe and the European Union, May 2007, see note 14 below and accompanying text.

⁵CJEU, Case C-294/83 *Les Verts v Parliament* [1986] ECR 1365, para 23, reiterated in numerous subsequent judgments and opinions.

⁶See the excellent overview by R Lawson, 'Council of Europe: Cooperation in the Field of Human Rights, Democracy and the Rule of Law' in R Wessels and J Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Edward Elgar Publishing 2019) 507; see also J Polakiewicz, 'Outside, But Not So Far: Strasbourg's Perspective – The European Union and the Council of Europe' in T Giegerich, D Schmitt and S Zeitzmann (eds), *Flexibility in the EU and Beyond* (Nomos 2017) 381–406.

⁷The EU Charter of Fundamental Rights (OJ C 202 of 7 June 2016, 389) was proclaimed jointly by the Council of the European Union, the European Commission, and the European Parliament, at the Nice Summit of December 2000.

and standards and the fact that numerically Union Member States represent a majority in the Council of Europe.

This article argues that the Council of Europe and the EU have a shared responsibility for upholding the effectiveness of their respective frameworks. Following a comprehensive analysis of the existing legal framework, concrete proposals are made with a view to further strengthening the existing cooperation through a more rational, rules-based approach.

2. The institutional status of the EU in the Council of Europe

Institutionally, the EU is neither a member of nor an observer to the Council of Europe. Under the Statute, only a 'European State' can become a member of the Council of Europe.⁸ The category of 'observer', originally not foreseen in the Statute, was only introduced by Statutory Resolution (93) 26 on Observer Status (14 May 1993). Article VII of this Resolution foresees the possibility of granting observer status to an international intergovernmental organisation, but this provision was never applied in practice.⁹ The EU's position in the Council of Europe has been described as a 'strange case',¹⁰ as a 'relationship [that] defies the usual categories'.¹¹ The existing legal framework indeed consists of a patchwork of texts, which, though having evolved over the years, do not fully take account of the current state of integration and the wide-ranging transfer of competences reached under the EU treaties.

The initial steps to foster cooperation between the two European institutions were taken under the 1957 Treaty of Rome, which provided that the 'Community shall establish all appropriate forms of cooperation with the Council of Europe'.¹² At the Warsaw summit (May 2005), the heads of state and government of Council of Europe Member States asked Mr Jean-Claude Juncker, then Prime Minister of Luxembourg, to examine the relationship between the Council and the EU. Mr Juncker presented his report 'Council of Europe – European Union: A sole ambition for the European continent' in April 2006.¹³ As foreseen in the Warsaw action plan, the Council of Europe and the EU started in parallel to negotiate a MoU, which was eventually signed on 11 May 2007. Though not a legally binding agreement, the MoU constitutes a framework for 'enhanced co-operation and political dialogue',¹⁴ while specifying priority areas of common interest and comparative advantages. Cooperation embraces all sectors of the Council of Europe and a wide spectrum of activities, making the EU an 'across the board' partner. The MoU describes the Council of Europe as 'the benchmark for human rights, the rule of law and democracy in Europe'.¹⁵

Under the Lisbon Treaty, relations with the Council of Europe are the competence of the High Representative of the Union for Foreign Affairs and Security Policy, who is the head of the European External Action Service and responsible for field delegations. The High Representative is invited to participate in the Committee of Ministers' sessions at ministerial level and a representative of the EU participates in the meetings of the Ministers' Deputies and their subsidiary groups.¹⁶ Since January 2011, this representation has been ensured by the Delegation of the European Union to the Council of Europe, acting under the authority of the High Representative. The head and other representatives of this delegation participate in meetings of the Ministers' Deputies and their Rapporteur Groups. However, none of the relevant texts (exchanges of letters, MoU or Committee of Ministers decisions) defines the rights of the EU representatives other than to indicate that they do not have voting rights. In practice, the

⁸Art 4.

⁹Only Canada, the Holy See, Japan, Mexico and the United States of America are currently observers to the Council of Europe.

¹⁰E Ruffer, 'Strange Case of the European Union's Position in the Council of Europe: More Than an Observer, Less Than a Member State?' (2019) 10 Czech Yearbook of Public and Private International Law 36.

¹¹Lawson (above note 6) 527.

¹²Art 303 Treaty establishing the European Community (TEC), now art 220 Treaty on the Functioning of the European Union (TFEU).

¹³Available at <<http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=11264&lang=en>> accessed 9 March 2021.

¹⁴MOU preamble para 8.

¹⁵Para 10.

¹⁶CM/Del/Dec(96)578 and CM/Del/Dec(96)579/2.1 app5.

EU delegation plays an active role in the Committee of Ministers, in particular when it comes to making statements on items under current political questions.

At a technical level, the EU enjoys the status of a ‘participant’ in advisory and technical committees set up by the Committee of Ministers under Article 17 of the Statute, the so-called intergovernmental committees governed by CM/Res(2011)24.¹⁷ This status is formally distinct from, but in substance identical to, that of an observer. EU representatives take part in meetings with no right to vote or defrayal of expenses.¹⁸ Drafting proposals made by participants may be put to the vote only if sponsored by a committee member.¹⁹ These provisions are, however, in contrast to a by now rather consistent practice which allows experts representing the EU, usually from the services of the European Commission, to negotiate on behalf of EU Member States and to present drafting proposals. Under Article 218(3) TFEU it is usually the European Commission that represents EU Member States in treaty negotiations.

The Council of Europe’s legal framework for expert committees which draft new treaties or revise existing ones is rather flexible. Article 17 of Appendix 1 to Resolution CM/Res(2011)24 contains the rules of procedure for Council of Europe intergovernmental committees. It provides that ‘any committee directly answerable to the Committee of Ministers may propose to the Committee of Ministers to amend these Rules or, in exceptional circumstances, to waive them in part’. Consequently, from the legal point of view, the applicable texts would not prevent the Committee of Ministers from granting the EU the right to make drafting proposals or to vote and to determine the arrangements for the exercise of that right to vote. In practice, however, this has never happened. The issue was considered in 2013 in the context of the preparation of an amending protocol to Data Protection Convention 108. Notwithstanding the existence of broad EU competences in this field, the Committee of Ministers did not grant voting rights to the EU in the ad hoc committee tasked with the elaboration of the protocol (CAHDATA).²⁰ This did not, however, prevent the Commission representative from speaking and negotiating on behalf of the EU Member States in practice. At the same time, it can be rather frustrating for NEUMS representatives to see EU Member States’ representatives in negotiating meetings who do not actively take the floor and contribute with their expertise to the negotiations.

3. Joint programmes

Over and above their normative work, the Council of Europe and the EU run a wide range of cooperation programmes – which can be country specific, regional or multilateral – to help raise standards of human rights and democracy across Europe and in neighbouring countries.²¹ According to the 2007 MoU, ‘in line with the Joint Declaration on co-operation and partnership between the Council of Europe and the European Commission signed on 3 April 2001, on-going cooperation will be reinforced in the framework of the joint programmes’.²² In practice, regular ‘scoreboard’ meetings are organised to discuss and evaluate joint programmes.

Cooperation programmes support legal reform and capacity building through many different activities – typically including training courses, workshops and seminars, expert reports and advice to governments, conferences and publications – carried out in cooperation with the governments of the countries concerned. The geographical scope of such programmes extends nowadays beyond Europe, covering also North Africa, the Middle East and Central Asia.

¹⁷Other ‘participants’ include representatives of States which have observer status with the Council of Europe, intergovernmental organisations, the Parliamentary Assembly, the European Court of Human Rights, the Congress of Local and Regional Authorities of the Council of Europe, the Council of Europe Commissioner for Human Rights and the Conference of INGOs of the Council of Europe.

¹⁸Art 7(b) of CM/Res(2011)24.

¹⁹Art 7(b) of Appendix I CM/Res(2011)24.

²⁰See the (inconclusive) decisions adopted by the Ministers’ Deputies at their 1183rd meeting, 6 November 2013, CM/Del/Dec(2013)1183/5.1.

²¹See Lawson (above note 6) 521–2; European Parliamentary Research Service, ‘European Union-Council of Europe: Cooperation and joint programmes’ (September 2018).

²²For information on the joint programmes, see <<https://www.coe.int/en/web/programmes/eu-cooperation>> accessed 9 March 2021.

A new framework agreement was signed in 2014, foreseeing a budget of up to €200 million over six years, to put these joint programmes on a more strategic and long-term basis. While the financial amounts involved are considerable and contribute substantially to visibility and impact of Council of Europe action, it must be taken into account that – with few exceptions – cooperation activities are not included in the Council of Europe’s ordinary budget, to which the EU does not contribute.

4. EU participation in Council of Europe treaties and partial agreements

Council of Europe treaties are strictly speaking not statutory acts of the organisation but multilateral treaties within the meaning of the 1969 Vienna Convention on the Law of Treaties (VCLT). They owe their existence to the consent of Member States that individually decide to sign and ratify them. Since 1949, more than 200 international treaties have been adopted by the Council of Europe. The EU’s engagement with the Council of Europe’s conventional *acquis* manifests itself in two ways. The EU can either itself become a party to the treaties (in addition to or substituting itself for its Member States) or it can influence the conclusion and application of these treaties through its Member States or through the adoption of parallel EU legislation.

As regards the first point, it should be noted that starting with the European Convention for the Protection of Animals kept for Farming Purposes (ETS 87, 1976), most Council of Europe treaties nowadays provide in their final clauses for participation of the EU as a party alongside Council of Europe Member States. While the EU initially could only accede after entry into force of the treaty in question and following an invitation by the Committee of Ministers,²³ since the early 1990s roughly two-thirds of the Conventions were immediately opened to signature and ratification by the EU. The EU has, however, not fully used existing possibilities to become a party to Council of Europe treaties and partial agreements. It is currently a party to only 13 Council of Europe treaties, the last of which it ratified in October 2018.²⁴ The EU has also signed four other Conventions, but they were not followed by ratification, the last signature dating from June 2017. The EU can become a party to 24 further treaties. In addition, the EU may be invited to accede to 13 other Conventions after their entry into force. As regards partial agreements, apart from the treaty-based European Pharmacopoeia, the EU has only joined the European Audiovisual Observatory as a full member. It has the status of a ‘participant’ in the Co-operation Group to Combat Drug Abuse and Illicit Trafficking in Drugs (Pompidou), the Co-operation Group for the Prevention of, Protection Against, and Organisation of Relief in Major Natural and Technological Disasters EUR-OPA, the European Commission for Democracy Through Law (‘Venice Commission’) and an ‘observer’ in the Group of States Against Corruption (‘GRECO’).²⁵ In particular the latter two cover thematic areas of strategic importance to the EU, which frequently uses their opinions and recommendations.

Furthermore, participation of a steadily increasing number of Council of Europe Member States in a more closely integrated EU has had important repercussions on the normative work of the organisation. It is not just the sheer quantity, but more importantly the very nature of EU law which raises complex legal issues for treaty-making in the Council of Europe. EU legal instruments have been adopted that replace Council of Europe Conventions, at least as far as relations between EU Member States are concerned.²⁶ Before examining in detail the impact of the EU and its law on the various steps of the Council of Europe treaty-making process (negotiation, conclusion, implementation), it is necessary to briefly recapitulate the nature of EU external competences and their legal basis.

²³Between 1977 and 1983, a few protocols have even been specifically adopted to open the respective parent treaties to signature or accession by the EU, see e.g. the Additional Protocol to the European Agreement on the Exchange of Therapeutic Substances of Human Origin (ETS 109, 1983).

²⁴See the relevant table at the Council of Europe’s treaty website the Council of Europe’s treaty <tinyurl.com/sjmk5fnz> accessed 9 March 2021.

²⁵See the relevant tables at the Council of Europe’s treaty website <<https://www.coe.int/en/web/conventions/partial-agreements/-/conventions/ap/list>> accessed 9 March 2021.

²⁶E.g. the Framework Decision on the European Arrest Warrant superseded Council of Europe extradition treaties.

4.1. The nature of EU competences and their impact on treaty-making

Exclusive EU competences are set out in Article 3 TFEU.²⁷ ‘A priori’ exclusive competences such as the common commercial policy or the conservation of biological resources in the common fisheries policy are usually not relevant within the context of the Council of Europe. However, in a judgment concerning the European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access (CETS 178, 2001),²⁸ the CJEU identified the common commercial policy as the appropriate legal basis, the signature being intended to promote the supply of such services. According to the CJEU, the detailed provisions on seizure and confiscation measures merely helped to achieve this primary objective. It rejected the position held by the Council and several Member States that the Convention could not be concluded by the EU alone because of the presence of such ancillary elements. However, although the CJEU annulled the initial Council of the EU decision regarding the signature of this Convention by the EU,²⁹ the EU’s signature was considered to remain valid at the level of international law. Several EU Member States which had initially ratified this Convention denounced it subsequent to the CJEU judgment.³⁰ Following the adoption of new Council decisions, the EU eventually became a party to the Convention on 10 September 2015. There are, however, still three EU Member States that are parties to it. Under Article 9(2) of this Convention, the EU is entitled to vote in multilateral consultations with a number of votes of the EU Member States that are parties to this Convention. Such consultations have in practice never been convened. However, were this to happen, the EU would end up with zero votes in the event that all EU Member States denounce this Convention.

Exclusive EU competences (‘conditional exclusivity’) may also arise following the adoption of EU legislation (‘ERTA-based exclusivity’). Article 3(2) TFEU provides:

The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

This second type of competence does not refer to a specific area but is limited to a type of legal instrument (international agreement). It concerns situations where the EU acts outside the areas defined as ‘exclusive’ in the previous paragraph. Therefore, the fact that the international agreement is concluded in an area of shared competence does not prevent the application of Article 3(2) TFEU. In order to determine whether exclusive EU competences under this provision exist, the CJEU carries out a comprehensive analysis of the treaty in question, taking into account:

the areas covered by the EU rules and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the EU rules and proper functioning of the system which they establish.³¹

It is not necessary that EU rules exist that correspond to all substantial provisions of a treaty, but merely that treaty obligations ‘fall within an area which is already *largely* covered by [EU] rules’ (emphasis

²⁷ Art 3(1) TFEU defines areas of ‘a priori’ exclusive competence, whereas art 3(2) TFEU provides that the Union shall also have exclusive competence ‘for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope’.

²⁸ Case C-137/12 *Commission v Council*, EU:C:2013:675; see also Opinion 3/15 on the Marrakesh Treaty, ECLI:EU:C:2017:114.

²⁹ CJEU, Case C-137/12 *Commission v Council*, EU:C:2013:675.

³⁰ The Convention is currently in force for the EU and six Council of Europe Member States of which three are EU Member States.

³¹ Opinion 1/03, EU:C:2006:81, para 133. See also Case 114/12 *Commission v Council*, EU:C:2014:2151, para 74 and generally A Rosas ‘EU External Relations: Exclusive Competence Revisited’ (2015) 38(4) *Fordham International Law Journal* 1073, at 1095–6.

added).³² Given the extensive, and often expanding, EU legislation, the material scope of this second type of exclusive EU competence is broad, encompassing core areas of Council of Europe activities such as judicial cooperation in civil and criminal matters or data protection. This is brought about by a series of overlapping legal instruments, usually Conventions on the side of the Council of Europe and directives on the side of the EU.

4.2. Drafting of treaties

The EU's impact on the drafting of treaties within the Council of Europe raises questions of both a procedural and substantive nature. Procedurally, the Council of Europe's legal framework so far recognises only States as members and negotiators of treaties. As explained above, the fact that EU Member States have conferred substantial competences on the EU and may no longer be entitled to exercise them internationally has so far been largely ignored within the Council of Europe.³³ Although the European Commission is regularly entitled under the EU treaties to negotiate on behalf of the Member States, its representatives currently have no standing under the applicable Council of Europe regulations which would correspond to this role.

When it comes to the adoption of draft treaties, only EU Member States are entitled to vote in the Committee of Ministers, including on a draft treaty the conclusion of which is within the exclusive competence of the EU. In such cases, the EU Member States participate in the adoption on behalf and in the interest of the EU. The CJEU has in fact recognised that, in a situation where the EU itself is prevented from acting on matters falling within the EU's external competence, that competence may be exercised through the intermediary of EU Member States.³⁴

It is interesting to note that the existing framework was considered insufficient during the negotiations on EU accession to the ECHR. The draft accession agreement provides in Article 7(2) that the EU shall be entitled to participate in the meetings of the Committee of Ministers, with the right to vote, when the latter adopts ECHR protocols. The draft explanatory report explains the rationale for this provision, highlighting at the same time its exceptional character:

To date, the Convention does not contain specific provisions regarding the adoption of protocols. Following the EU's accession to the Convention, it is consistent with the principles underlying the Accession Agreement and with the principles of the Vienna Convention on the Law of Treaties (in particular Article 39³⁵) to ensure that the EU can participate on an equal footing with the other High Contracting Parties in the adoption of Committee of Ministers decisions relating to the adoption of protocols. In order to allow such participation of the EU, the Accession Agreement will add a new paragraph to Article 54 of the Convention (where it is stated that the Convention shall not prejudice the statutory powers of the Committee of Ministers), providing an explicit legal basis in the Convention for the Committee of Ministers' power to adopt protocols to the Convention. A reference to this new paragraph of Article 54 appears in Article 7, paragraph 2, of the Accession Agreement entitling the EU to participate in the Committee of Ministers, with the right to vote, when the latter takes decisions under specific provisions of the Convention. This provision will constitute a *lex specialis* in respect of the Statute of the Council of Europe, and in particular in respect of Article 15.a thereof. This is an exceptional provision derived from the particular circumstances of the accession of the EU to this Convention and the exceptional character of its participation. Therefore, these arrangements do not constitute a precedent for other Council of Europe conventions.³⁶

³²Opinion 2/91, EU:C:1993:106, para 25; Opinion 1/03, EU:C:2006:81, paras 120 and 126; Case C-114/12 *Commission v Council*, EU:C:2014:2151, para 70.

³³See Section 2 above.

³⁴To that effect see CJEU, Opinion 2/91, EU:C:1993:106, para 5; CJEU, Opinion 1/13, EU:C:2014:2303, para 44.

³⁵Pursuant to art 39 VCLT, '[a] treaty may be amended by agreement between the parties'.

³⁶Fifth Negotiation Meeting Between the CDDH Ad Hoc Negotiation Group And The European Commission on The Accession of The European Union to the European Convention On Human Rights, Final report to the CDDH, Strasbourg, 10 June 2013, 47+1(2013)008rev2 para 79.

Substantively, the joint action of EU Member States within the Council of Europe, however beneficial it may be in terms of combining the action of 27 Member States, affects the multilateral character of negotiations. Such joint action must not lead to a marginalisation of NEUMS, which feel that their views do not carry much weight in the negotiations, or indeed to a transformation of the role of the Council of Europe from a standard-setter to a standard-receiver.³⁷ Where EU Member States negotiate collectively, usually represented by the European Commission, individual EU Member States' capacity to contribute to the discussions during drafting meetings is significantly reduced to merely supporting or explaining the EU position put forward by the EU's representative.³⁸

For a majority of Council of Europe Member States which are members of the EU the focus of negotiations tends to shift from Strasbourg to Brussels, to the competent EU Council working group which prepares common EU positions ahead of the negotiating meetings in the Council of Europe. This is a potentially frustrating situation for experts from countries that are not members of the EU, who, due to their numerical minority in the Council of Europe, may feel that their views do not carry much weight in the negotiations. Instead of being truly multilateral, negotiations are becoming progressively bilateral, between the EU and its Member States on the one hand and the rest of the Council of Europe Member States on the other (e.g. recent negotiations regarding Conventions in the animal welfare field, and notably animal transport,³⁹ the revision of Data Protection Convention 108⁴⁰ or the foreign fighters' Riga protocol to the Council of Europe Convention on the Prevention on Terrorism (CETS 196, 2005)).⁴¹

Council of Europe treaties are essential building blocks of a common European legal space; they aim at fostering 'closer unity between all like-minded countries of Europe'.⁴² Participation of all Member States on an equal footing is an important element for establishing genuine ownership, which in turn facilitates actual compliance. The dynamics and arguably even the results of negotiations in Strasbourg are different if EU Member States do not contribute individually and substantially to the discussions.

Possibly a distinction could be made between *treaty-making* and *treaty-shaping*. Experts from EU Member States could be allowed to participate fully and individually in the early stages of drafting, provided that the approval of the treaty by the Committee of Ministers were preceded by the adoption of the necessary legal acts under Article 218 TFEU. Such a procedure was used during the drafting of the agreement allowing the extension of the Schengen agreements to European Economic Area (EEA) countries.⁴³

4.3. Conclusion of treaties

Under the Statute of the Council of Europe, treaties are adopted and opened for signature by the Committee of Ministers.⁴⁴ It is then up to each Member State to decide individually whether to become party to a particular treaty or not. The impact of EU law on Member States' expression to be bound by Council of Europe treaties depends on whether the treaty in question is a 'mixed agreement' or whether the subject-matter falls entirely within *exclusive* EU competence.

If the agreement is *mixed*, the EU signs and ratifies to the extent of its competence, and the EU Member States do the same regarding matters within their competence. In the words of the CJEU, 'when

³⁷O De Schutter, 'Institutional Reforms in the European and International Human Rights Protection Architecture – Towards a More Comprehensive System of Protection', paper presented at a seminar organised by the then Council of Europe Commissioner for Human Rights, Mr Thomas Hammarberg with the support of the then President of the Parliamentary Assembly of the Council of Europe, Mr Rene van der Linden (Strasbourg, 17 April 2007).

³⁸EU Member States are bound by duties of loyal and sincere cooperation to respect the role of the European Commission as negotiator, see CJEU, Opinion 1/08, EU:C:2009:734, para 136; CJEU, Opinion 2/00, EU:C:2001:664, para 18; CJEU, Opinion 1/94, EU:C:1994:384, para 108; Case C-28/12 *Commission v Council (Hybrid acts)*, EU:C:2015:282, para 54.

³⁹European Convention for the Protection of Animals during International Transport (Revised) (CETS 193, 2003).

⁴⁰Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS 108, 1981).

⁴¹Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS 217, 2015).

⁴²Statute of the Council of Europe (ETS 1, 1949), preamble para 4.

⁴³Agreement concluded by the Council of the European Union, the Republic of Iceland and the Kingdom of Norway on the association of these two states to the implementation, to application and to the development of the *acquis de Schengen* (18 May 1999), L176, 10/07/1999, 36.

⁴⁴See art 15 of the Statute of the Council of Europe and the section on Powers of the Committee of Ministers in the Resolution adopted by the Committee of Ministers at its 8th Session, May 1951.

such an agreement is negotiated and concluded, each of those parties must act within the framework of the competences which it has while respecting the competences of any other contracting party.⁴⁵ EU Member States are bound by duties of loyal and sincere cooperation, the requirement of unity in the international representation of the Union, and the fundamental principle of conferral of powers.⁴⁶

In that context, it must be taken into account that, due to the increase of EU competences under the Maastricht, Amsterdam and Lisbon treaties, almost all Council of Europe treaties nowadays contain at least some provisions falling within exclusive EU competence. These may be substantive or horizontal, often rather ancillary provisions, for example on judicial cooperation or data protection issues related to the subject-matter covered by the treaty in question. In the case of ‘mixed agreements’, in particular where shared competences are ‘inextricably linked’,⁴⁷ it has been argued that the duty of loyal cooperation would entail that neither the EU nor its Member States can go ahead individually and become a party.⁴⁸ However, to require consensus by all its Member States (‘common accord’) for the conclusion of a particular treaty means in practice that a single Council of Europe Member State (that is also a member of the EU) can prevent more than half of the Member States from joining a treaty duly adopted under the Statute. Such an outcome not only risks affecting treaty-making procedures within the Council of Europe, but may also contradict principles of both international and EU law. Regarding EU law, it must be emphasised that the duty of loyal cooperation is of horizontal and general application.⁴⁹ It applies both to EU institutions and Member States when acting within the scope of EU law.⁵⁰ Should EU Member States that have loyally participated, under commonly agreed negotiating directives, in the negotiation and adoption of a treaty be entitled to individually withhold their consent?

The issue is not only of theoretical interest but has become relevant for the Council of Europe Convention on the Manipulation of Sports Events (CETS 215, 2014) and the Istanbul Convention (CETS 210, 2011). The so-called Macolin Convention provides an internationally agreed legal framework to combat the manipulation of sports competitions. Such manipulations not only constitute a major threat tarnishing the reputation of sport and sport values, but have also become a dangerous playground for transnational organised crime.⁵¹ Despite enjoying widespread support by the competent ministries and the sports movement, to date only seven Member States have ratified the Convention; 31 countries have signed it, including a non-Member State, Australia.

The ratification process has been seriously hampered by Malta’s veto of the EU’s ratification. Malta, whose economy is heavily dependent on betting revenues, claims that the definition of ‘illegal sports betting’ goes beyond the scope of the Convention and does not contribute to the fight against match-fixing. While it could not prevent the Convention’s adoption and opening for signature in the Council of Europe,

⁴⁵CJEU, Case C-28/12 *Commission v Council (Hybrid acts)*, EU:C:2015:282, para 47.

⁴⁶In the case of mixed international agreements, ‘it is essential to ensure close cooperation between the Member States and the EU institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into’, CJEU, Case C-28/12 *Commission v Council (Hybrid acts)*, EU:C:2015:282, para 54. See also CJEU, Opinion 1/08, EU:C:2009:734, para 136; Opinion 2/00, EU:C:2001:664, para 18; Opinion 1/94, EU:C:1994:384, para 108. The CJEU also held that the duty is ‘all the more necessary’ when EU Member States have to act on behalf of the EU because the latter cannot be represented in an international organisation; CJEU, Opinion 2/91 *ILO*, EU:C:1993:106, para 37.

⁴⁷See CJEU, Opinion 1/94 (WTO), ECLI:EU:C:1994:384, para 109; see also CJEU, Case C-459/03 *Commission v Ireland (MOX Plant)*, EU:C:2006:345, paras 175–6.

⁴⁸The CJEU has stated in CJEU, Opinion 1/94 (WTO), ECLI:EU:C:1994:384, para 108, that ‘where it is apparent that the subject-matter of an agreement or convention falls in part within the competence of the Community and in part within that of the Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into’; see also CJEU, Case C-246/07 *Commission v Sweden*, EU:C:2010:203, para 73; CJEU, Case C-25/94 *Commission v Council*, EU:C:1996:114, para 48; A Rosas, ‘The European Union and Mixed Agreements’ in A Dashwood and C Hillion (eds), *The General Law of EC External Relations* (Sweet & Maxwell 2000) 208; A Rosas, ‘The Future of Mixity’ in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart 2010) 372; T Giegerich in M Pechstein, C Nowak and U Häde (eds), *Frankfurter Kommentar zu EUV und AEUV (mit GRC)* (Mohr Siebeck 2017) art 218 AEUV, marginal notes 124 et seq.

⁴⁹CJEU, Case C-433/03 *Commission v Germany*, EU:C:2005:462, para 64.

⁵⁰*ibid*, para 46.

⁵¹See comprehensively, PACE Committee on Culture, Science, Education and Media, ‘Time to act: Europe’s political response to fighting the manipulation of sports competitions’ (rapporteur Mr Roland Rino Büchel) (15 May 2020).

where such decisions are taken by two-thirds majority,⁵² Malta effectively blocked decision-making in the Council of the EU, relying on the ‘common accord’ doctrine. The CJEU has never explicitly endorsed this doctrine, which requires unanimous consent of all Member States to be bound by the Convention with respect to their national competences before the Council can proceed with the adoption, by a qualified majority, of decisions concerning the conclusion by the Union itself. State practice in this area is not consistent.⁵³ The applicable procedures under Article 218 TFEU foresee decision-making by qualified majority and not by unanimous agreement of all EU Member States.⁵⁴ The ‘common accord’ doctrine thus introduces an additional element in the Union’s treaty-making procedure which is not foreseen by the EU treaties. This was the position taken already in 2016 by the Commissioner in charge.⁵⁵ On 21 November 2019, the EU Council meeting of sports ministers agreed to:

examine ways, together with the Commission, to solve the deadlock with regard to the Council of Europe Convention on the Manipulation of Sports Competitions, which entered into force on 1 September 2019, in view of enabling the EU and all its Member States to complete their respective ratification processes and accede to the Convention as soon as possible.⁵⁶

The ‘common accord’ doctrine has, moreover, been challenged before the CJEU by the European Parliament in an opinion procedure regarding another Council of Europe treaty, the Istanbul Convention.⁵⁷ The argument sometimes put forward that only joint participation of the EU and all its Member States can avert the risk of international responsibility of the EU (or other EU Member States having concluded the treaty)⁵⁸ does not appear to be compelling. First of all, it should be emphasised that Council of Europe treaties have rarely given rise to claims of international responsibility. The Istanbul Convention contains primarily obligations which parties implement domestically and compliance with which is monitored through the mechanisms established by the Convention itself.

More importantly, however, the risk of international responsibility could be averted through the use of an interpretative declaration. Such declarations are capable of creating obligations under international law.⁵⁹ Like most recent Council of Europe treaties, the Istanbul Convention provides for signature and ratification by the EU alongside its Member States⁶⁰ although EU competences do not comprehensively cover all provisions of the Convention. The EU can implement the Convention only to a certain extent (supposedly to that of its competences). This fact could be made known to the other parties through a declaration as the Istanbul Convention does not allow for reservations in this regard,⁶¹ nor does it allow a partial consent within the meaning of Article 17 VCLT. Such a declaration regarding the implementation of the Istanbul Convention as a whole would not alter the obligations of either the EU or its Member States that are parties to the Istanbul Convention. The statement would merely clarify that the EU is not competent for all areas covered by the Istanbul Convention.⁶² The declaration in question would not have

⁵² Art 20(d) of the Statute of the Council of Europe.

⁵³ A Rosas, ‘The Status in EU Law of International Agreements Concluded by EU Member States’ (2011) 34(5) *Fordham International Law Journal* 1304, at 1309; Giegerich (above note 48) art 218 marginal note 124.

⁵⁴ See, *mutatis mutandis*, CJEU, Case C-28/12 *Commission v Council (Hybrid acts)*, EU:C:2015:282.

⁵⁵ See his declaration before the European Parliament on 15 September 2016: ‘The Commission disagrees with this approach. The applicable procedure and voting is clear: the Treaty clearly stipulates qualified majority voting for this kind of Council decision. The Court of Justice has also confirmed in a recent judgment that the rules regarding the manner in which the EU institutions arrive at their decisions are laid down by the Treaties and are not at the disposal of the Member States or of the institutions themselves.’

⁵⁶ Council Conclusions (EYCS), ‘Combating Corruption in Sport’ (22 November 2019), para 26.

⁵⁷ Opinion 1/19, request submitted pursuant to art 218(11) TFEU on 9 July 2019.

⁵⁸ Rosas (above note 53); Giegerich (above note 48) art 218, marginal note 124.

⁵⁹ O Dörr, ‘Declaration’ in Rüdiger Wolfrum (ed), *The Max Planck Encyclopaedia of Public International Law* (Heidelberg and Oxford University Press 2008).

⁶⁰ Art 75(1).

⁶¹ Under art 78, the Convention allows only for a certain number of exhaustively enumerated reservations.

⁶² This type of declaration is not foreseen explicitly by the Istanbul Convention, but, for example, in para 280 of the explanatory report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS 201, 2007) and in para 160 of the explanatory report of the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS 223, 2018).

to indicate exhaustively the list of EU competences, which are in any case evolutive in nature. Where necessary, questions related to the exact distribution of competences between the EU and its Member States could be addressed in the context of the monitoring mechanism in which both the EU and its Member States would anyway have to cooperate on the basis of the duty of loyal cooperation.

4.4. Participation of the EU in follow-up and monitoring mechanisms

Many Council of Europe treaties provide for some form of follow-up.⁶³ While committees set up under Article 17 of the Statute act under the direct authority of the Committee of Ministers, conventional committees or multilateral consultations⁶⁴ are autonomous bodies representing directly the parties to the treaty in question. While follow-up mechanisms may also carry out certain monitoring functions in a broad sense, such as information gathering, collecting data or preparing comparative studies on treaty implementation and addressing recommendations to the parties, they must be distinguished from independent monitoring mechanisms. The latter actively monitor respect for treaty obligations country by country, often not only on the basis of reports of the parties, but also through country visits and on-the-spot investigations, and also thematically. Under the respective treaties, the mechanisms have an explicit mandate to identify issues of non-compliance and address their findings or policy recommendations to the parties.

The EU's full participation in follow-up and monitoring mechanisms may result in the monitoring mechanisms having to address complex issues of attribution and international responsibility. EU law also facilitates and, in some cases, requires cooperation between Member States and their authorities, for instance through the recognition of judgments, evidence, alerts of third-country nationals and the issuing of visas. Alleged cases of non-compliance with Council of Europe treaties may therefore involve simultaneously actions or omissions by the EU institutions or bodies and/or national authorities of one or more Member States.

As regards EU Member States' action, it will often be difficult to clearly distinguish, in practical terms, between measures that implement EU law and purely domestic ones. EU law often leaves a certain measure of discretion as to its implementation or provides for exceptions which can be invoked by Member States on the basis of their national law. In particular, human rights monitoring mechanisms focus on actual interferences with individual rights irrespective of whether such interferences are determined by EU or national law. Evaluation of compliance typically involves complex, often closely interwoven actions and or omissions. It would be a difficult, maybe even somehow artificial exercise to distinguish according to the internal distribution of competences between the EU and its Member States. Moreover, any such assessment by an external monitoring mechanism is likely to interfere with internal EU matters and the CJEU's exclusive jurisdiction over the distribution of competences between the EU and its Member States.⁶⁵

4.4.1. Voting rights

Closely linked to the issue of attribution and responsibilities is the question of EU voting rights. Only a few Council of Europe treaties contain specific provisions addressing this question. They consistently follow the 'principle of no additionality'. Depending on the distribution of competences, it is either the EU or its Member States that are entitled to vote on a particular question. The EU votes with a weight equivalent to that of its Member States party to the treaty in question and bound by the EU instruments from which the external competence arises. The Convention on the Conservation of European Wildlife

⁶³See J Polakiewicz, *Treaty-Making in the Council of Europe* (Council of Europe Publishing 1999) 119 et seq.

⁶⁴E.g. European Convention on the Service Abroad of Documents relating to Administrative Matters (ETS 94, 1977), European Convention on the Obtaining Abroad of Information and Evidence in Administrative Matters (ETS 100, 1978), European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access (ETS 178, 2001) as well as various treaties in the field of animal welfare.

⁶⁵That such an assessment could be made by the ECtHR was one of the objections of the CJEU against the draft agreement on accession by the EU to the ECHR, see Opinion 2/13, EU:C:2014:2454, paras 221 et seq.

and Natural Habitats, known as the Bern Convention (ETS 104, 1979), currently the only Council of Europe treaty with a functioning follow-up mechanism to which the EU is a party, follows this rule.⁶⁶

Voting rights are negotiated and special voting arrangements (e.g. cumulative or weighted voting) are possible. Granting the EU a separate voting right in addition to that of its Member States may, for example, be appropriate if the EU (through its acts or its agencies) is subject to supervision of compliance separately, for example by virtue of its own legal personality, and not just ‘replacing’ the EU Member States in the exercise of competences. International law and practice do not, however, support any legal claim or automatism in this regard. In situations where the EU on its own is party to a treaty involving a follow-up mechanism, it generally has *one vote* like other contracting parties. Indeed, as one author has observed, ‘the more like a regular state it [the EU] becomes, the more it will be treated as one, with all the international legal implications this may entail.’⁶⁷ It seems that so far there are no international agreements and organisations in which only the EU participates and where it has a number of votes corresponding to the number of its Member States.⁶⁸ As regards treaties relating to areas of EU exclusive competence to which it is *not* itself party, the Union may rely on the votes of its Member States which are parties to the treaty in question, acting jointly in the EU interest.

The issue of EU voting rights was the subject of protracted negotiations in the context of the revision of Data Protection Convention 108. Non-Member States of the EU argued that the EU should have one vote like other contracting parties. Giving the EU the same number of votes as it has Member States would be unbalanced and prejudicial to the rights of Member States that are not members of the EU. It must be taken into account that EU Member States are legally bound, under the EU treaties, to coordinate their votes on matters within the scope of EU competence.⁶⁹ An important new feature of the revised Convention 108 will be a reinforced follow-up mechanism through a committee of the parties (‘Convention Committee’).⁷⁰ When dealing with the monitoring of compliance either by the EU alone, or by one or more of its Member States acting within the scope of EU law, EU Member States are obliged to express positions and to vote in a coordinated manner. The revised Convention 108 therefore foresees special voting rules which are contained in an appendix to the amending protocol (CETS 223, 2018).⁷¹ The basic rule remains that each party has a right to vote and shall have one vote. However:

regional integration organisations, in matters within their competence, may exercise their right to vote in the Convention Committee, with a number of votes equal to the number of their member States that are Parties to the Convention. Such an organisation shall not exercise its right to vote if any of its member States exercises its right.⁷²

Decisions regarding compliance with the Convention will require a four-fifths majority, including a majority of the votes of States parties not members of a regional integration organisation that is a party to the Convention. Where the Convention Committee takes such decisions and adopts recommendations

⁶⁶Its art 13(2) provides as follows: ‘Any Contracting Party may be represented on the Standing Committee by one or more delegates. Each delegation shall have one vote. Within the areas of its competence, the European Economic Community shall exercise its right to vote with a number of votes equal to the number of its member States which are Contracting Parties to this Convention; the European Economic Community shall not exercise its right to vote in cases where the member States concerned exercise theirs, and conversely.’

⁶⁷J Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press 2009) 226.

⁶⁸There is one exception regarding the adoption of amendments to the Convention on Information and Legal Co-operation concerning ‘Information Society Services’ (CETS 180, 2001); its art 7(2) provides: ‘The proposed amendment shall be examined by the Parties, which may adopt it by a two-thirds majority of the votes cast. The text adopted shall be forwarded to the Parties. The European Community shall have the same number of votes as the number of its member States.’ The text of this Convention had been proposed by the European Commission. Without going through any intergovernmental drafting committee, it was immediately approved by the European Committee on Legal Co-operation (CDCJ) and adopted by the Committee of Ministers, but never entered into force.

⁶⁹CJEU Case C-246/07 *Commission v Sweden*, EU:C:2010:203, paras 69–75; Case C-25/94 *Commission v Council*, EU:C:1996:114, para 48.

⁷⁰Its composition, functions and procedure are laid down in art 22, 23 and 25 of the (revised) Convention.

⁷¹The appendix to the amending protocol forms an integral part of the protocol and has the same legal value as the other provisions of the protocol (para 6 of the explanatory report).

⁷²Point 6 of the ‘Appendix to the Protocol: Elements for the Rules of Procedure of the Convention Committee’.

pursuant to Article 23, *littera h*, of the Convention, the party concerned by the review shall not vote. Whenever such a decision concerns a matter falling within the competence of a regional integration organisation, neither the organisation nor its Member States shall vote.⁷³ The explanatory report, which was exceptionally formally adopted by the Committee of Ministers, thus giving it special weight,⁷⁴ requires that the EU, upon accession, ‘shall make a statement clarifying the distribution of competences between the EU and its member States and . . . [s]ubsequently . . . will inform the Secretary General of any substantial modification in the distribution of competences’.⁷⁵

4.4.2. Applicability of Article 218(9) TFEU

Another important issue arising in the context of Council of Europe follow-up or monitoring mechanisms is the application of Article 218(9) TFEU, which requires a Council of the EU decision to establish the EU’s position in ‘a body set up by an agreement’. The CJEU dealt with the scope of Article 218(9) TFEU in several cases. Cases C-399/12 *Germany v Council*,⁷⁶ C-600/14 *Germany v Council*⁷⁷ and C-620/16 *Commission v Germany*⁷⁸ seem particularly relevant for the Council of Europe context. The first case concerned the validity of the Council Decision establishing the position to be adopted with regard to certain resolutions to be agreed upon by the ‘International Organisation of Vine and Wine’ (OIV) having been contested. The OIV is a technical organisation which adopts non-binding recommendations on technical standards for producing and marketing vine and wine products. It should be noted that 21 out of the 46 OIV Member States are EU Member States. The EU itself is not a member, but it had chosen to refer to some OIV recommendations in its so-called ‘Single CMO Regulation’.⁷⁹ The CJEU found that Article 218(9) TFEU was applicable irrespective of the fact that the EU is not a party to the OIV agreement. It explicitly rejected the argument made by Advocate General Cruz Villalón that the provision only applied where the measures in question are binding as a matter of international law.⁸⁰ Having regard to the fact that OIV recommendations are capable of decisively influencing the content of the EU legislation in the area of the common organisation of the wine markets, the CJEU concluded that they must be regarded as having legal effect for the purposes of Article 218(9) TFEU. The CJEU confirmed these findings in subsequent judgments. It rejected in particular the argument that it would be necessary that the Union had first adopted common rules that are liable to be affected by the decisions of the treaty body.⁸¹ The CJEU also underlined that derogating from the legal form laid down by the EU treaties constitutes an infringement of essential procedural requirements.⁸²

The CJEU has established a rather broad test, which is to a certain extent ‘self-referential’ in the sense that the EU legal order can create the conditions as to whether (or not) an act has legal effect within the meaning of Article 218(9) TFEU. As regards OIV recommendations, the CJEU accorded particular weight to ‘their incorporation into EU law by virtue of Articles 120f(a), 120g and 158a(1) and (2) of Regulation No 1234/2007 and the first subparagraph of Article 9(1) of Regulation No 606/2009’.⁸³ In the ITLOS case, where it held that Article 218(9) TFEU was not applicable to the submission by the European Commission of a written statement on behalf of the EU to the International Tribunal for the Law of the Sea, the CJEU emphasised the legal character of the statement whose purpose was ‘not to formulate a policy’, the EU having been ‘invited to express, as a party, a position “before” an international court not “in” it’.⁸⁴

⁷³Point 4 of the Appendix.

⁷⁴See the decisions taken on 18 May 2018, at the 128th session of the Committee of Ministers and para 6 of the explanatory report.

⁷⁵Para 160 of the explanatory report.

⁷⁶CJEU, Case C-399/12 *Germany v Council*, EU:C:2014:2258.

⁷⁷CJEU, Case C-600/14 *Germany v Council*, ECLI:EU:C:2017:935.

⁷⁸CJEU, Case C-620/16 *Commission v Germany*, ECLI:EU:C:2019:256.

⁷⁹For more information see <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R1308>> accessed 9 March 2021.

⁸⁰CJEU, Case C-399/12 *Germany v Council*, Opinion of Advocate General Cruz Villalón, EU:C:2014:289.

⁸¹CJEU, Case C-600/14 *Germany v Council*, ECLI:EU:C:2017:935, para 62.

⁸²CJEU, Case C-687/15 *Commission v Council*, ECLI:EU:C:2017:803, para 44.

⁸³CJEU, Case C-399/12 *Germany v Council*, EU:C:2014:2258, para 64.

⁸⁴CJEU, Case C-73/14 *Council v Commission*, EU:C:2015:663, paras 63 and 71.

In the absence of further case law and the so far very limited participation of the EU in Council of Europe follow-up mechanisms, it is hard to predict what relevance a Council of Europe soft-law standard must have in the EU's legal order to trigger the application of Article 218(9) TFEU. It might be argued that in the event of the EU's full participation in a Council of Europe follow-up or monitoring mechanism, certain findings and recommendations will have immediate 'legal effects' for the EU, not because of their subsequent incorporation into EU law, but because the EU would be bound by international law to comply with them.⁸⁵ It must also be taken into account that even where a position does not have legal effects, but its adoption amounts to a policymaking decision, the European Commission must respect the Council of the EU's prerogatives under Article 16(1) Treaty on European Union (TEU) and seek its approval.

From a policy point of view, it must be taken into account that requiring a Council of the EU decision could be a relatively cumbersome procedure (even taking into account that Council of the EU decisions may be adopted through written procedure). Depending on the degree of detail the Council of the EU decision will go into, such a requirement may also have the consequence that substantial discussions among EU Member States on Council of Europe soft-law standards may take place primarily in the Council of the EU and no longer in the competent Council of Europe bodies, thus affecting the position of NEUMS and very nature of intergovernmental work in the Council of Europe.⁸⁶ In that context, it is interesting to note that the draft agreement on EU accession to the ECHR provides for the continued participation of all Member States' experts in the drafting of recommendations and resolutions related to the ECHR system, including after accession.⁸⁷

4.5. Financial contribution

Several Council of Europe treaties contain rather elaborate follow-up or monitoring mechanisms. In most cases, the costs of these mechanisms are part of the organisation's ordinary budget, which means that they are borne by Member States only. Non-Member States of the Council of Europe or the EU are not contributing to the running costs of follow-up mechanisms even if they are a party to the treaty in question. At the Helsinki ministerial session in 2019, the Secretary General argued that 'new member states which participate as of right in the follow-up mechanism of a convention should be asked to contribute to the financing of that convention. This should be a condition of ratification.'⁸⁸ The same argument could be made *mutatis mutandis* for the EU.

As regards *existing* treaties, a financial contribution is compulsory if a clause to that effect is included in the text of the treaty in question. So far, such clauses have only been included in three Conventions: CETS 211,⁸⁹ CETS 215⁹⁰ and CETS 216.⁹¹ Among the three, only the Convention on the Manipulation of Sports Competitions (CETS 215, 2014) envisages the EU's accession. In all other cases, voluntary contributions are possible, as the example of the Bern Convention (ETS 104, 1979) shows, where the EU contributes to joint programmes facilitating the implementation of the Convention, for example the 'Emerald network of Areas of Special Conservation Interest'.

As regards *future* treaties with an independent or peer-review monitoring mechanism, the inclusion of specific clauses on financial contributions by parties that are not members of the Council of Europe could indeed be considered. Financial obligations may, however, act as a deterrent for the promotion of Council of Europe treaties among non-members. Due to its special status, the EU may require special treatment which will have to be agreed on a case-by-case basis for each treaty, taking into account the real costs related to the EU's participation in a particular follow-up or monitoring mechanism in addition to its Member States. In any case, this issue has to be considered not just from the Council of Europe

⁸⁵Certain findings by GRECO, for example, though being adopted as 'recommendations', are binding, see Rules 30–32 of GRECO's Rules of procedure.

⁸⁶See above note 37 and accompanying text.

⁸⁷See art 7(3) and draft explanatory report, para 81.

⁸⁸Secretary General's report 'Meeting the challenges ahead – Strengthening the Council of Europe' (2019) 51.

⁸⁹Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (CETS 211, 2011).

⁹⁰Council of Europe Convention on the Manipulation of Sports Competitions (CETS 215, 2014).

⁹¹Council of Europe Convention against Trafficking in Human Organs (CETS 216, 2015).

perspective, but also in light of the EU's own budgetary and financial arrangements, which contain specific requirements as to the legal basis of compulsory contributions.

Finally, it should be emphasised that the most effective way to promote Council of Europe treaties is to make accession to them worthwhile for members and non-members alike because of the concrete benefits that they derive from their participation. If these instruments are seen to provide real added value, facilitate cooperation between the parties, provide focal points for networks of experts, exchange of good practices and are accompanied by meaningful cooperation activities, all parties will be more than willing to participate in the necessary financing. The Council of Europe Convention on Cybercrime (CETS 185, 2001), with its worldwide capacity-building programmes, provides a good example in this respect.⁹²

5. Overlapping human rights standards and EU accession to the ECHR

Under the TEU, the Charter of Fundamental Rights is binding and the EU is committed to accede to the ECHR.⁹³ Already the mere proclamation of the Charter had been seen 'as part of an ongoing process that has the potential to transform substantially the Union and its legal order'.⁹⁴ And yet the Charter itself provides that it 'does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties' (Article 51(2)). The explanations to the Charter⁹⁵ emphasise this point even further. Indeed, the Lisbon Treaty did not implement significant changes to the Union's legislative powers in human rights matters *stricto sensu*. At the same time, the Lisbon Treaty extended legislative powers in many other fields and the Charter introduced a duty to 'promote the application' of the rights contained therein (Article 51(1)).

Making the Charter binding was a major step in further enhancing human rights protection in the EU. At the same time, the resulting complexity of the overall system of fundamental rights protection in Europe is a source of confusion, not only for citizens, but also for judicial authorities in the Member States. The latter will henceforth be confronted with up to four different legal sources of fundamental rights to be applied simultaneously, partly with different standards, structures, terminology and qualifications, being:

- their own domestic law, in most cases the national Constitution's fundamental rights catalogue;
- the ECHR and its protocols;
- the UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights;
- the EU Charter of Fundamental Rights.

What makes the situation particularly complex is the fact that the different legal sources will have to be combined as the legal systems concerned do not merely *co-exist* but *overlap* each other. In this context, domestic courts play a central role, not only as 'Community courts of ordinary jurisdiction', but also as 'Convention courts of ordinary jurisdiction', as it is for them to ensure in the first place that the rights of individuals are respected. Referring to the famous expression by Georges Scelle ('*dédoulement fonctionnel*'), the former President of the ECtHR described the modern-day challenge of European domestic courts as a '*détriplement fonctionnel*'.⁹⁶ It is therefore not surprising that there was talk of a 'lawyers' paradise' when the EU Charter was being drafted.⁹⁷ It is indeed difficult for practitioners

⁹²The Council of Europe – through its Cybercrime Programme Office (C-PROC) in Romania – is supporting countries worldwide in the strengthening of their criminal justice capacities to respond to the challenges posed by cybercrime and electronic evidence, see the overview at <<https://www.coe.int/en/web/cybercrime/capacity-building-programmes>> accessed 9 March 2021.

⁹³Art 6(2) TEU.

⁹⁴A von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 Common Market Law Review 1307.

⁹⁵Which were eventually given official status, see the Charter's preamble, recital (4) and art 52 § 7.

⁹⁶L Wildhaber, 'The Coordination of the Protection of Fundamental Rights in Europe', address given in Geneva, 8 September 2005, 2.

⁹⁷See also P Havers and R English, 'Taking a Liberty', *European Lawyer*, July 2000, 66, who made the following comments before the Nice Summit: 'If the promoters of the EU Charter of Rights get their way at the Nice Summit, the scope for arguing rival interpretations of similar rights – by the Strasbourg Court, the House of Lords and the ECJ – will be immense. The imaginative lawyer may be able to build a whole practice out of inconsistent interpretations of these principles – without necessarily ever

to keep abreast of the developing case law in Luxembourg and Strasbourg. Acting often in urgency, judges have to identify in each individual case the applicable standards and accommodate the various legal sources, which will exist wholly independently from each other. To quote a practitioner, ‘it is a demanding methodological task for a Supreme Court Justice to untangle the intricate and dynamic web of legal material that continuously are being spun within European law, layer by layer.’⁹⁸ In the worst case, domestic authorities may be held responsible under the Convention for action that is imposed by EU law.⁹⁹

The EU Charter contains certain safeguards to ensure that its rights are interpreted consistently with the ECHR. Article 52(3) seeks to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, insofar as the rights in the Charter correspond to rights guaranteed under the ECHR, the meaning and scope of those rights, including authorised limitations, should be the same as those laid down by the ECHR. Article 53 provides that nothing in the Charter may be interpreted as restricting or adversely affecting the human rights and fundamental freedoms recognised in international agreements, such as, in particular, the ECHR, and national Constitutions.

The various ‘more favourable law’ principles (in favour of the ECHR and domestic fundamental rights in Article 53, and of more extensive protection under EU law in Article 52(3) of the Charter), taken together, should in principle lead to the application of the provision offering the highest level of protection. In *Melloni*, the CJEU qualified this proposition in the name of ‘the primacy, unity and effectiveness of EU law’, arguing that even a theoretically higher standard must not be applied where a commonly agreed EU standard exists.¹⁰⁰ Moreover, the clauses in question imply that human rights are quantifiable and may easily be assessed in terms of ‘maximum’ versus ‘minimum’ protection.¹⁰¹ Such reasoning may be justified in instances where individual rights are weighed against governmental interests. For example, limiting the maximum period during which a person may be detained without being brought before a judge to two days provides more protection than a period of four days. But even in such cases, the quantification of levels of protection based on generally worded provisions is often difficult if not impossible. As Ronald Dworkin observed pertinently, ‘it is very difficult to think of liberty as a commodity.’¹⁰² Human rights entail choices as to the appropriate balance between the interests of individuals against those of other individuals or the community.¹⁰³ In particular in cases of competing human rights interests that must be reconciled, such as freedom of expression versus privacy,¹⁰⁴ the right to respect the decision to become (or not to become) a parent,¹⁰⁵ or the right to property versus the right to strike, the appropriate balancing requires valuations and assessments unique to the society at issue. In the context of multipolar relations, extending the protection of one right or attaching more weight to it will have the consequence of restricting the right of another person. Under the EU Charter, the standard which appears most favourable at first sight may be applied only insofar as this does not lead to an inadmissible restriction of the other basic

having to establish that his client is an entity entitled to enjoy such rights, or indeed that they are central to the case in issue. Good news for lawyers but not such good news for their clients.’

⁹⁸Justice A Bårdsen (Norwegian Supreme Court), ‘Fundamental Rights in EEA Law – The Perspective of a National Supreme Court Justice’ (12 June 2015), para 26.

⁹⁹EU law is primarily implemented, applied and enforced by national authorities, which may or may not have discretion in applying Union law. In the absence of EU accession, only Member States may be held responsible by the ECtHR, which developed the so-called ‘Bosphorus presumption’, see e.g. *Bosphorus Hava Yollari Turizm v Ireland* [GC], no 45036/98, ECHR 2005-VI, 107, §§155–7; *M.S.S. v Belgium and Greece* [GC], no 30696/09, ECHR 2011-I, 255, §§338–40.

¹⁰⁰CJEU, Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, EU:C:2013:107, para 60.

¹⁰¹See the pertinent criticism by A-M Widmann, ‘Article 53: Undermining the Impact of the Charter of Fundamental Rights’ (2002) 8 *Columbia Journal of European Law* 342–58.

¹⁰²R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 270.

¹⁰³JHH Weiler, ‘Eurocracy and Distrust’ (1986) 61 *Washington Law Review* 1103, 1127.

¹⁰⁴See *Caroline von Hannover v Germany*, judgment of 24 June 2004, [2004] ECHR 294.

¹⁰⁵See *Evans v UK*, judgment (GC) of 10 April 2007, [2007] ECHR 264, § 73: ‘The dilemma central to the present case is that it involves a conflict between the Article 8 rights of two private individuals: the applicant and J. Moreover, each person’s interest is entirely irreconcilable with the other’s, since if the applicant is permitted to use the embryos, J will be forced to become a father, whereas if J’s refusal or withdrawal of consent is upheld, the applicant will be denied the opportunity of becoming a genetic parent. In the difficult circumstances of this case, whatever solution the national authorities might adopt would result in the interests of one or the other parties to the IVF treatment being wholly frustrated.’

right. The wording of Article 53 of the Charter suggests that the ECHR should be given precedence in this respect, and that its (minimum) standards should at all events be guaranteed.¹⁰⁶

The mere existence of two different texts to be interpreted by distinct courts operating in different contexts is not conducive to legal certainty. There is a real risk of creating divisions between EU Member States and NEUMS, the latter being bound by the ECHR but not by the Charter.¹⁰⁷ Against this background, it becomes obvious why already the Laeken Declaration (2001) and the subsequent EU Convention (2001–2003) and Intergovernmental Conferences (2003 and 2007) established a *junktum* between the incorporation of the EU Charter into the treaties and accession of the EU to the ECHR. As the EU Convention's Working Group II on the EU Charter and accession emphasised already in 2002, 'accession would be the ideal tool to ensure a harmonious development of the case-law of the two European Courts in human rights matters'.¹⁰⁸ It 'would give a strong political signal of the coherence between the Union and the "greater Europe", reflected in the [Council of Europe] and its pan-European human rights system'.¹⁰⁹

Following the entry into force of the Lisbon Treaty in December 2010, hopes for a rather speedy accession process were high. However, on 18 December 2014 the CJEU delivered Opinion 2/13¹¹⁰ concluding that the draft agreement on accession of the EU to the ECHR¹¹¹ was not compatible with EU law. The CJEU raised a series of objections, which are not only of an exceptional magnitude, but also, at least partially, of questionable legal relevance.¹¹² What is particularly surprising in Opinion 2/13 is the absence of any argument referring to the constitutional significance of Article 6(2) TEU. As Piet Eeckhout put it so pertinently, the concept of the autonomy of EU law as developed in Opinion 2/13:

risks undermining the very authority of law in the European legal space. It is one thing to conceive of European legal orders or systems – national law, EU law, and Convention law – as having their own identity and autonomy. It is another to conceive of them as self-contained and unbridgeable. The territorial and personal space in which they operate is unitary.¹¹³

These legal systems may all claim authority over a single case, be it an asylum seeker in a refugee camp in Greece, a criminal suspect to be surrendered to a country in which s/he may suffer from inhuman prison conditions or an ordinary citizen whose personal data are intercepted illegally. 'If the answer to their claims depends on which set of norms is applied, and which court hears their case, the rule of law will become relative and contingent, and the very idea of inalienable human rights will suffer.'¹¹⁴

If one takes all the CJEU's objections at face value and tries to overcome them one by one by formal amendments to the draft accession agreement, there is a real risk that, as a result, the ECtHR's jurisdiction over EU legal acts will be more restricted than it is today. Such a solution would not only undermine the whole purpose of accession, but would also be unacceptable to NEUMS. It must not be forgotten that

¹⁰⁶C Grabenwarter, 'Europäisches und nationales Verfassungsrecht' (2001) 60 Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer 290, at 330–1; J Kühling, 'Fundamental Rights' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart 2007) 501, at 547.

¹⁰⁷F Jacobs, 'Contribution' in 'The accession of the European Union/European Community to the European Convention on Human Rights', report by Mrs M-L Bemelmans-Videc, Parliamentary Assembly doc. 11533 (2008) 19. See also M Fischbach, 'Le Conseil de l'Europe et la Charte', *Revue universelle des droits de l'homme* 2000, 7 at 8.

¹⁰⁸Final report of Working Group II, CONV 352/02, WGII16, Brussels, 22.10.2002, at 12.

¹⁰⁹EU Working Group II report, *ibid*.

¹¹⁰Opinion 2/13 (Full Court) (18 December 2014); this Opinion should be read together with the comprehensive 'View' of Advocate General J Kokott (13 June 2014).

¹¹¹The text of the draft accession agreement, its explanatory report and related instruments had been agreed at negotiators' level on 13 April 2013. On the background and initial stages of the negotiations see J Polakiewicz, 'The European Union's Accession to the European Convention on Human Rights' in W Meng, G Ress and T Stein, *Europäische Integration und Globalisierung* (Nomos 2011) 375–91.

¹¹²See comprehensively on how to overcome the objections J Polakiewicz, 'Accession to the European Convention on Human Rights – An Insider's View Addressing One by One the CJEU's Objections in Opinion 2/13' (2016) 36 *Human Rights Law Journal* 10–22; see also my presentation to the FREMP/COHOM meeting held in Brussels on 9 March 2019 at <<https://www.coe.int/en/web/dlapil/-/eu-accession-to-the-echr-how-to-square-the-circle->> accessed 9 March 2021.

¹¹³P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky' (2015) 38 *Fordham International Law Journal* 955, at 991.

¹¹⁴*ibid*, 991–2.

whatever concrete proposals the European Commission present, they will be the subject of negotiations in Strasbourg. As a former director of the Council of the EU's legal service, Jean-Jacques Jacqu , remarked so pertinently in an early comment to Opinion 2/13, it 'needs two to tango'.¹¹⁵ It was therefore reassuring that the letter by former Commission President Jean-Claude Juncker and Vice-President Frans Timmermans requesting the resumption of negotiations emphasises that the EU will limit its request for amendments to the draft accession agreement to what is strictly necessary to address the objections raised by the CJEU.¹¹⁶

6. Concluding remarks: towards a more structured relationship?

While the Council of Europe's legal framework has generally proven to be sufficiently flexible to identify ways and means to allow effective EU participation even without the EU being a full member of the organisation, a series of legal issues have regularly come up. There appear to be two main options for the future: either to continue to accommodate the requirements of EU law in a pragmatic way within the existing legal framework or to change this framework with a view to better reflecting the reality of EU competences post Lisbon.

It would serve both legal certainty and transparency to agree on a series of basic principles of horizontal application such as voting rights, speaking rights or financial arrangements. Similar rules exist in the United Nations.¹¹⁷ The Parliamentary Assembly recommended their adoption also for the Council of Europe in Recommendation 2114 (2017).¹¹⁸ The Committee of Ministers did not address these recommendations substantially when it adopted a joint reply to this and another recommendation related to the idea of a Council of Europe summit.¹¹⁹ At that time, the Committee of Ministers was preoccupied by the institutional crisis sparked off by the default in payment by the Russian Federation of its budgetary contributions. Parliamentary Assembly Recommendation 2178 (2020) based on the report by Mr Roland Rino B chel regarding the Macolin Convention could provide an opportunity to revisit these issues.¹²⁰

If new rules are to be adopted, they should ideally cover the whole treaty-making process, from the first drafting committee to adoption of the treaty by the Committee of Ministers. A jointly agreed framework could provide for a series of general principles of horizontal application (such as voting rights, speaking rights, reporting and financial arrangements). In any case, it will be important to preserve the Council of Europe's long-standing practice of transparency, inclusiveness and participation, on an equal footing, of all Member States in treaty-making procedures as well as the invaluable contribution of national experts. Legal issues raised by the EU's participation in monitoring and follow-up mechanisms should be considered on a case-by-case basis, taking into account the specificities of each follow-up or monitoring mechanism. In parallel, the EU may be asked to clarify the scope of application of Article 218(9) TFEU in respect of legal acts adopted by such mechanisms. If the above-mentioned idea of a jointly agreed general framework were to be pursued, it might also be used to address this issue, possibly including timelines for Council of the EU decisions and default rules if no decisions are taken. As regards the EU's financial contribution to treaty-based follow-up or monitoring mechanisms, voluntary contributions and contributions via joint programmes are always possible. The inclusion of specific clauses on financial contributions by parties that are not Council of Europe members in future treaties should be considered on a case-by-case basis. Any such rules will have to take the EU's own budgetary and financial arrangements and rules into account.

¹¹⁵Jean-Paul Jacqu , 'Non   l'adh sion   la Convention europ enne des droits de l'homme?' (23 December 2014).

¹¹⁶Letter of 31 October 2019 from the President and the First Vice-President of the European Commission to the Secretary General of the Council of Europe.

¹¹⁷See 'Participation of the European Union in the work of the United Nations', UN Doc A/65/856 of 1 June 2011.

¹¹⁸See in particular points 10.2.5 and 10.2.6.

¹¹⁹'Defending the acquis of the Council of Europe: preserving 65 years of successful intergovernmental co-operation', joint reply adopted by the Committee of Ministers on 17 January 2018 at the 1304th meeting of the Ministers' Deputies.

¹²⁰Recommendation 2178 (2020) 'Time to act: Europe's political response to fighting the manipulation of sports competitions' (12 October 2020); B chel report (above note 51).

As Rick Lawson put it so aptly, ‘the EU and the Council of Europe are natural partners. They got engaged at a very early stage of their lives, but never got married’.¹²¹ The strategic partnership between the EU and the Council of Europe would be undermined if the latter were no longer able to effectively play its role. If it is true that the Council of Europe’s ‘comparative advantage is in its expertise . . . its legal and moral authority and its unique combination of roles’,¹²² it is in the common interest of all Member States, the EU and the Council of Europe to maintain and strengthen this expertise through even more effective cooperation and accession by the EU to the ECHR.

Declarations and conflict of interests

This article was written in a strictly personal capacity and does not necessarily reflect the official position of the Council of Europe. The author declares no conflicts of interest with this work.

¹²¹Lawson (above note 6) 527.

¹²²European Commission, ‘Strategic evaluation of the EU cooperation with the Council of Europe (2000–2010)’ (2012).