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STEERING COMMITTEE FOR HUMAN RIGHTS  
(CDDH)

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COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN  
CONVENTION ON HUMAN RIGHTS  
(DH-SYSC)

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**DRAFTING GROUP ON THE PLACE OF THE EUROPEAN CONVENTION ON  
HUMAN RIGHTS IN THE EUROPEAN AND INTERNATIONAL LEGAL ORDER  
(DH-SYSC-II)**

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**Outline of the draft chapter of Theme 3 (Challenge of the interaction between  
the Convention and the legal order of the EU and other regional  
organisations)**

*(as submitted by the Rapporteur, Ms Kristīne Līcis,  
in view of the 5<sup>th</sup> meeting of the DH-SYSC-II)*

*DRAFT OUTLINE for discussion*

### **THEME 3:**

## **CHALLENGE OF THE INTERACTION BETWEEN THE CONVENTION AND THE LEGAL ORDER OF THE EU AND OTHER REGIONAL ORGANISATIONS**

### **1. Introduction**

To set the stage for the subsequent analysis, this section of the Chapter should contain:

- a. Brief description of the EU, in particular, brief description of:
  - i. The origins and the post-Lisbon structure of the EU as a legal order (Treaties, Charter of Fundamental Rights);
  - ii. The sources of EU law (primary and secondary), main features in their adoption (intergovernmental v. community method) and application (national process v. direct effect);
  - iii. The role and competence of the Court of Justice of the European Union (CJEU);
- b. Brief description of the Eurasian Economic Union:
  - i. The origins and current arrangement;
  - ii. Role and competence of the Court of the Eurasian Economic Union.

### **2. Interaction between the Convention and the EU legal order**

#### **a. Observations:**

- i. Main principles as developed in the case law of the respective Court on issues relevant for the interaction between the systems:
  - CJEU:
    - *Article 6 of the Treaty on European Union*<sup>1</sup>;

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<sup>1</sup> “1.The Union recognises the rights, freedoms and principles set out on the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. 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.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional

- *Principle of equality of member States, principle of mutual recognition and principle of mutual trust;*
- *Article 52(3) of the Charter of Fundamental Rights of the European Union<sup>2</sup>;*
- *Article 53 of the Charter of Fundamental Rights of the European Union<sup>3</sup>;*
- European Court of Human Rights:
  - *Principle of subsidiarity and margin of appreciation;*
  - *Article 53 of the Convention;*
- ii. Main principles as developed by the European Court of Human Rights (ECtHR) with respect to interaction between the Convention and the EU legal order:
  - Responsibility of the Member States after a transfer of competences to international organisations;
  - Responsibility of the Member States for national measures giving effect to EU law;
  - “Bosphorus presumption” of equivalent protection;
- iii. Opinion 2/13 of the CJEU and the consequences of the delay in the EU’s accession to the Convention (e.g., is there lacuna in the protection of individual’s rights?);

#### **b. Analysis of the challenges;**

To keep the Chapter manageable, it appears feasible to limit the analysis to the areas where the interaction between the two systems is the most obvious, such as:

- Dublin regulation;
- Right to fair trial (request for preliminary ruling and Article 6 of the Convention; mutual recognition and enforcement of judgments and Article 6);
- European Arrest Warrant and Articles 5 and 6 of the Convention.

The analysis could further distinguish between situations where the complaint before the ECtHR concerns a cross-border issue (most notably, Dublin regulation, EAW), and situations limited to one Member State.

On substance, the analysis of the challenges should consider, among others, the following issues:

- Whether the principles developed by the two courts (examined under “Observations” above) indicate

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traditions common to the Member States, shall constitute general principles of the Union’s law”.

<sup>2</sup> “2. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

<sup>3</sup> “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.”

differences in general approach (e.g., how to achieve effective simultaneous application of the principle of mutual trust and the principle of individual examination of the person's situation);

- Whether the criteria (threshold) used by the CJEU and the ECtHR in the above areas are similar (e.g., "systemic problems" or "individual situation");
- Admissibility issues (e.g., remedies under EU law as "domestic remedies" within the meaning of the Convention);

**c. Possible responses;**

**3. Interaction between the Convention and the Eurasian Economic Union**

**a. Observations**

- i. Interpretation method of the Court of the Eurasian Economic Union;

**b. Analysis of the challenges;**

**c. Possible responses**

**4. Conclusions and proposals**