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# The future of EU human rights law: is accession to the ECHR still desirable?

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# Overview

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3. Possible fixes
4. The AFSJ as a (future) site of contention
5. Developments in the absence of accession
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# Why (still) accession to the ECHR?

- **Legal obligation** in Article 6 (2) TEU: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms."
  - represents the "very idea of a collective understanding and enforcement of fundamental rights" (Callewaert, CMLRev 2018)
- **Elimination of the risk of inconsistencies and fragmentation**
  - two (partly) parallel systems with courts interpreting the same rights
  - evidence of cross-fertilization
  - but despite coordinating provisions, such as Article 52 (3) CFR: instances of contradiction/lack of coordination
    - e.g. *ne bis in idem* (Article 50 CFR/Art 4 Prot 7 ECHR) - absolute right or not? *Menci*
- **Closure of accountability gaps**

# Why (still) accession to the ECHR?

Accountability gaps

- The rule in *Matthews*:
  MS may transfer powers onto the EU, provided that Convention rights continue to be secured. MS responsibility therefore continues even after such a transfer.
- **Exception 1:** *Bosphorus* presumption
- **Exception 2:** the *Connolly* gap

# Issues identified in Opinion 2/13

- Co-respondent mechanism
- Prior involvement of the ECJ
- Article 344 TFEU and inter-party cases
- Coordination between Articles 53 CFR and 53 ECHR
- Protocol No 16
- Exclusion mutual trust/recognition cases
- Exclusion of jurisdiction over CFSP measures

# Possible fixes

"Inspiration": Council of the EU (leaked document of 20 Sept 2019)

- Method:
  - amendments to the Draft Accession Agreement
  - adoption of EU internal rules
- Questions:
  - will these solutions be enough to satisfy the ECJ?
  - will these solutions be acceptable to the non-MS in the CoE?

protection system. The various opening statements were greatly encouraging. Norway highlighted
Europe. The negotiations should continue on the basis of the main principles on which the previous draft Accession Agreement had been elaborated, including the principle that the EU should accede to the ECHR on "equal footing" with the other 47 High Contracting Parties. It noted
the EU should be taken into account and the authoritative interpretation of the ECHR by the ECtHR would have to be maintained. A fair balance would have to be found between these

# Possible fixes

- Co-respondent mechanism
- Prior involvement of the ECJ
- Article 344 TFEU and inter-party cases
- Protocol No 16
- Coordination between Articles 53 CFR and 53 ECHR
- Two big hurdles:
  - CFSP
  - Mutual trust

?

- unconditional right for EU/MS to become co-respondents; no assessment by ECtHR
- no departure from the rule of joint responsibility in any circumstances (exception: MS reservations)

- unconditional right for the EU to request 'sufficient time' for the prior involvement of the ECJ
- to be extended to cases raising questions of interpretation (and not just validity) of EU law

- no inter-party cases between EU and MS
- duty for ECtHR to inform EU of any inter-party application btw. MS and of any reference under Prot 16 by a MS court
- duty to suspend the procedure if infringement proceedings launched against the MS until ECJ decision determines whether infringement has happened

# Possible fixes: CFSP

Problem: lack of jurisdiction of ECJ over (some) CFSP measures (Art 24 (1) TEU)

- hence: after accession ECtHR would have had the power to rule on their compliance with the ECHR without the ECJ having jurisdiction to do likewise.

Solution (Council of the EU)?

- New clause in accession agreement: attribution of such acts to one (or more) MS only if EU and MS jointly make a declaration to that effect
  - plus: internal rules as to which MS should be designated as MS responsible for these purposes
  - consequence: suspension of proceedings before ECtHR for 3 months allowing for launch of domestic proceedings
- Convincing?

# Possible fixes: mutual trust

With regard to **mutual trust** in the AFSJ, the ECJ held in Opinion 2/13:

it must be prevented that "the EU and the Member States [are] 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 [and] 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, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law".

# Possible fixes: mutual trust

Solution (Council of the EU)?

- new provision in Accession Agreement that recognises mutual trust as a fundamental principle of EU law, which
  - may require each MS to presume that fundamental rights have been observed by all other MS
  - may provide that a judicial decision of one MS is to be recognised or executed in another MS if the defendant failed to exhaust domestic remedies in the MS of origin
- Effect? presumably to exclude ECtHR jurisdiction in mutual trust cases
- Question 1: Would that work at a technical level?
  - Mind the 'autonomy trap'

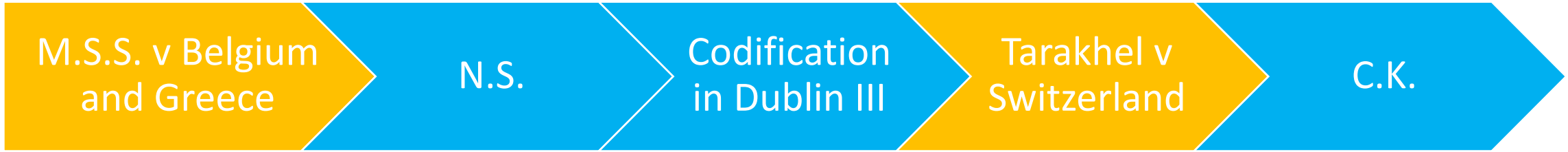
# The AFSJ as a (future) site of contention

Question 2 (more important): would that solution be desirable?

- with 106 new cases in 2019 the busiest area of ECJ activity
- by its very nature the AFSJ is particularly fundamental rights sensitive
- hence exclusion (in principle) of review by one MS of another MS's fundamental rights compliance (e.g. where a European Arrest Warrant is concerned) means that individuals must challenge fundamental rights compliance in the MS where the alleged violation would take place

# Developments in the absence of accession

Example: cross-fertilization in EU asylum and refugee law



# Developments in the absence of accession

What can we conclude from this?

- ECtHR case law has had an influence over the ECJ's softening
  - fairly obvious in asylum and refugee law
  - plausible argument that the same happened in EU criminal law
- Why?
  - the 'manifest deficit' threat (Bosphorus)

# Conclusion

Is EU accession to the ECHR (still) a good idea?

Is the privileging for the EU legal order (including its MS) acceptable to non-EU MS?

Or is the pluralism that we have today the way forward?

**Thank you very much!**