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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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Notes of the presentation on Theme 3 – The challenge of the interaction between the Convention and the legal order of the EU and other regional organisations

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(available in English only)

The interaction between the European Convention on Human Rights and the legal order of the European Union

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This note is prepared in support of the 5th meeting of the Drafting Group on the place of the European Convention on Human Rights in the European and international legal order (DH-SYSC-II) (5-8 February 2019). It addresses the issue of the changing role of the European Convention on Human Rights in the legal order of the European Union. It discusses in turn the origins of the protection of fundamental rights in the legal order of the European Union (1) and its gradual constitutionalization (2). It then turns to the significance of Opinion 2/13 delivered by the Court of Justice of the European Union on the accession of the European Union to the European Convention on Human Rights for the future relationships between the ECHR and the process of integration within the EU (3), noting how this opinion illustrates a broader tendency towards "autonomization" of the EU from international human rights law and from the ECHR in particular (4). It emphasizes, however, that the current situation is not fixed, and that there are indications in the jurisprudence of the Court of Justice of the European Union of a continued openness towards the ECHR and its interpretation by the European Court of Human Rights (5). It provides a brief conclusion (6).

1. The origins of the protection of fundamental rights in the EU legal order

The European Court of Justice (now the Court of Justice of the European Union) has incorporated fundamental rights in its case-law since the early 1970s. It did so in response to the concerns expressed by domestic constitutional courts that the supremacy of European law might otherwise undermine the protection of fundamental rights under national constitutions. In the famous *Nold* judgment of 14 May 1974, the Court described its sources of inspiration for defining these rights as follows:

> 'In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those States. Similarly, *international treaties for the protection of human rights on which the member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law*'.[1]

Since this period, the Court of Justice has sought to apply the European Convention on Human Rights as if it were part of EU law, within the framework of the European Union. Indeed, since 1989, the Court recognizes the "special significance" of the European Convention on Human Rights in the EU legal order, by which it means that it shall treat the jurisprudence of the European Court of Human Rights as authoritative.[2]

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[1] Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, judgment of 14 May 1974, ECR 491, para. 13 (emphasis added).

[2] Joined cases 46/87 and 227/88, *Hoechst AG v Commission of the European Communities*, Judgment of 21 September 1989 (ECLI:EU:C:1989:337), para. 13. See also, restating this "special significance" of the ECHR, the judgments of the Court of Justice in the cases of *ERT*, C-260/89, EU:C:1991:254, paragraph 41, and of *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 283.

The position adopted by the Court of Justice was endorsed in the Treaty of Maastricht establishing the European Union, which referred to the ECHR in Article F (later Article 6 TEU), which entered into force on 1 November 1993.[3] It is currently reflected in Article 6(3) of the TEU, as amended by the Treaty of Lisbon (in force since 1 December 2009):

> Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

2. The constitutionalization of fundamental rights in the EU legal order

The gradual constitutionalisation of fundamental rights in the EU legal order culminated in the proclamation of the Charter of Fundamental Rights at the Nice Summit of December 2000.[4] Following a few adaptations of its 'horizontal clauses', [5] the Charter is now incorporated in the European Treaties: the Treaty of Lisbon provides explicitly that it shall have the same legal force as the treaties.[6]
In all situations where the Member States act in the scope of application of EU law (in particular, when they implement a directive, apply a regulation, execute a decision or restrict an economic freedom stipulated in the Treaties), they are therefore bound to comply with the Charter of Fundamental Rights as well as with fundamental rights recognized as general principles of Union law.[7] Cases of non-compliance can be brought before the Court of Justice of the European Union, either through infringement proceedings -- filed by the European Commission, as the guardian of the Treaties, under article 258 of the Treaty on the Functioning of the European Union (TFEU) --, or, more generally, by challenging the measures adopted by the State before domestic courts, which shall refer the question of interpretation of the requirements of EU law to the Court of Justice in the conditions stipulated by article 267 TFEU.

In order to promote consistency between the approaches of, respectively, the European Court of Justice and the European Court of Human Rights, the drafters of the Charter of Fundamental Rights sought to ensure that the rights and freedoms of the Charter that 'correspond' to rights and freedoms listed in the European Convention on Human Rights would be interpreted in accordance with the case-law of the European Court of Human Rights.[8] The Explanations appended the EU Charter of Fundamental Rights provide the list of such correspondances, distinguishing between the articles of the Charter 'where both the meaning and the scope are the same as the corresponding

[3] OJ C 191 of 29.7.1992.
[4] OJ C 364 of 18.12.2000, p. 1.
[5] Charter of Fundamental Rights, OJ C 303 of 14.12.2007, p. 1.
[6] Article 6(1) of the Treaty on the European Union provides that: 'The Union recognises the rights, freedoms and principles set out in 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'.
[7] Article 6(1) and (2) TEU, respectively.
[8] Article 52(3) of the Charter provides to that effect: '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'. As stated by Advocate General Trstenjakin it his opinion of 22 September 2011 delivered in the Case C-411/10, *N.S.*: 'under Article 52(3) of the Charter of Fundamental Rights it must be ensured that the protection guaranteed by the Charter in the areas in which the provisions of the Charter overlap with the provisions of the ECHR is no less than the protection granted by the ECHR. Because the extent and scope of the protection granted by the ECHR has been clarified in the case-law of the European Court of Human Rights, particular significance and high importance are to be attached to that case-law in connection with the interpretation of the relevant provisions of the Charter of Fundamental Rights by the Court of Justice' (para. 148).

Articles of the ECHR', and the articles ' where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider'.[9]

In principle, therefore, the EU legal order is well equipped to ensure that the EU institutions and agencies comply with the the substantive requirements of the European Convention on Human Rights, and that the EU Member States are not faced with conflicting obligations imposed, respectively, under EU law and the European Convention on Human Rights. However, recent developments now have come to threaten this coexistence.

3. The failed accession of the European Union to the European Convention on Human Rights

On 18 December 2014, the Court of Justice of the European Union delivered Opinion 2/13, in which it concluded that the draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms was not compatible with Article 6(2) TEU or with 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. Article 6(2) TEU provides that: "The Union shall accede to the [ECHR]. Such accession shall not affect the Union's competences as defined in the Treaties". Protocol (No 8) provides that "The [accession agreement] provided for in Article 6(2) [TEU] shall make provision for preserving the specific characteristics of the Union and Union law", and that accession shall not affect the competences of the EU or the powers of its institutions; and it clarifies the consequences of these requirements.

This is not the place to provide a detailed analysis of Opinion 2/13. Various commentators have challenged the legal arguments put forward by the Court of Justice of the European Union to conclude that the draft accession agreement was incompatible with EU law. At the heart of the opinion, however, is the idea that the EU Member States have established between themselves specific legal order, premised on the idea of mutual trust and on the continuation of a process of integration that the Court sees as the very *raison d'être* of the legal structure of the European Union. The Court of Justice considers that it is in this light that the protection of fundamental rights in the EU legal order should be considered, "within the framework of the structure and objectives of the EU" (and not only "within the framework" of the EU, as in the original formulation of the *Nold* judgment of 14 May 1974). After recalling that the supremacy of EU law and its direct applicability before domestic courts are essential characteristics of EU law, the Court states:

> 167. These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'.
>
> 168. This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.

[9] For instance, whereas Article 9 of the Charter covers the same field as Article 12 of the ECHR on the right to marry, its scope 'may be extended to other forms of marriage if these are established by national legislation', since Article 9 of the Charter does not refer to the right to marry of 'men and women' and does not link the right to marry to the right to 'found a family', as does Article 12 ECHR, thus leaving open the possibility that same-sex marriage shall be protected.

169. Also at the heart of that legal structure are the fundamental rights recognised by the Charter (which, under Article 6(1) TEU, has the same legal value as the Treaties), respect for those rights being a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable in the EU (see judgments in *ERT*, C-260/89, EU:C:1991:254, paragraph 41; *Kremzow*, C-299/95, EU:C:1997:254, paragraph 14; *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 73; and *Kadi and Al Barakaat International Foundation* v *Council and Commission*, EU:C:2008:461, paragraphs 283 and 284).

170. The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU (see, to that effect, judgments in *Internationale Handelsgesellschaft*, EU:C:1970:114, paragraph 4, and *Kadi and Al Barakaat International Foundation* v *Council and Commission*, EU:C:2008:461, paragraphs 281 to 285).

171. As regards the structure of the EU, it must be emphasised that not only are the institutions, bodies, offices and agencies of the EU required to respect the Charter but so too are the Member States when they are implementing EU law (see, to that effect, judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 17 to 21).

172. The pursuit of the EU's objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute — each within its specific field and with its own particular characteristics — to the implementation of the process of integration that is the *raison d'être* of the EU itself.

173. Similarly, the Member States are obliged, by reason, inter alia, of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In addition, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU (Opinion 1/09, EU:C:2011:123, paragraph 68 and the case-law cited).

174. In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law.

175. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law (Opinion 1/09, EU:C:2011:123, paragraph 68 and the case-law cited).

176. In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law (see, to that effect, judgment in *van Gend & Loos*, EU:C:1963:1, p. 12), thereby serving to ensure its

> consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (see, to that effect, Opinion 1/09, EU:C:2011:123, paragraphs 67 and 83).
>
> 177. Fundamental rights, as recognised in particular by the Charter, must therefore be interpreted and applied within the EU in accordance with the constitutional framework referred to in paragraphs 155 to 176 above.

It is against this background that the Court of Justice found that the accession of the EU to the ECHR may lead to question the principle of mutual trust between the Member States, which is "of fundamental importance in EU law", since it "allows an area without internal borders to be created and maintained" (para. 191). Indeed, that principle "requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law" (para. 191). Yet, according to the Court of Justice, the accession of the Union to the European Convention on Human Rights is "liable to upset the underlying balance of the EU and undermine the autonomy of EU law", since it would require "the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States" (para. 194).

In effect, the Court of Justice takes the view here that -- quite apart from the other legal obstacles it identifies in Opinion 2/13 --, the accession of the EU to the ECHR should only be allowed if the instrument of accession included a "disconnection clause" allowing the relationships between the EU Member States to be regulated by EU law only, in the areas in which EU law has indeed pre-empted, based on the notion that such relationships are based on mutual trust and should not be obstructed by a case-by-case verification of compliance with fundamental rights (on the notion of "disconnection clauses", see appendix 1).

This position is problematic, since it betrays an implicit, but clear, retreat from the pre-existing allocation of roles between the Court of Justice and the European Court of Human Rights. Indeed, it is *already* the case, today, that the European Court of Human Rights examines whether EU Member States comply with the requirements of the ECHR when they cooperate with one another, even in situations where such cooperation is based on mutual trust and on the presumption that the EU Member States comply with fundamental rights, as part of the values (listed in Article 2 TEU) on which the Union is based. The European Court of Human Rights does accept a presumption that EU Member States applying EU law under the supervision of the Court of Justice of the European Union comply with the substantive requirements of fundamental rights, as stipulated in the ECHR. That presumption, however, is not absolute. In the well-known *Bosphorus Hava* case of 2005, the European Court of Human Rights made it clear that it could intervene in situations where a "manifest deficiency" would be apparent. The Court took the view in that case that

> State action taken in compliance with [legal obligations flowing from that State's membership in an international organisation such as the EU] is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (...). By “equivalent” the Court means “comparable”: any requirement that the organisation's protection be

> "identical" could run counter to the interest of international co-operation pursued (...). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights' protection. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. *However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient*. (emphasis added)[10]

Since the European Court of Human Rights announced this doctrine in the *Bosphorus Hava* judgment of 2005, it has on a number of occasions confirmed that the organisation of the relationships between the EU Member States on the basis of "mutual trust" (or, *mutatis mutandis*, the organisation of the relationships between the Member States of the European Economic Area[11]), did not exempt States from complying with the European Convention on Human Rights in their mutual relations. [12] This position is perfectly understandable in the logic of human rights: human rights treaties are concluded for the benefit of individuals under the jurisdiction of States parties, and not in the mutual interest of States, and therefore it is not allowable for States parties to negotiate between them to "derogate" (in the vocabulary of the Vienna Convention on the Law of Treaties) from such treaties. Opinion 2/13, instead, suggests that it would be allowable to the EU Member States to agree between themselves to cooperate to deepen the process of integration on the basis of mutual trust, without such cooperation being subject to scrutiny by human rights mechanisms external to the EU legal order.

4. The reluctance of the Court of Justice of the European Union to refer to the case-law of the European Court of Human Rights

Another recent evolution that has caused concern is the selective approach of the Court of Justice of the European Union towards the case-law of the European Court of Human Rights. There are cases (including recent cases) in which the Court of Justice makes detailed references to the interpretation of the European Court of Human Rights.[13] In other cases however, the Court of Justice appears to be reluctant to make such references, even where the case-law of the European Court of Human Rights would be relevant to deciding the issue submitted to the Court of Justice. For instance, in the *Google*

[10] Eur. Ct. H.R. (GC), *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, judgment of 30 June 2005 (Appl. No. 45036/98), paras. 155-156.
[11] Eur. Ct. HR (GC), *Tarakhel v. Switzerland*, judgment of 4 November 2014 (Appl. No. 29217/12).
[12] See, e.g., Eur. Ct. HR (GC), *M.S.S. v. Belgium and Greece*, judgment of 21 January 2011 (Appl. No. 30696/09) (although the Court considered in that case that the presumption established in *Bosphorus Hava* did not apply, since the instrument of EU law at stake (the "Dublin Regulation" (Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50 of 25.2.2003, p. 1), implementing in EU law the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, 15 June 1990 (published OJ C 254, 19.8.1997, p. 1)) contained a provision known as the "sovereignty clause" (Art. 3(2)) allowing the national authorities to refrain from transferring an asylum-seeker to a receiving State (responsible for examining the claim to asylum) where doubts exist as to the situation of fundamental rights in that State (see *M.S.S. v. Belgium and Greece*, judgment of 21 January 2011, para. 340). For systematic analyses, O. De Schutter, 'L'espace de liberté, de sécurité et de justice et la responsabilité individuelle des Etats au regard de la Convention européenne des droits de l'homme', in G. de Kerchove et A. Weyembergh (eds.), *L'espace pénal européen : enjeux et perspectives*, Bruxelles, éd. de l'ULB, 2002, pp. 222-247; O. De Schutter, 'The Two Europes of Human Rights. The Emerging Division of Tasks Between the Council of Europe and the European Union in Promoting Human Rights in Europe', *Columbia Journal of European Law*, vol. 14, No. 3, Summer 2008, pp. 509-561; O. De Schutter and Fr. Tulkens, 'Confiance mutuelle et droits de l'homme. La Convention européenne des droits de l'homme et la transformation de l'intégration européenne', in *Mélanges en hommage à Michel Melchior*, Bruxelles, Anthemis, 2010, pp. 939-960.
[13] See below, section 5.

Spain judgment of 13 May 2014,[14] the Court of Justice -- while it expands the right of individuals to the protection of their personal data by recognizing what is colloquially referred to as a "right to be forgotten" -- does not cite a single judgment of the European Court of Human Rights, despite the extensive case-law that exists under Article 8 ECHR. This is all the more surprising since, at the time of the judgment delivered in *Google Spain*, the European Court of Human Rights had already given guidance on the criteria to be taken into account when there is a need to balance freedom of expression against the right to respect for private life[15]; indeed, a Chamber of the European Court of Human Rights had delivered a judgment in the case of *Delfi AS v. Estonia*, concerning the owner of an internet news portal, where this issue was raised.[16]

In other cases still, where domestic make a preliminary referral to the Court of Justice of the European Union requesting that the Court provide an interpretation of EU law or assess its validity in the light of fundamental rights as protected by the European Convention on Human Rights, the Court replaces the reference to the ECHR by a reference to the EU Charter of Fundamental Rights, despite the stipulation in Article 6(3) of the Treaty of the European Union that the rights guaranteed by the ECHR form part of the general principles of Union law.[17] Such cases indicate a tendency within the jurisprudence of the Court of Justice of the European Union to "autonomize" European Union law, in order terms, to ensure a protection of fundamental rights within the EU legal order based primarily on the EU Charter of Fundamental Rights, complemented occasionally by a reference to general principles of Union law based on the constitutional traditions of the EU member States, while only exceptionally referring to sources of fundamental rights external to the EU legal order -- including the ECHR and its interpretation by the European Court of Human Rights.

5. The role of fundamental rights in European integration

The position of the Court of Justice of the European Union as expressed in Opinion 2/13 therefore fits within a broader evolution, in which the Charter of Fundamental Rights increasingly appears to operate as a screen, shielding EU law from other sources of fundamental rights, even where such sources are international human rights ratified by all the EU Member States. This evolution is far from systematic, however. Some recent judgments of the Court of Justice of the European Union illustrate that the Court continues to rely on the jurisprudence of the European Court of Human Rights, and seeks to ensure a high level of protection of fundamental rights in the legal order of the European Union.[18]

The judgment delivered on 5 April 2016 in the *Pál Aranyosi and Robert Căldăraru* cases may serve as an illustration.[19] In these cases, the Court of Justice took the view that national authorities of a Member State should refuse to execute a European Arrest Warrant delivered by the judicial

[14] Case C-131/12, *Google Spain SL and Google, Inc.*, judgment of 13 May 2014 (ECLI:EU:C:2014:317).
[15] See, for instance, Eur. Ct. HR (GC), *Von Hannover v. Germany (no. 2)*, judgment of 7 February 2012 (Appl. Nos. 40660/08 and 60641/08); and Eur. Ct. HR (GC), *Axel Springer AG v. Germany* (Appl. No. 39954/08), judgment of 7 February 2012.
[16] Eur. Ct. HR (1st sect.), *Delfi AS v. Estonia*, judgment of 10 October 2013 (Appl. No. 64569/09). Following a referral of the case to the Grand Chamber of the European Court of Human Rights, the Grand Chamber delivered a judgment on 16 June 2015 essentially confirming the view of the first judgment that the interference with the freedom of expression of Delfi AS was proportionate.
[17] See, for instance, Case C-543/14, *Ordre des barreaux francophones et germanophones and Others v. Conseil des Ministres* (ECLI:EU:C:2016:71); Case C-601/15 PPU, *J.N.*, ECLI:EU:C:2016:84, para. 46 (where the Court states that the validity of EU secondary law "must be undertaken solely in the light of the fundamental rights guaranteed by the Charter"); Case C-203/15, *Tele2 Sverige AB* (ECLI:EU:C:2016:970), paras. 127-129; Case C-218/15, *Paoletti* (ECLI:EU:C:2016:748), para. 22.
[18] Case C-205/15, *Toma*, ECLI:EU:C:2016:499, para. 41; Case C-419/14, *WebMindLicenses Kft.*, ECLI:EU:C:2015:832, para. 70.
[19] Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, Judgment of 5 April 2016 (ECLI:EU:C:2016:198). For another illustration, in the field of asylum, see Case C-578/16, PPU, *C.K.* (ECLI:EU:C:2017:127), esp. para. 68.

authorities or another Member State if there exists a real risk that the person against whom the arrest warrant is delivered will be subject to inhuman or degrading treatment in the receiving State (Hungary, in these cases), in violation of Article 4 of the Charter of Fundamental Rights. This is a highly significant decision. The 2002 Framework Decision on the European arrest warrant and the surrender procedures between Member States provides in its Preamble that "the mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union [now Art. 2 TEU], determined by the Council pursuant to Article 7(1) of the said Treaty [now Art. 7(2) TEU] with the consequences set out in Article 7(2) thereof [now Art. 7(3) TEU]".[20] However, the text of the Framework Decision itself states clearly that it "shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union" (Art. 1(3)), and it follows from Articles 6(1) and 6(3) TEU that Member States are bound to comply with fundamental rights, as listed in the Charter of Fundamental Rights and as included among the general principles of Union law, in the implementation of Union law.

According to the Court, it follows that the Member States involved in the execution of the European Arrest Warrant cannnot set aside the requirements of fundamental rights, even when they seek to discharge a duty to cooperate with other EU Member States in accordance with the principle of mutual recognition. The Court cites explicitly the case-law of the European Court of Human Rights,[21] and it sees compliance with fundamental rights as a condition for the mutual recognition of judicial decisions : cooperation in the area of freedom, security and justice, in other terms, presupposes that the EU Member States can trust one another's commitment to upholding fundamental rights. Were such mutual trust to dissolve, it is the very cement of such cooperation that would disappear.

6. Conclusion

The relationships between the EU legal order and the European Convention on Human Rights are therefore at a crossroads. A potential conflict could result from a situation in which, on the one hand, the European Court of Human Rights would continue to insist that the EU Member States fully comply with the ECHR even in their mutual relations, particularly in the area of freedom, security and justice, and in which, on the other hand, the Court of Justice of the European Union, in the name of the deepening of European integration, would insist on mutual trust being not only a precondition for inter-State cooperation, but also a presupposition -- in other terms, a strong presumption that all EU Member States comply with fundamental rights, to be set aside only in exceptional cases where the risk of violations are the most serious.

Such a conflict is not inevitable. Instead, a form of mutual accommodation seems the most likely route, in which the European Court of Human Rights operates on the basis of the presumption established in the *Bosphorus Hava* judgment of 2005, allowing the EU Member States, to a certain

[20] Council Framework Decision (2002/584/JHA) of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ L 190, 18.7.2002, p. 1), Preamble, para. 10.

[21] The Court quotes the European Court of Human Rights, in particular to note that "it follows from the case-law of the ECtHR that Article 3 ECHR imposes, on the authorities of the State on whose territory an individual is detained, a positive obligation to ensure that any prisoner is detained in conditions which guarantee respect for human dignity, that the way in which detention is enforced does not cause the individual concerned distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in detention and that, having regard to the practical requirements of imprisonment, the health and well-being of the prisoner are adequately protected (see judgment of the ECtHR in *Torreggiani and Others v. Italy*, Nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10, and 37818/10, of 8 January 2013, § 65)" (Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru*, Judgment of 5 April 2016, para. 90).

extent, to trust each other on the basis of the values that they share and the various mechanisms that have been set up to ensure that such values are complied with, while retaining the possibility of rebutting the presumption where a "manifest deficiency" exists; and in which, conversely, the Court of Justice of the European Union duly takes into account the case-law of the European Court of Human Rights, not only by interpreting the rights of the EU Charter of Fundamental Rights that "correspond" to rights listed in the ECHR in the light of that case-law (as required by article 52(3) of the Charter itself), but also by complementing the Charter of Fundamental Rights by direct references to the ECHR, which Article 6(3) TEU acknowledges as forming part of the general principles of Union which the Court of Justice must uphold. The presumption stipulated in *Bosphorus Hava*, after all, was premised on the conviction of the European Court of Human Rights that the level of protection of fundamental rights in the EU legal order, and in particular the gradual incorporation within the EU legal order of the ECHR, justified establishing a doctrine according to which, where an EU Member State implemented EU law and was therefore placed under the supervision of the Court of Justice of the European Union, it could be presumed to comply with the ECHR. The more diligent the Court of Justice of the European Union shall be, in the future, in applying the ECHR as part of the general principles of Union law, and in relying on the case-law of the European Court of Human Rights both for that purpose and for the interpretation of the Charter of Fundamental Rights, the stronger the presumption shall be.

Appendix 1. "Disconnection clauses" in Council of Europe instruments

Following the precedents set by the European Convention on Extradition of 13 December 1957,[22] the European Convention on Transfrontier Television of 5 May 1989,[23] and the Protocol to the Convention on Insider Trading of 11 September 1989,[24] the conventions opened for signature on 16 May 2005 at the Third Summit of Heads of State or government of the Member States of the Council of Europe contain a clause withdrawing the mutual relations between Member States of the EU and the relations between Member States and the European Community / Union from the scope of the rules laid down in those instruments. A similar clause was inserted in the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which was negotiated between 2005 and 2007. The canonical form of such clauses is the following:[25]

> Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.[26]

As part of the compromise which allowed the inclusion of this clause and the conclusion of the negotiations despite the strong reservations of certain Member States of the Council of Europe, when the Committee of Ministers of the Council of Europe adopted the three conventions on 3 May 2005, the European Community and the EU Member States made the following statement[27]:

[22] CETS no. 24 (entered into force on 18 April 1960). Article 28(3) of this instrument provides that 'Where, as between two or more Contracting Parties, extradition takes place on the basis of a uniform law, the Parties shall be free to regulate their mutual relations in respect of extradition exclusively in accordance with such a system notwithstanding the provisions of this Convention. The same principle shall apply as between two or more Contracting Parties each of which has in force a law providing for the execution in its territory of warrants of arrest issued in the territory of the other Party or Parties.'

[23] CETS n° 132. According to Article 27(1) of the Convention : 'In their mutual relations, Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned'.

[24] CETS No. 133. The Protocol was adopted for the sole purpose of inserting into the Convention on Insider Trading (CETS No. 130) a disconnection clause, stating (in Article 16bis of the Convention) that 'In their mutual relations, Parties which are members of the European Economic Community shall apply Community rules and shall therefore not apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned'.

[25] See Article 26(3) of the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196); Article 40(3) of the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197); Article 52(4) of the Council of Europe Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198); Article 43(3) of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201).

[26] The final part of the sentence was included at a late stage of the negotiations of the three conventions adopted in 2005, as a result of the insistence by certain States represented within the Committee of Ministers of the Council of Europe that 'the EU should give a guarantee that the clause cannot lead to the adoption and application of Community or EU rules which override the minimum standards laid down in the convention in question. For example, in the case of the draft Convention against Trafficking in Human Beings, it is a question of obtaining confirmation that, as a matter of principle, the clause could not allow the drafting and application of rules less favourable than the standards for the protection of victims' rights enshrined in the convention' (Note prepared by Directorate General I - Legal Affairs and Directorate General II - Human Rights of the Council of Europe, containing a Proposal aimed at facilitating the conclusion of the negotiations concerning the three draft conventions of the Council of Europe, 623d meeting of the Ministers' Deputies, CM(2005)58, 6 April 2005).

[27] Such a statement forms part of the 'context' of the Convention within the meaning of Article 31(2)(b) of the Vienna Convention on the Law of Treaties and should therefore guide its interpretation: see paragraphs 375 and 376 of the Explanatory Report of the Council of Europe Convention on Action against Trafficking in Human Beings. Identically worded declarations are made under the other disconnection clauses, in the above-mentioned instruments.

> The European Community/European Union and its Member States reaffirm that their objective in requesting the inclusion of a "disconnection clause" is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the Member States to the Community.
>
> This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to this Convention.
>
> The disconnection clause is necessary for those parts of the convention which fall within the competence of the Community/Union, in order to indicate that European Union Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community/Union). This does not detract from the fact that the Convention applies fully between the European Community/European Union and its Member States on the one hand, and the other Parties to the Convention, on the other; the Community and the European Union Members States will be bound by the Convention and will apply it like any party to the Convention, if necessary, through Community/Union legislation. They will thus guarantee the full respect of the Convention's provisions vis-à-vis non-European Union parties.

The disconnection clause provides, in sum, that the objectives of the instrument in which it is incorporated are fully maintained, but that as far as the Member States of the EU and the EU are concerned, the obligations imposed by that instrument on its Parties may be performed by the Member States or by the Union according to how their respective competences develop as will ensue in particular from the adoption of legislation by the Union.[28] In principle, whether the obligations imposed by those instruments are fulfilled by the EU Member States acting individually or by their joint action in the framework of the Union should make no difference for the beneficiaries of the instrument in question, for example for the victims of acts of terrorism or of trafficking in human beings, or for children who have been sexually abused. The disconnection clause should not affect the scope of the obligations that are taken on, but simply the means through which those obligations shall be implemented. It does not seek to introduce an exception to the obligations stipulated by the instrument in which it is incorporated, but instead attempts to meet the needs of the instrument's integration within the EU by taking into account the evolutionary nature of the division of competences between the Member States and the Community/Union. Thus, for example, the EU Member States who become parties to the Council of Europe Convention on Action against Trafficking in Human Beings would be in violation of their obligations under this instrument if, due to the content of their obligations under Union law (to which they afford priority, in conformity with the 'disconnection' clause, in their mutual relations), they were unable to comply with the obligations imposed under this convention. It is in order to make this clear that, after their proposal to insert a 'disconnection clause' within the Council of Europe instruments relating to domains partly transferred to the EU met with resistance, the European Community and the EU Member States offered to make the declaration quoted above, leading in turn to a conciliatory statement of the

[28] It has been noted in another context that 'A general disconnection clause is more efficient than trying to identify for each aspect of a Convention possible inconsistencies with EC law. In addition, this is a difficult exercise, given that the Convention provisions are general and that EC legislation may evolve. Because the Convention provisions are so general, incompatibility with EC law could arise from their implementation into domestic law. A disconnection clause is also helpful in re-assuring all interested parties that the Convention will not usurp existing Community law instruments' (Recommendation of the European Parliament on the Strategy for Creating a Safer Information Society by Improving the Security of Information Infrastructures and Combating Computer-related Crime (2001/2070(COS) (rapp. C. Cederschiöld), EP doc. A5-0284/2001, fn. 1).

Council of Europe Secretary General.[29] In addition, all the conventions containing a 'disconnection clause' provide for the accession of the European Community/Union. Therefore, provided the EU has acted in a particular field, it will have to comply with the requirements of the convention, while its member States may apply Union law (rather than the prescriptions of the Council of Europe convention) in their mutual relations; where the EU has not taken action, the EU Member States remain bound, individually, by the convention.

[29] When presented with the draft of the declaration made by the European Community and its member states and relating to the disconnection clause, to be included in the Explanatory Report, the Secretary General of the Council of Europe reportedly stated that the said declaration 'provided the assurance asked for by the Secretariat that the clause could not lead to the adoption and implementation of Community and Union rules which derogated from the minimum standards laid down in the conventions under consideration'. See Committee of Ministers of the Council of Europe, Notes on the 923rd meeting of the Ministers' Deputies, CM/Notes/923/2.4/4.2/10.4 Addendum 11 April 2005.