SYEUL
SLOVAK YEARBOOK OF EUROPEAN UNION LAW

PUBLISHED BY
COMENIUS UNIVERSITY BRATISLAVA
FACULTY OF LAW

ISSN (online): 2729-9988

EU ACCESSION TO THE CONVENTION AND THE PROTECTION OF AUTONOMY: A CHALLANGE FOR EU PRIMARY LAW

Mgr. Vanda Peťková
PhD Candidate
Comenius University in Bratislava
Faculty of Law
Institute of European Law
Šafárikovo nám. č. 6,
810 00 Bratislava
Slovakia.
vanda.petkova@flaw.uniba.sk
ORCID: 0009-0005-1115-6195

This article was originally presented, under the same title, at the conference "The Milestones of Law in Central Europe 2026" held on 27 – 28 March 2026 in the Purpose-built facility of the National Council of the Slovak Republic Častá – Papiernička.

Abstract: *The accession of the European Union to the European Convention on Human Rights appears more realistic than ever in light of the Revised Draft Accession Agreement of 2023. By taking this step, the European Union moves closer to fulfilling its obligation under Article 6 (2) of the Treaty on European Union, thereby assuming direct responsibility for the protection of human rights. However, it remains uncertain how the Union would respond in situations where judgments of the European Court of Human Rights require amendments to EU primary law, or where provisions of EU primary law are found incompatible with the European Convention on Human Rights. Such situations raise the question of whether, and to what extent, the autonomy of the EU legal order could be affected. This article therefore aims to examine the potential of conflicts between EU primary law and the European Convention on Human Rights following accession, the mechanisms available for resolving such conflicts, and whether their resolution could undermine the autonomy of the EU legal order as defined by the Court of Justice.*

Key words: *autonomy of EU law, primary law, conflict, accession, human rights*

Suggested citation:
Vanda Peťková, 'EU Accession to the Convention and the Protection of Autonomy: A Challenge for EU Primary Law' (2026) 4 *Slovak Yearbook of European Union Law* 9.
https://doi.org/10.46282/syeul.2026.4.1471

Submitted: *10 May 2026*
Accepted: *23 July 2026*
Published: *30 August 2026*

1. INTRODUCTION

The protection of human rights was not a primary concern of the European Communities at the time of their establishment. Over time, however, key actors increasingly recognized the necessity of safeguarding fundamental rights, even within a framework whose initial objective was primarily economic integration. The European Union's (EU, the Union) path toward effective human rights protection began in the early 1970s, through the jurisprudence of the Court of Justice of the European Union (the Court of Justice) with the general principles of EU law.[1] Subsequently, the EU attempted to accede to the European Convention on Human Rights (the Convention), but these efforts

[1] Case C-11/70, *Internationale Handelsgesellschaft*, EU:C:1970:114; Case C-29/69, *Stauder***,** EU:C:1969:57; Bruno De Witte, 'The role of the ECHR in the evolution of EU law' (2025) 32 (2) Maastricht Journal of European and Comparative Law. 112. https://doi.org/10.1177/1023263X251341678.

were unsuccessful due to a lack of legal competence.[2] Determined to provide its citizens with adequate protection of their rights and freedoms, the Union amended its founding treaties, thereby establishing a legal obligation to accede to the Convention.[3] Although significant challenges have persisted for many years, the Revised Draft Accession Agreement of 2023 (RDAA),[4] which addresses nearly all issues raised in Opinion 2/13,[5] brings the prospect of EU accession to the Convention closer to realization.

Nevertheless, the present article demonstrates that, for the EU to establish itself as a credible and reliable protector of human rights, certain compromises may be unavoidable. This article does not seek to revisit the extensive scholarly debate surrounding the compatibility of the European Union's accession to the Convention with the essential characteristics of EU law, as articulated by the Court of Justice.[6] Rather, its focus lies on a more fundamental constitutional question: **how the principle of autonomy of EU law governs the relationship between EU primary law and the Convention, and what legal consequences follow where EU primary law is not in accordance with Convention standards**.

The primary objective of the present article is to draw attention to potential conflicts between EU primary law, its interpretation by the Court of Justice, and the Convention, as interpreted by the case law of the European Court of Human Rights (ECtHR), and to examine the ways and mechanisms available for their resolution. Furthermore, the article seeks to assess whether such a resolution could have implications for the autonomy of the EU legal order.

In this regard, the convergence between EU primary law and the Convention is of fundamental importance, as any structural incompatibility would undermine the very rationale of the Union's accession. The relevance of examining this relationship is further reinforced by the constitutional rigidity of EU primary law. As the highest source of EU law, primary law correction, and its amendment require politically demanding and procedurally complex treaty revision. If provisions of EU primary law diverge from Convention standards, as interpreted by the ECtHR, the Union's capacity to remedy such inconsistencies is therefore structurally constrained. The importance of examining these issues is further heightened in light of the European Union's prospective accession to the Convention, as addressing potential conflicts *ex ante* is essential to ensuring predictability and legal certainty. Identifying structural tensions prior to accession may prevent difficulties arising thereafter, the resolution of which would likely require lengthy and politically complex processes. Particular attention must be paid to the position of EU primary law, which is not subject to internal constitutional review within the EU legal

[2] Opinion 2/94 Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:1996:14.

[3] Following the entry into force of the Treaty of Lisbon, the European Union became legally obliged to accede to the European Convention on Human Rights. Article 6 (2) TEU provides that: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."

[4] Council of Europe, CDDH Ad Hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human Rights: Report to the CDDH, 46+1(2023)35FINAL. Available at: https://rm.coe.int/report-to-the-cddh/1680aa9816.

[5] Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:2014:2454.

[6] E.g., Inga Daukšienè, Simas Grigonis, 'Accession of the EU to the ECHR: Issues of the co-respondent mechanism' (2015) 1(2) *International Comparative Jurisprudence* 98. https://doi.org/10.1016/j.icj.2016.01.001; Felix Agerbeek Ronkes, 'EU Accession to the European Convention on Human Rights: A New Hope'(2024) 9 (2) *European Papers* 695. https://doi.org/10.15166/2499-8249/778; Tobias Lock, 'EU Accession to the ECHR: Implications for Judicial Review in Strasbourg' (2010) 35 *European Law Review* 777. https://ssrn.com/abstract=1736602.

order. The Court of Justice of the European Union lacks the competence to annul or set aside provisions of primary law,[7] and no effective remedy exists under EU law where such provisions infringe the rights of individuals.[8] For this reason, it has been argued in the literature that EU primary law should not fall within the supervisory jurisdiction of the ECtHR.[9] However, as persuasively argued by Tobias Lock, this position is untenable, since the European Union must be held accountable for compliance with human rights across its entire legal order, including at the level of primary law,[10] an expectation that has also been expressly articulated by Member States.[11]

To this end, the present article first sets out the relevant theoretical and doctrinal framework. It then proceeds to identify areas of potential tension between EU primary law and the Convention, including the jurisprudence of the ECtHR. Finally, it analyses the possible methods for resolving such conflicts and evaluates whether the existence of, and responses to, these tensions may undermine the autonomy of EU law.

2. OPENING THE EU LEGAL ORDER WITHOUT LOSING AUTONOMY

The mere establishment of a distinct EU legal order, separate from both national and international legal systems, does not preclude the Union from concluding international agreements.[12] On the contrary, as a subject of international law with legal personality,[13] the EU is fully competent to negotiate, sign, and ratify such agreements.[14] Upon their conclusion, these agreements become an integral part of the EU legal order[15] and acquire binding effect on the EU's institutions as well as on all Member States,[16] enjoying a status equivalent to that of internal EU norms. While such agreements may take precedence over secondary legislation, they do not supersede the constitutional foundations of the EU legal order, including the general principles of EU law and the provisions of primary law, which continue to retain their primacy.[17], [18]

One of the conditions for submitting EU to a judicial system established by an international agreement, established already in 1991 by the Court of Justice, was that

---

7 Article 263 TFEU; Paul Gragl, 'Strasbourg's External Review after the EU's Accession to the European Convention on Human Rights: A Subordination of the Luxembourg Court?' (2012) 17 *Tilburg Law Review* 52 https/doi.org./10.1163/221125912X638044.

8 Lock (n 6) 790.

9 Apparently, this is the French government's aim, cf. French Senate, Communication de M. Robert Badinter sur le mandat de négociation (E 5248) May 25, 2010, at: http://www.senat.fr/europe/r25052010.html#toc1 [Accessed October 2, 2010]; ECtHR Tulkens J. warned of an exclusion of primary law at a hearing before the European Parliament's Committee on Constitutional Affairs, March 18, 2010 at http://www.europarl.europa.eu/activities/committees/hearingsCom.do?language=EN&body=AFCO [Accessed October 2, 2010].

10 Lock (n 6) 783.

11 Opinion 2/94 (n 2)

12 Opinion 2/94 (n 2). para 6.

13 Article 47 TEU.

14 Article 218 TFEU.

15 Case C-181/73, *Haegemann v Belgian State*, EU:C:1974:41.

16 Article 216 (2) TFEU.

17 Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* EU:C:2008:46, paras 282-286; De Witte B, "European Union Law: How Autonomous is its Legal Order?"(2010) 65 *Zeitschrift für Öffentliches Recht 153*.

18 A noteworthy perspective is offered by Timmermans, who argues that pursuant to Article 52(3) of the Charter, the Convention has been incorporated into EU law, including its primary law, thereby granting Convention rights a status higher than that typically afforded to treaties concluded by the Union under Article 216 (2) TFEU. Timmermans CH, 'Will the Accession of the EU to the European Convention on Human Rights fundamentally change the relationship between the Luxemburg and the Strasbourg courts?' (2014) *EUI Distinguished Lectures*. (Speech delivered at the 'Judicial Cooperation in Private Law' of 15 and 16 April 2013).

DOI: 10.46282/syeul.2026.4.1471

accession cannot call into question the autonomy of the *acquis communautaire* emphasizing in particular the necessity to respect the independence of the Community's judicial bodies and the exclusivity of the Court of Justice in interpreting Community law.[19] The Court reiterated this in regard to the EU's accession to the Convention, also in its Opinion 2/13, after the EU finally acquired legal competence to accede to the Convention, and negotiations began.[20]

Concerns regarding the preservation of the autonomy of the EU legal order after the EU's accession to the Convention were already raised in 1994 by several Member States[21] and subsequently echoed by the Court of Justice in Opinion 2/13. In contrast, other Member States supported the EU's accession to the Convention from the outset,[22] arguing that such accession would not compromise the autonomy of the EU legal order. They emphasized, in particular, that absolute autonomy is neither necessary nor desirable and that external scrutiny does not preclude the consideration of the specific characteristics of Community law. Ultimately, the primary objective of the Union's accession to the Convention is, after all, to subject the EU and its actions to external scrutiny and to ensure that it genuinely respects human rights in the exercise of its powers at all times.[23]

The concept of autonomy of EU law was first introduced in the landmark judgment of the Court of Justice in Van Gend en Loos[24] and initially signified that the EU legal order exists independently of the national legal orders of its Member States (internal autonomy).[25] Over time, this principle became a shield vis-à-vis international law as well (external autonomy).[26]

Given its central role within the EU legal order, external autonomy functions, in general terms, as a safeguard designed to protect the essential characteristics of EU law, in particular the Union's institutional framework, the allocation of competences, the structure of its judicial system, and the uniform interpretation and application of EU norms, as well as the substantive values and principles underpinning the Union.[27]

This jurisprudential development in this context has not remained uncontested in academic discourse. As several scholars have observed, the Court's jurisprudence has, over time, effectively subsumed almost the entirety of primary EU law under the notion of the "essential characteristics of EU law." [28] This expansive understanding of external autonomy has attracted significant scholarly criticism.[29] In particular, commentators have argued that the Court's approach unduly constrains the Union's ability to open its legal order to the broader framework of international law.[30] Some have further suggested

[19] Opinion 1/91 Creation of the European Economic Area, EU:C:1991:490.
[20] Article 6 (2) Treaty of Lisbon.
[21] The Spanish, French, Irish and Portuguese Governments, and the Government of the United Kingdom.
[22] The Belgian, German, Danish, Greek, Italian, Austrian, and Finnish governments.
[23] Jed Odermatt, 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' (2016) *EUI Working Papers* MWP 2016/07 15. http://cadmus.eui.eu/handle/1814/41046.
[24] Case C-26/62, *Van Gend en Loos***,** EU:C:1963:1.
[25] Damjan Kukovec, 'Autonomy: The Central Idea of the Reasoning of the Court of Justice'(2023) 8 (3) *European Papers* 1408. DOI: 10.15166/2499-8249/723.
[26] Cases C-402/05 P and C-415/05 P, Kadi (n 17); Opinion 1/09 Creation of a Unified Patent Litigation System, EU:C:2011:123; Case C-284/16, Achmea, EU:C:2018:158.
[27] Koen Lenaerts, 'The autonomy of European Union Law' Bari: Cacucci Editore, 2019 *Post AISDUE*, I(1), 28 October 2018, p.6.
[28] Lenaerts (n 27) 10.
[29] Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky'(2015) 38 (4) *Fordham International Law Journal* 955. https://ir.lawnet.fordham.edu/ilj/vol38/iss4/2.
[30] Eleanor Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13'. (2015) 22(1) *Maastricht Journal of European and Comparative Law* 35. https://doi.org/10.1177/1023263x1502200103.

that this jurisprudence reflects a reluctance on the part of the Court of Justice to submit to external judicial review, notably by the European Court of Human Rights, in order to preserve the primacy of EU law.[31] In this context, Van Rossem characterises autonomy as a flexible concept whose specific contours and implications vary depending on the circumstances of the individual case.[32] From this perspective, such an approach by the Court of Justice may ultimately result in limitations on the effective protection of fundamental rights within the EU legal order. By contrast, other scholars have assessed Opinion 2/13 and the Court of Justice's approach to the EU's accession to the Convention in a more favourable light, arguing that the objections raised by the Court are well-founded and interpreting Opinion 2/13 as expressing a constitutional vision of the European Union.[33]

Although Opinion 2/13, together with observations made by several Member States as early as 1994, identified a number of concerns relating to the potential impact of accession on the autonomy of the EU legal order, the majority of these issues were addressed in the RDAA of 2023. That draft incorporates the requirements formulated by the Court of Justice in Opinion 2/13 and amends the agreement, accordingly, thereby rendering accession increasingly realistic.[34]

In the specific context of EU law and the Convention, the ECtHR has held that EU law is, in principle, presumed to comply with Convention standards and to provide an equivalent level of human rights protection.[35] This so-called Bosphorus presumption was developed in order to determine responsibility for human rights violations arising from the implementation of EU law by Member States, depending on whether they retained any discretion in the implementation process.[36] However, it remains uncertain whether this presumption will continue to operate following the Union's accession to the Convention. The debate on this issue is ongoing, while some scholars argue that the presumption may become redundant after accession,[37] Imamović goes further in questioning its continued relevance, recommending that the ECtHR should abandon this presumption entirely after the EU's accession.[38] Tzevelekos adopts an even more radical position, arguing that the ECtHR should abandon the Bosphorus presumption altogether, even prior to the Union's accession to the Convention.[39] On the other hand, there are some

---

[31] Bruno De Witte 'A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union' In M. Cremona & A. Thies (Ed.). The European Court of Justice and External Relations Law: Constitutional Challenges London: Hart Publishing. DOI: 10.5040/9781474201599.ch-003.

[32] Jan Willem Van Rossem 'The Autonomy of EU Law: More is Less?', In Ramses. A. Wessel and Steven Blockmans (eds), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (Springer, 2013) p. 18.

[33] eg Daniel Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward" (2019) 16 (1) *German Law Journal* 105. https://doi.org/10.1017/S2071832200019441; Agerbeek Ronkes (n 6).

[34] Agerbeek Ronkes (n 6) 713.

[35] Bosphorus v. Ireland, ECtHR App. No. 45036/98, 30 June 2005, § 165.

[36] Matthews v. The United Kingdom, ECtHR, App. No. 24833/94, 18 February 1999, §32; Bosphorus v. Ireland (n 36), §143-148; Michaud v France, ECtHR, App. No. 12323/11, 6 December 2012, § 113.

[37] See also Timmermans (n 18); Jasper Krommendijk, 'EU Accession to the ECHR. Completing the Complete System of EU Remedies?' In Fink, M. (ed.), Redressing Fundamental Rights Violations by the EU. The promise of the 'complete system of remedies', 2024, Cambridge University Press, pp. 177-205.

[38] Šejla Imamović, 'Post-EU Accession to the ECHR: The Argument for Why the ECtHR Should Abandon the Bosphorus Doctrine'. (2024) 39 (1) *Utrecht Journal of International and European Law* 17. https://doi.org/10.5334/ujiel.639.

[39] Vassilis Tzevelekos, 'The EU's Accession to the ECHR: The Future of the Revised Draft Accession Agreement and a Call to End the Bosphorus Doctrine' (2025) 6 *European Convention on Human Rights Law Review* 1, https://doi.org/10.1163/26663236-bja10120.

scholars who presume that the Bosphorus presumption could find its relevance even after the accession.[40]

Despite the extensive academic and institutional debate surrounding the Union's accession to the Convention, existing analyses have largely concentrated on procedural and institutional concerns. Considerably less attention has been paid to the substantive question of whether EU primary law itself, as currently formulated and interpreted, is fully compatible with the standards of the Convention, and to the constitutional implications that may arise should the ECtHR reach a contrary conclusion after accession. This gap is significant, as accession would, for the first time, expose EU primary law to external human rights scrutiny, thereby raising complex questions regarding the mechanisms available to address potential incompatibilities without undermining the essential characteristics of EU law.

By focusing on these scenarios, this article seeks to contribute a novel perspective to the accession debate by shifting the analysis from institutional safeguards alone to the substantive resilience of EU primary law in a post-accession context. The following sections, therefore, focus on aspects of EU primary law that could potentially be found incompatible with the human rights guarantees enshrined in the Convention, as well as the mechanisms and approaches available for resolving such conflicts, with particular attention to whether their application would affect the autonomy of the EU legal order.

3. ACCESSION WITHOUT COMPATIBILITY? EU PRIMARY LAW AND THE ECHR

Does EU primary law, as it currently stands, fully conform to the standards of the European Convention on Human Rights to which the Union seeks to accede? This chapter explores potential conflicts between EU primary law, as interpreted by the Court of Justice, and the Convention, as interpreted by the European Court of Human Rights, leaving the analysis of possible mechanisms for resolving such conflicts to the following chapter.

The notion of "conflict" is employed in a functional rather than a formal sense and encompasses normative, interpretative, and structural forms of incompatibility. While the accession of the EU may give rise to numerous situations in which EU primary law could be found incompatible with the Convention, the present analysis does not intend to provide an exhaustive account of all conceivable conflicts, but rather to highlight selected issues of particular relevance.

First, a potential source of conflict between EU primary law and the Convention arises in relation to the rights and freedoms enshrined in the Charter of Fundamental Rights of the EU (the Charter) that correspond to those guaranteed by the Convention. Pursuant to Article 52 (3) of the Charter, such corresponding rights are to be interpreted as having the same meaning and scope as those laid down in the Convention, as interpreted by the ECtHR.[41] However, the obligation of interpretative equivalence does not entail a corresponding expansion of the Union's competences.[42] Furthermore, when interpreting rights and freedoms in the Charter, the Court of Justice must have regard to the particular specifics of all Union law.[43] As the Court of Justice has consistently

[40] Pieter Van Dijk, 'The Accession of the European Union/European Community to the European Convention on Human Rights' (2007) Available at: http://www.statewatch.org/news/ 2007/sep/van-dijk-eu-echr.pdf.
[41] For more detailed analysis of Article 52 (3) of the Charter see also Brittain S, 'The Relationship Between the EU Charter of Fundamental Rights and the European Convention on Human Rights: an Originalist Analysis' (2015) 11 (3) *European Constitutional Law Review* 482. https://doi.org/:10.1017/S1574019615000255.
[42] Article 51 (2) of the Charter.
[43] Brittain (n 41) 511.

emphasised, the autonomy of the EU legal order necessitates that the interpretation of fundamental rights be ensured within the framework of the structure and objectives of the Union.[44] Thereby, the Union may be unable to give full effect to the Convention standard, notwithstanding the formal correspondence between the relevant Charter provision and its Convention counterpart.

After the accession, a situation may arise in which the ECtHR interprets a Convention right or freedom dynamically, while the Court of Justice either adopts a more restrictive interpretation of the corresponding Charter right or just accords precedence to specific features of Union law over the effective and adequate protection of fundamental rights, thus undermining human rights protection. Although Article 52 (3) of the Charter seeks to address this particular concern, articulated already by many, of deviations in interpretations of rights and freedoms between the Charter and the Convention, the jurisprudence of the ECtHR could not be strictly binding in all circumstances.[45]

The problem is further compounded by the principle of mutual trust as articulated in the Court of Justice's judgment in *Melloni*.[46] Where EU law harmonises a field exhaustively, Member States are precluded from applying higher standards of fundamental rights protection than those provided by the Charter, even where such higher protection is required under national constitutional law or the Convention.[47] As a consequence, Member States may be prevented from addressing deficiencies in the level of protection afforded by EU law, thereby exposing themselves to potential liability before the ECtHR. Conversely, should a Member State seek to comply with Convention standards in derogation from the requirements of EU law, it risks breaching the principle of mutual trust and may consequently be subject to infringement proceedings under EU law.

Instances can already be identified in which the Court of Justice has adopted positions that arguably diverge from the case law of the ECtHR, resulting in lower human rights protection, rendering such concerns well-founded. Such divergences have emerged, inter alia, in the assessment of fundamental-rights risks in the context of the European Arrest Warrant,[48] asylum procedures, [49] and administrative sanctions in competition. By way of illustration, in the case of Byankov,[50] the Court of Justice adopted an approach that departed from the decision of the ECtHR, where it set aside a national provision that limited the freedom of movement of Union citizens with unsecured debt in excess of a specified statutory amount, thereby prioritising free movement considerations over competing interests of creditors protected under the Convention.[51] Similarly, as noted also by Kochenov,[52] in *Mohamad M'Bodj v Belgium*[53], the Court of Justice significantly limited the margin of discretion available to the Member States by

[44] Opinion 2/13 (n 5), para. 170.

[45] For analysis of circumstances when the Court of Justice may depart from the jurisprudence of the ECtHR see also Brittain (n 42).

[46] Case C-399/11, *Melloni*, EU:C:2013:107.

[47] Melloni (n 46). paras. 60-64; Franssen V, "Melloni as a Wake-up Call - Setting Limits to Higher National Standards of Fundamental Rights' Protection." (European Law Blog, 2014) Available at: https://doi.org/10.21428/9885764c.ca921b04.

[48] Johan Callewaert, 'The European arrest warrant under the European Convention on Human Rights: A matter of Cooperation, Trust, Complementarity, Autonomy and Responsibility'. (2021) Z*EuS-Sonderband 105*.

[49] See also Rick Lawson, Atlas Shrugged: An Analysis of the ECtHR Case Law Involving Issues of EU Law Since Opinion 2/13' (2024) 9 (2) *European Papers* 647, https:/doi.org/10.15166/2499-8249/775.

[50] Case C-249/11, *Byankov v Glaven sekretar na Ministerstvo na vatreshnite raboti*, EU:C:2012:608.

[51] Brittain (n 41) p.508.

[52] Dimitri Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) *Yearbook of European Law* 21, https://doi.org/10.1093/yel/yev009.

[53] Case C-542/13 *Mohamad M'Bodj v Belgium*, ECLI:EU:C:2014:2452, para. 44.

requiring the removal of seriously ill third-country nationals to states where they would face a foreseeable risk of premature death due to the absence of adequate healthcare.

This is connected to another substantial issue. The Convention contains rights and freedoms that require the Contracting Parties not only to abstain from taking any action, thus not interfere with the right or freedom of an individual but often also positive obligations, hence, to also take active measures to ensure and secure rights and freedoms of individuals. On the other hand, EU law is structured around the principle of conferral, which means that the Union can act only within the competences conferred on it by the Treaties.[54] Here, the question arises of what would happen if the ECtHR were to find the EU responsible for not taking any positive measures to ensure the rights or freedoms of individuals, but the EU would lack the competences to comply with the judgment? This would create tension between the EU's obligations under the Convention and its internal legal limits. Hence, this scenario highlights a fundamental legal tension that accession does not, in itself, resolve: **the EU can be held internationally responsible for Convention violations, yet it does not have the competences to abide by them,** raising the further question of where ultimate responsibility lies.

A particularly illustrative example of a potential conflict between EU primary law and the Convention that combines structural, interpretative, and normative issues concerns the judicial review of Commission decisions authorising inspections of business premises under EU competition law. Under EU competition law (Regulation 1/2003[55]), the Commission may adopt a decision authorising an inspection, which may involve extensive investigative powers, including entry into business premises, examination and copying of documents, and questioning of staff.[56] Such inspections constitute serious interferences with rights protected under the Convention, notably the right to respect for private life, home, and correspondence under Article 8 of the Convention, as well as the right to an effective remedy under Article 13 of the Convention.

In its judgment *Delta Pekárny a.s. v. Czech Republic,*[57] the ECtHR clarified that ex ante judicial authorisation of inspections is not required, provided that effective ex post judicial review is available.[58] However, the ECtHR found a violation of Article 8 of the Convention where the legality of an inspection could be reviewed only within administrative proceedings or in proceedings concerning the imposition of a fine, concluding that such mechanisms did not amount to effective judicial control of the interference as such.[59]

The parallels with the EU legal framework are evident. As in *Delta Pekárny a.s. v. Czech Republic*, the only judicial avenue available to undertakings is an action for annulment under Article 263 TFEU directed against a subsequent decision imposing a fine.[60] As a result, the lawfulness of the inspection is reviewed only incidentally and retrospectively, and only if enforcement proceedings ultimately culminate in the imposition of a sanction. Although the Court of Justice has asserted that it provides effective judicial protection by reviewing the proportionality and conduct of inspections

[54] Article 5 TEU.
[55] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (*OJ L 1, s. 1 – 25).*
[56] Article 17-22 Regulation 1/2003.
[57] *Delta Pekárny a.s. v. Czech Republic,* ECtHR, *App. No. 97/11,* 2 October 2014.
[58] *Delta Pekárny* (n 57) §87.
[59] *Delta Pekárny* (n 57) §89-94.
[60] Case T-289/11, *Deutsche Bahn and Others v Commission*, EU:T:2013:404; De Peyer B, 'The Limits to the European Commission's Powers of Inspection' Competition Law Cases Under Article 8 of the ECHR (Evropeiski praven pregled 2020) Available at: https://evropeiskipravenpregled.eu/25-2/?utm_source=chatgpt.com#_ftn1.

in the context of annulment actions against fines,[61] such review remains contingent, delayed, and ancillary to the primary subject matter of the proceedings. Nevertheless, EU primary law does not provide for an autonomous judicial remedy directly challenging either the inspection decision itself or the manner in which the inspection was conducted. This raises doubts as to whether the EU system satisfies the requirement of effective ex post judicial review capable of addressing the lawfulness and necessity of the interference itself.[62] This structural limitation is not merely a matter of secondary legislation or administrative practice, but flows from the absence, in EU primary law, of a procedural mechanism allowing for autonomous judicial review of inspection measures. Although some Member States provide for such remedies at the national level, the Treaties do not contain a corresponding form of action enabling direct scrutiny of the Commission's conduct in this context.[63]

These examples thus illustrate how certain features of EU primary law, long regarded as compatible with fundamental rights protection within the Union, may be called into question following accession, and how ensuring compliance with the Convention may generate issues also for the EU primary law.

3.1 Resolving Conflicts Between EU Primary Law and the ECHR: Possibilities and Constraints

The following paragraphs address possible mechanisms for resolving potential conflicts that may arise following the European Union's accession to the Convention. Firstly, we will highlight the key limitations, constraints, and critical considerations associated with these conflicts that must be borne in mind, and consequently, proceed to propose potential solutions, while remaining focused on the specific issues identified in the preceding chapter.

The issue of divergent interpretation between the Charter and the Convention was already raised during the drafting of the Charter.[64] While some actors advocated for strict alignment with the Convention,[65] others emphasised the autonomy of the EU legal order.[66] At that stage, accession of the European Union to the Convention appeared to be the sole viable solution.[67] The question nevertheless remains whether accession will in fact resolve divergences in the interpretation of corresponding rights and freedoms, considering that both courts operate under different circumstances.[68] EU law has its special characteristics, which will always have to be regarded when interpreting any EU legal norm.

Firstly, even if RDAA provides that the application of Article 53 of the Convention shall not undermine the principle of mutual trust between the Member States,[69] the Draft Explanatory Report to the RDAA nevertheless clarifies that the

[61] Case C-583/13 P, *Deutsche Bahn and Others v Commission*, EU:C:2015:404, paras. 34-35.
[62] Nicholas Khan & Kerse Christopher Stephen, 'Kerse & Khan on EU antitrust procedure.' (2012) 6th ed. London: Sweet & Maxwell/Thomson Reuters. pp.159-160.
[63] More on compatibility of Commission's inspections of business premises see De Peyer (n 60).
[64] Brittain (n 41) p.500.
[65] Contribution of Lord GOLDSMITH, Personal Representative of the Government of the United Kingdom' CHARTE 4146/00, CONTRIB 36, 6 March 2000, p. 3-4.
[66] 'Amendments submitted by the members of the Convention regarding social rights and the horizontal clauses,' Brussels, 16 June 2000, CHARTE 4372/00, CONVENT 39, p. 431.
[67] The Council of Europe's contribution to a European Union Charter of Fundamental Rights' CHARTE 4105/00 BODY 1, 17 December 1999, p. 26-27.
[68] Lenaerts (n 27) 3.
[69] Article 1 (9) RDAA (n 4).

DOI: 10.46282/syeul.2026.4.1471

preservation of mutual trust is contingent upon the level of human rights protection afforded within the EU not falling below the minimum standard guaranteed by the Convention as interpreted by the case law of the ECtHR.[70] Moreover, the ECtHR also held that the principle of mutual trust cannot be applied in a manner that would lead to automatic and mechanical restriction of effective human rights protection[71], and Member States remain obliged, notwithstanding the principles of mutual trust and mutual recognition, to ensure compliance with Convention rights where serious and substantiated allegations of a manifest deficiency in human rights protection are raised in a particular case.[72]

In this context, where Member States will be acting in accordance with the principle of mutual trust, as interpreted in Melloni, they will be required to apply the Charter exclusively as interpreted by the Court of Justice. In the event of divergences in interpretation between the Charter and the Convention, the corresponding rights and freedoms under the Convention cannot be relied upon to provide a higher level of protection. This may give rise to situations in which Member States, constrained by EU law, are effectively precluded from complying with Convention standards as interpreted by the ECtHR and are instead required to adhere to the level of protection afforded by the Charter and EU law. Such an outcome would not only limit the practical effect of the Convention within the EU legal order but could also fundamentally undermine the primary objective of accession, namely, to enhance the protection of human rights throughout the EU. Moreover, as was already articulated, should a Member State choose to comply with the ECtHR's interpretation of the corresponding rights in such circumstances, it would risk acting in breach of Union law, thereby exposing itself to infringement proceedings. The coexistence of these obligations would thus place the Member State in a legally untenable position. Furthermore, this dynamic could effectively position the EU and its Member States in a more favourable situation vis-à-vis the ECtHR, potentially requiring the acceptance of a lower standard of protection due to the constraints imposed by the principle of mutual trust. This raises the question of whether accession will, in practice, substantively strengthen the protection of human rights, or merely formalize a legal framework that continues to prioritise the autonomy of EU law over the effective enforcement of fundamental rights.

Another issue that is interconnected to this one concern is the positive obligations stemming from the Convention and not enough competences within the EU to fulfil them after the accession.

In light of the European Union's increasing commitment to protecting human rights, accession to the Convention appears both appropriate and desirable, as it would subject the Union and its acts to external review, thereby strengthening the overall system of human rights protection.[73] At the same time, due regard must be had to the specific characteristics of the EU legal order and its mode of operation, including the principle of conferral and the Union's limited competences and objectives. Human rights permeate all areas of law and public policy, and the exercise of public authority therefore requires particular caution so as not to interfere unjustifiably with their enjoyment, while

[70] Appendix 5, Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, para.138.
[71] Avotins v. Latvia, ECtHR, App. No. 17502/07, 23 May 2016, paras.105-112.
[72] Avotins v. Latvia (n 72) § 116; Gonçalves A, ,The ECtHR's Bosphorus Presumption and the European Union's principle of mutual trust' (2022) *JusGov Research Paper* No. 2022-05, http://dx.doi.org/10.2139/ssrn.4088810.
[73] More on benefits of the accession see Krommendijk (n 37).

simultaneously ensuring the conditions necessary for their effective protection.[74] This task is especially challenging for an entity such as the European Union, whose competences do not extend to all spheres of social and political life. What may be problematic in this context, is that Article 2 of the Protocol No. 8 states that the accession shall not affect the competences of the Union[75] and Article 1 (3) draft Accession Agreement from 2013 (DAA), same as Article 1 (3) RDAA states that no provision of the Convention or its Protocols may impose on the Union an obligation to adopt an act or take a measure that would fall outside its competences under EU law.[76] This limitation is also reflected in the very legal basis for accession, namely Article 6 (2) TEU.

Accordingly, the Court of Justice has maintained that accession must not interfere with the allocation of competences between the Union and its Member States.[77] Moreover, it has emphasized that, by virtue of their membership in the EU, Member States have agreed that their relations in areas governed by EU law shall be regulated exclusively by EU law, to the exclusion of other legal regimes.[78] However, as noted by Italy in Opinion 2/94:

All Member States, in connection with their competences, have voluntarily subjected themselves to the mechanisms of international human rights oversight. The transfer of competences from the States to the Community requires that the Community be subjected to the same international oversight in order to restore the balance originally intended by the Member States. [79]

With regard to the specific issue identified as illustrative of the potential conflicts that may arise following the European Union's accession to the Convention, namely, the arguably insufficient and ineffective ex post judicial review of inspections of business premises under EU primary law, the potential deficiency appears to be primarily procedural in nature. The core problem lies in the absence of an available and effective remedy for undertakings within EU primary law, as required by the standards established by the ECtHR. Addressing this gap would therefore necessitate the introduction of a new remedial mechanism within the framework of remedies established under the TFEU. Furthermore, the continuance of the Bosphorus presumption would be of high relevance in this case.

If the Bosphorus presumption were to continue to apply following accession, the level of human rights protection within the EU legal order would be presumed equivalent to that guaranteed by the Convention, unless a manifest deficiency is established in a particular case.[80] To date, however, the ECtHR has not articulated with sufficient precision the criteria for determining what constitutes a manifest deficiency in

---

[74] All acts of EU must be in accordance with human rights set out in the Charter. Case C-260/89, ERT, EU:C:1991:254, para. 41; Case C-112/00, *Schmidberger*, EU:C:2003:333, para. 73, Case C-402/05 P and C-415/05 P, Kadi (n 17), paras. 283 a 284.

[75] Article 2 of the Protocol No. 8 relating to Article 6 (2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms: „The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.".

[76] Opinion 2/13 (n 5) para. 53.

[77] Opinion 2/13 (n 5). paras. 230-231.

[78] Opinion 2/13 (n 5) para. 193.

[79] Opinion 2/94 (n 2).

[80] Bosphorus v. Ireland (n 35) §156.

DOI: 10.46282/syeul.2026.4.1471

the protection of individual rights and freedoms.[81] As regards the requirement of equivalence under the Bosphorus doctrine, it must be satisfied in respect of both substantive standards and procedural guarantees.[82] In his Concurring Opinion in Bosphorus, Judge Ress suggested that a manifest deficiency could be identified, inter alia, where the Court of Justice lacks jurisdiction to ensure effective judicial protection, a concern that appears particularly pertinent in the context examined here.[83] At the same time, the ECtHR has interpreted "equivalent protection" as requiring protection that is merely comparable, rather than identical,[84] and has acknowledged that the EU legal system generally provides procedural safeguards through access to national courts and the preliminary reference mechanism.[85] However, in the context at issue here, the interference is carried out directly by an EU institution, rather than by national authorities. As a result, the measure cannot be challenged before national courts but only before the Court of Justice. Yet, as discussed above, the Court of Justice's jurisdiction is limited to reviewing the legality of the decision imposing a fine through an action for annulment, while the lawfulness of the inspection itself is examined only incidentally and retrospectively. Such a form of review may fall short of the procedural standards required under the Convention.

Accordingly, if an individual were to challenge a Commission decision authorising an inspection before the ECtHR following accession, and the Bosphorus presumption remained applicable, the ECtHR would be required to assess whether this procedural framework amounts to a manifest deficiency.

Should the ECtHR conclude that the absence of effective judicial review constitutes a manifest deficiency, the Bosphorus presumption would cease to apply, thereby enabling the ECtHR to conduct a full review of EU law for compliance with the Convention. If such a review were to result in a finding of a Convention violation, the Union would be expected to take corrective action, potentially including amendments to its founding Treaties. However, such a judgment would effectively impose a positive obligation on the Union, the implementation of which would depend on whether the EU considers itself to possess the necessary competences. This assessment would have to be made in light of the Accession Agreement, which precludes the Convention from requiring the Union to adopt acts or measures falling outside its conferred competences.

By contrast, should the Bosphorus presumption be abandoned following the Union's accession to the Convention, the analytical framework would largely mirror that described in the preceding paragraph, albeit without the intermediate assessment of "manifest deficiency". In such circumstances, the ECtHR would proceed directly to a full review of EU law in order to determine whether it complies with, or undermines, the relevant Convention rights. The outcome would consequently depend on the ECtHR's substantive assessment, as well as on the manner in which the Union responds to the resulting judgment.

After highlighting the key factors that have to be taken into account, we now turn to the examination of possible ways of resolution of such conflicts ex ante or ex post.

Firstly, as to the ex ante options, one possible theoretical response to both interpretative divergences and the challenge of fulfilling positive obligations would be to extend the scope of EU competences, specifically in the field of human rights. This approach reflects the reality that the EU, as an international organization, cannot be

[81] Veronika Bílková 'Equivalent Protection' *Max Planck Encyclopedia of International Procedural Law (*2018) p.9.
[82] Bosphorus v. Ireland (n 35) §155.
[83] Bosphorus v. Ireland (n 35). Concurring Opinion of Judge Ress, §3.
[84] Bosphorus v. Ireland (n 35) §155; Bílková (n 81) 3.
[85]Bosphorus v. Ireland (n 35) § 165.

blamed for lacking the competences necessary to effectively safeguard fundamental rights, since these competences were not conferred upon it by the Member States. At the same time, the Member States themselves are unable to fill this gap, as they have relinquished the competence to act in the relevant area. The resulting deficiency, where the Union is empowered to act but neither the EU nor the Member States are equipped to protect rights and freedoms, could therefore be addressed by granting the Union the necessary human rights competences.

It may be argued that such a course of action could potentially conflict with Article 6 (2) TEU, Article 2 of Protocol No. 8, and Article 1 (3) of both Accession Agreements (2013 and 2023). These provisions stipulate that the Accession Agreement shall not affect the competences of the Union and that the Convention and its Protocols may not impose on the EU an obligation to adopt an act or take any measure that would fall outside its competences. Their primary purpose appears to be to protect the EU from external interference in the shaping of its legal order. This creates a tension between fully realising the human rights objectives of accession and respecting the established distribution of competences. However, the approach outlined above would not entail an imposed modification of the Union's competences, but rather a voluntary choice by the EU aimed at fully realising the objectives underlying its accession to the Convention as it could be done even before the EU effectively accedes to the Convention. I believe that the EU can voluntarily take steps to enhance its compliance with the Convention, but legal and treaty-based constraints limit any compulsory extension of competences.

Such an extension, however, may not be strictly necessary. Respect for human rights is already enshrined as a foundational value of the European Union, and the European Parliament has interpreted Article 2 TEU as not being constrained by the limitations set out in Article 51 (1) of the Charter.[86] This commitment binds not only the Member States but also the Union itself[87] and operates independently of the specific applicability of EU law in a given situation. It appears that the obligation to respect human rights constitutes a structural requirement that permeates the entire EU legal order, irrespective of whether a particular measure formally falls within the scope of EU competences. Of course, Article 2 TEU is not a legal basis for adopting any measure in the EU law, thus it would have to be paired with another provision in a particular area of the Treaties, considering the specifics of the particular case.

Nevertheless, this approach is not without challenges, notably in relation to procedural safeguards and the absence of a legal basis for individual access to the Court of Justice, which would likely require further amendments to the founding Treaties.

Even so, it would permit the EU to undertake certain voluntary measures that extend beyond the strict allocation of competences, should it choose to do so. Importantly, it would provide discretion as to whether the extension should apply to all areas of EU law or be limited to specific domains, thus it would also allow both the EU and the Member States to act in accordance with the principles of subsidiarity and proportionality.

Secondly, as to the ex post options, in both the first draft and the RDAA, it is stipulated that in any case before the ECtHR in which the EU is a co-respondent, the Court of Justice is to provide, where it has not already done so, an interpretation of the relevant primary or secondary EU law provisions, in accordance with the subsidiarity principles of

[86] European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), point I.
[87] European Parliament resolution of 3 July 2013 (n 87) point C.

the Convention.[88] At first glance, this provision appears to offer a solution to the issue of divergent interpretations. However, situations may still arise in which the Court of Justice, during the prior involvement procedure, renders an interpretation of a human right or freedom that differs from that of the ECtHR. Moreover, such prior involvement decisions of the Court of Justice are not binding on the ECtHR.[89]

Hence, another potential approach to addressing mainly the issue of interpretative divergence would be to institutionalize a structured dialogue between the ECtHR and the Court of Justice within the framework of the prior-involvement established in the Accession Agreement, not merely an 'involvement'. It could ensure the harmonization of interpretations of corresponding rights in areas of overlap while preserving the distinctive characteristics of the EU legal order, as it would enable both Courts to find the most appropriate, effective, and coherent interpretation of specific human rights standards.

In regard to the positive obligations issue, a similar approach could be envisaged. Given that Member States may already participate as co-respondents in proceedings concerning EU primary law, [90] a coordinated dialogue between the Union and its Member States could be pursued in cases before the ECtHR where effective protection of a particular right or the full enjoyment of an individual freedom would require additional measures. Such dialogue would be both appropriate and consistent with the objectives of accession and the principle of solidarity, allowing the Union and its Member States to jointly assess their willingness to undertake any necessary treaty amendments. This approach would avoid relying solely on provisions of the Accession Agreement that preclude the adoption of acts or measures beyond the Union's competences, even where such limitations might hinder the effective protection of human rights. By fostering cooperation, this method would prioritize the actual protection of rights and freedoms, rather than permitting potential gaps in EU competences to justify inaction.

Finally, given the uncertainty surrounding the continued relevance of the Bosphorus presumption in the context of these issues, we align with the view advanced in the literature that, should the presumption be retained, the ECtHR ought to articulate clear and transparent criteria for identifying the circumstances in which a deficiency in equivalent protection arises, in order to enhance legal certainty. [91]

Based on the foregoing considerations, it appears that these issues cannot be fully eliminated, and a cautious approach is warranted. This is due, not only to the Union's limited competences to ensure that the rights enshrined in the Charter correspond in all respects to those guaranteed by the Convention, but also to the necessity of preserving the specific characteristics and structural requirements of EU law. Accordingly, a more appropriate approach would be to undertake a careful and systematic examination of those areas in which the EU may be unable to ensure the full protection of human rights as interpreted by the ECtHR or where it may need to adopt a differentiated approach to the interpretation of certain rights or freedoms to reconcile them with its own objectives. Based on such an analysis, the most suitable measures can then be determined to address the resulting gaps.

[88] Article 3 (6) DAA, Article 3 (7) RDAA (n 4).
[89] Article 3 (7) RDAA (n 4).
[90] Article 3 (3) RDAA (n 4).
[91] Spaventa argues that the Bosphorus presumption is sufficiently adaptable to allow effective human rights protection in cases involving the non-discretionary implementation of EU law by Member States, provided that the ECtHR adopts a broader understanding of what amounts to a "manifest breach" of the Convention. Spaventa (n 30).

3.2. Autonomy Revisited: Would Conflict Resolution Undermine the EU Legal Order?

Having delineated potential conflicts between EU primary law and the Convention and outlined possible avenues for their resolution, attention now turns to a consideration that could potentially undermine all of the foregoing proposals. This chapter, therefore, examines whether the identified mechanisms for addressing conflicts between EU primary law and the Convention, together with their inherent limitations, may pose a risk to the preservation of the autonomy of the EU legal order, as interpreted by the Court of Justice. More specifically, the analysis assesses whether these proposals could affect the allocation of competences between EU institutions, the distribution of competences between the Union and the Member States, and the exclusive interpretative authority of the Court of Justice over EU law.

Based on Opinion 2/13 of the Court of Justice and the relevant scholarly literature, the Court of Justice's approach may appear primarily focused on safeguarding its institutional prerogatives rather than the protection of human rights.[92] Eleanor Sharpston and Daniel Sarmiento observe that, in balancing individual rights against the principle of primacy, the Court of Justice in Opinion 2/13 clearly favoured the latter.[93] Peers has also characterised the Court of Justice's Opinion as "a clear and present danger to human rights protection".[94] Conversely, some scholars defend this approach, interpreting it as an effort to protect the constitutional structure and integrity of the European Union.[95] Moreover, Member States are divided.[96] We align with those scholars who argue that the Court of Justice's approach places institutional considerations above the effective protection of individual human rights within the EU. Moreover, we submit that such an approach is unnecessary, given that it is possible to preserve the autonomy of the EU legal order while simultaneously ensuring the highest attainable level of human rights protection within the Union.

First, one of the proposals advanced in the preceding chapter concerned the possibility of expanding the Union's competences specifically in the field of human rights, for example, by enabling the EU to adopt acts or measures necessary to ensure effective human rights protection across all, or selected, areas of EU law. Such an extension could, at least in principle, affect the allocation of competences between the Union and the Member States. However, given that any decision to confer additional competences would necessarily be voluntary and taken jointly by the EU and its Member States, it would not result from external imposition by an international organisation or judicial body. Consequently, such a development would not undermine the existing allocation of competences nor interfere with the autonomy of the EU legal order, as the decision to amend the Treaties would remain entirely within the Union's hands. Moreover, should the Member States choose to pursue such an extension, they would retain the ability to take full account of the specific characteristics of EU law, ensuring that other elements safeguarded by the principle of autonomy are likewise preserved.

---

[92] Sionaidh Douglas-Scott '*Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice*' (*VerfBlog,* 2014) [accessed 20 March 2026] https://doi.org/10.17176/20181005-151351-0.
[93] Eleanor Sharpston and Daniel Sarmiento, 'European citizenship and its new union: Time to move on?', in Dimitry Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights,* Cambridge University Press, 2017.
[94] Steve Peers, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human right protection' (EU Law Analysis, 2014) [accessed 20 March 2026].
[95] See n 36.
[96] See n 11 and 12. Opinion 2/94 (n 2).

In Opinion 2/94, the Court of Justice already characterised the accession of the EU to the Convention as being of constitutional significance.[97] By subsequently transforming accession into a legal obligation and by engaging in negotiations aimed at ensuring a balanced and effective accession framework, the EU legislature appears to have reaffirmed the constitutional importance of this process, both for the Union and for the protection of individual rights. **In this sense, it may be argued that a more proactive role of the Union in safeguarding human rights is not only permissible but** also appears both expected and desirable within the constitutional framework of the EU legal order.

Secondly, a structured dialogue between the Court of Justice and the ECtHR would serve to strengthen the mechanism of prior-involvement of the Court of Justice in proceedings before the ECtHR by allowing the European Union to inform the ECtHR of the particular interests and structural characteristics of EU law that should be taken into account when interpreting the relevant human rights provisions. Such a framework would facilitate an exchange between the Luxembourg and Strasbourg courts on how to ensure the effective protection of individual rights while simultaneously respecting the distinctive features of the EU legal order. Agerbeek interprets the Opinion 2/13 as indicating that „the Court of Justice is essentially asking the European Court of Human Rights to recognise what it is continually asking national courts to accept: that in the field of EU law, fundamental rights adjudication requires an EU-wide view of the relevant polity and of the competing social goods."[98] Moreover, as highlighted by Brittain, certain aspects of the Court of Justice's approach to fundamental rights interpretation call for differentiation.[99] By providing a structured channel for dialogue, this mechanism would enhance the coherence and consistency of human rights interpretations across both the Charter and the Convention. Importantly, such dialogue would not entail the ECtHR interpreting EU law, rather, it would enable the Strasbourg Court to gain a more nuanced understanding of the specific features of EU law, allowing it to adjust its reasoning accordingly, while a reciprocal benefit would accrue to the Court of Justice. In this sense, this dialogue would facilitate compromise between adequate human rights protection and EU law specifics. Consequently, this approach could effectively address the CJEU's concerns regarding autonomous interpretation of EU law particularly with respect to Charter rights expressed in Opinion 2/13, without jeopardising the autonomy of the EU legal order.

Lastly, the establishment of a structured dialogue between the European Union and its Member States following judgments of the ECtHR would serve as an important mechanism for determining the most appropriate approach to ensuring the compatibility of EU law and practice with the Union's human rights obligations. Such a dialogue would not undermine the autonomy of the EU legal order. On the contrary, it could contribute to strengthening the protection of fundamental rights within the EU legal framework while simultaneously respecting the roles and perspectives of the Member States. As was already apparent in the debates surrounding the protection of fundamental rights within the Union in the 1990s, Member States have historically differed in their views on the desirable level of human rights protection within the EU legal order. While some have advocated for a higher level of protection, others have considered the existing framework sufficient.[100] In this context, a dialogue-based mechanism would allow these differing positions to be taken into account and could facilitate a coordinated response to the ECtHR's judgments. Importantly, any resulting measures would depend on the

[97] Opinion 2/94 (n 2) para. 6.
[98] Agerbeek Ronkes (n 6) 706.
[99] Brittain (n 41).
[100] Brittain (n 41). Opinion 2/94 (n 2).

willingness of the Member States to harmonise their approaches and adopt common solutions aimed at enhancing the protection of fundamental rights for individuals within the Union, thereby preserving the autonomy of EU law while promoting its development. Thus, the autonomy of the EU legal order would remain unaffected, as the Union would retain discretion in determining the most appropriate means of fulfilling its Convention obligations, taking into account its competences, institutional framework, and the willingness of the Member States to support further development of human rights protection within the EU legal system.

It appears that the preservation of the autonomy of the EU legal order and effective external human rights scrutiny are not inherently incompatible objectives. The mechanisms examined in this chapter illustrate that potential conflicts between EU law and the Convention can be managed internally, without undermining the allocation of competences or the essential characteristics of EU law. Crucially, these mechanisms preserve the Union's discretion in shaping its response to Convention obligations and ensure that any development occurs within the parameters of subsidiarity, proportionality, and institutional balance, and simultaneously provide adequate protection of human rights. Accordingly, the chapter concludes that the autonomy of the EU legal order does not have to constitute an obstacle to effective human rights protection within the EU.

4. CONCLUSION

This article has examined the prospective accession of the European Union to the Convention through the prism of EU primary law and the principle of autonomy of the EU legal order. Moving beyond the predominantly institutional and procedural focus that has characterised much of the existing scholarship, the analysis has demonstrated that accession raises profound substantive constitutional questions, particularly where EU primary law, as interpreted by the Court of Justice, may fall short of Convention standards as interpreted by the ECtHR.

The European Union's accession to the Convention constitutes a significant symbolic and structural advancement in the promotion and protection of human rights and fundamental freedoms. However, mere accession is insufficient to guarantee effective compliance. This analysis demonstrates that EU primary law, in its current form, is not without vulnerabilities.

The analysis has shown that potential conflicts between EU primary law and the Convention are neither hypothetical nor marginal. Divergences in the interpretation of corresponding rights under the Charter and the Convention, the constraints imposed by the principle of mutual trust, the limited scope of EU competences in fulfilling positive obligations, and structural deficiencies in judicial protection illustrate that accession will expose areas of vulnerability within the EU's constitutional framework. These tensions are further heightened by the constitutional rigidity of EU primary law and the absence of internal mechanisms capable of remedying incompatibilities at that level.

Therefore, it is essential for the European Union to anticipate and address potential conflicts between its primary law and the Convention prior to accession, in order to prevent protracted and complex challenges thereafter. The article has demonstrated that such conflicts are not inevitably unsolvable. The proposed ex ante and ex post mechanisms illustrate that it is possible to avoid these conflicts or resolve them effectively after accession. Nevertheless, these mechanisms cannot entirely eliminate the risk of disputes arising after accession, serving as a caution that accession may entail more complex legal challenges than initially anticipated.

DOI: 10.46282/syeul.2026.4.1471

At the same time, the article has demonstrated that such conflicts and their ways of resolution do not inevitably undermine the autonomy of the EU legal order. On the contrary, autonomy need not be understood as an absolute barrier to external human rights scrutiny. Proposed mechanisms preserve the Union's institutional balance, respect the principle of conferral, and maintain the Court of Justice's exclusive authority to interpret EU law, while nonetheless strengthening the practical effectiveness of human rights protection.

In conclusion, this article demonstrates that the European Union's accession to the Convention will inevitably entail legal and constitutional challenges and that effective human rights protection may require the Union to accept certain compromises. Nonetheless, the analysis shows that accession remains feasible. It is possible to subject the Union, including its primary law, to external human rights scrutiny while simultaneously preserving the autonomy of the EU legal order and ensuring effective human rights protection.

Ultimately, accession should be understood not as a definitive solution, but as a framework that enables, and indeed requires, ongoing institutional cooperation, interpretative caution, and political willingness to ensure that the Union's commitment to fundamental rights is not merely formalised but effectively realised in practice.