The protection of fundamental rights has been subject to extensive scrutiny and development over the past 50 years. As the competences of the European Union (EU) expand, it has become increasingly relevant for the Union to address human rights issues. While the member states are all party to the European Convention on Human Rights (ECHR), the Union has always remained outside the scope of the ECHR, despite various attempts to accede. This has led to inconsistencies in the interpretation and protection of human rights in the Union. After decades of discussion, the Lisbon Treaty has placed on the Union an obligation to accede to the ECHR and has given an explicit competence to the EU institutions to accede to this system.

After accession, the relationship between the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) will be formal based on system of direct complaints (and within the framework of Article 263 TFEU) and indirect complaints (within the framework of Article 267 TFEU). This will amount to a legal big bang in terms of judicial remedies/protection and probably to an important cultural shift in both Strasbourg and Luxembourg. However, the path is still quite long and full of obstacles before an accession to the ECHR, and this even though the Stockholm programme in 2009 urged for a rapid accession of the EU to the ECHR. In October 2011, a Draft Accession Agreement was examined in the Extraordinary meeting of the Steering Committee on Human Rights (CDDH) on European Union accession to the European Convention of Human Rights with the Informal Group on Accession of the EU to the Convention (CDDH-UE) and the European Commission.

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2 Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizens (Brussels, 2 December 2009) at p. 3.
3 Extraordinary meeting of the Steering Committee on Human Rights (CDDH) on European Union accession to the European Convention of Human Rights with the
Yet, the process of accession was slowed down by some divergences among certain member states of the European Union. On April 2012, Sir Bratza, at this time president of the European Court of Human Rights, reiterated the Court’s unequivocal support for the rapid accession of the European Union to the Convention and called for a swift and successful conclusion of the work on the accession agreement. The various hick-ups related to accession are in fact not surprising considering the complexity of the task. In essence, this daunting task can be summarised in the following question: how does one preserve the specificity of the EU legal order when the principle of equality between the contracting states of the ECHR is the overarching rule? One thing that remains sure, however, as put by Tulkens, is that “[t]he quality of the relationship between the European Convention of Human Rights and Union law will determine to a large extent the future of European law in general and the legal culture inspiring it”.

The first section of this chapter traces the origins and the long path followed by the EU to accede to the ECHR. Special attention is also given to the study of the different rationales used for adhering to the Convention (6.1). The second section focuses on the relationship between the two Courts, i.e. the ECtHR and the CJEU, in light of, more specifically, the Strasbourg case law. This analysis is realised both pre- and post-Lisbon Treaty in order to determine whether the new Treaty has had an impact on the relationship. The potential impact of the accession to the ECHR on the Strasbourg jurisprudence is also discussed (6.2). Finally, the third section goes into the Draft Accession Agreement of 12-14 October 2011 and assesses the main reform proposed by the agreement in light of, in particular, the “sacrosanct” specificity and autonomy of the EU legal order (6.3).

6.1. The Accession Debate and Reasons for Accession

6.1.1. The Road to Accession to the ECHR

Already in 1953, in its draft Treaty establishing a European Community, the ad hoc assembly of the European Coal and Steel Community provided for the integration of the substantive provisions of the ECHR in the Treaty. Yet, the “omission of a reference to fundamental rights in the ECSC and the EEC treaties was because, in the opinion of their authors, these were economic treaties with implications for the protection of fundamental rights. By contrast, when it came to

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4 High Level Conference in Brighton on 18–20 April 2012, Sir Nicolas Bratza, President of the European Court of Human Rights.