The Treaty of Lisbon and the Protection of Human Rights in the European Union

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Abstract

This paper will deal with the theoretical and practical impact of the Treaty of Lisbon (ToL) on the protection of fundamental rights (FR) in the European Union (EU) by analysing the new provisions of Art. 6 TEU. The degree of individual protection under Art. 6 TEU post-Lisbon will be compared with the system under Art. 6 TEU of the Nice Treaty in order to assess the importance of the ToL provisions for the advancement of FR protection in the EU.

This dissertation will have a double-headed structure. First, it will analyse the main tendencies pre-Lisbon in order to develop a precise insight into the status quo before 1 December 2009. Three vital aspects of the multi-level structure of the European FR instruments have been chosen for this comparative study: strengths and weaknesses of the protection under the general principles of EC/EU law, relationship between the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) along with the EU scrutiny of the ECtHR, and the judicial value of the Charter of Fundamental Rights (ChFR). Although, the main focus of this paper will be on the post-Lisbon era, the above-mentioned aspects need to be analysed in detail as they establish the most relevant parameters for the intended comparison.

The second part of this paper will deal with the repercussions of the ToL on the above-mentioned areas. The most remarkable reforms, the new legal status of the ChFR and the accession of the EU to the European Convention on Human Rights (ECHR) will be analysed in view of the main findings of the first section. The conclusion of this paper will use the results of parts one and two in order to determine the ToL’s revolutionary character which lies somewhere between a remarkable qualitative step towards more individual protection and a mere consolidation of pre-defined tendencies.

Article 6 Treaty of the European Union (TEU)

1. The Union recognizes 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. 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 traditions common to the Member States, shall constitute general principles of the Union’s
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1. **Introduction - Aims and Rationale of Research**

Art. 6 TEU post-Lisbon has been sufficiently analysed by legal as well as political scientists in recent years, but little attention has been paid to its practical impact on the degree of individual protection. In addition, it is doubtful that many European citizens are aware of the new possibilities under the reformed regime. This already leads us to one of the main questions of this dissertation: Are there new practical rights for EU citizens? Along with a variety of unsettled questions linked to these reforms, the ToL caused some confusion about the scope, applicability and practical relevance of FR protection in the EU. This paper will address this problem by providing for an impact assessment of the most relevant aspects for individual protection.

The main research questions of this paper are the following:

*Did the ToL pave the way for a more complete and coherent regime of HR protection in Europe or are the consequences less practical than symbolic in nature and therefore only consolidate the status quo?*

*Does the standard post-ToL potentially increase the degree of individual protection in terms of locus standi requirements, enforcement mechanisms and the material/personal scope of the relevant instruments?*

*Is the ToL revolutionary in a way that it is a real turning point for FR protection within the EU, or does it just further develop pre-existing objectives?*

These questions will be answered together with the following hypotheses:

1. The new binding legal status of the EU Charter of Fundamental Rights is in practice not as significant as generally proclaimed given the jurisprudence of the ECJ pre-Lisbon in this field. The ToL is more of a consolidation than a revolution.

2. No major damage has been done to the Charter by removing it from the Treaty itself.

3. Accession of the EU to the ECHR will have symbolic consequences rather than a qualitative impact on the protection of HR in the short term. The most likely effect is a clearer hierarchical structure of norms.

4. Many serious shortcomings of the existing regime have not been tackled in the latest Treaty amendment.
1.1 Methodology and Terminology

This paper will work with the most recent literature in this field as well as a great variety of primary sources, such as legal and political documents issued by EU institutions, relevant case law of the ECJ, as well as the ECtHR, and opinions of Advocates General of the ECtHR.

The most problematic aspect of this dissertation is the definition of criteria relevant for the analysis of the degree of individual protection. There is no set of well-established criteria available in existing literature. This paper will work with the following criteria that the author deems most appropriate:

1. Access to justice - *Locus standi* requirements for individual non-privileged applicants
2. Enforcement mechanisms – judicial relevance of existing instruments
3. Material and personal scope of these instruments
4. Legal certainty

Ad. 1: One main assumption of this paper is that the broader the individual *locus standi* is, the more effective the protection is. This paper will analyse the possibility of individual complaint pre- and post-ToL.

Ad. 2: This paper will analyse if the ToL has created new effective judicial and quasi-judicial forms of enforcement mechanisms. The influence of the ToL on the judicial relevance of existing instruments such as the ChFR will also be subject to a detailed analysis.

Ad. 4: The boundaries of competences between the ECHR, the EU regime of FR protection, and their respective courts must be sufficiently clear in order to create a high degree of legal certainty. Potential victims must be able to understand the most important complaint mechanisms and have certainty about the outcome of the enforcement of judgments and legal acts.

The main aim of this paper is to identify the major developments in the above-mentioned fields and to explain the role of the ToL in this context. The limited scope of this study does not allow for an in depth analysis of all relevant aspects.

For the purpose of this paper, HR will be referred to as Fundamental Rights (FR) in the context of EC/EU law, which is in line with the ECJ’s case law. When reference is made to HR in the context of the ECHR, the term HR will be used.
2. FR Protection in EC/EU Law Prior to the Entry into Force of the Treaty of Lisbon

A complex multi-level structure of FR protection has been established in Europe over the last decades. Its main defining characteristic is a special form of legal pluralism, which is dominated by the well-documented dichotomy of the ECtHR jurisdiction, based on the ECHR and the ECJ jurisdiction derived from the general principles of EC/EU law. This can be positive and negative at the same time. Legal pluralism in this context is able to expand the protection of FR via two co-existing regimes and the joint powers of the ECJ and the ECtHR as double safeguards. On the other hand, it also causes uncertainty when it comes to legal standing requirements and the material scope of relevant rights and procedures. Avbelji provides us with a very good analysis of the many facets of EU legal pluralism that has supranational, national, and intergovernmental spheres (Avbelji 2006). There is no formal hierarchy or legal connection between these layers, as they all compete for ultimate legal authority in the macro-level of Europe. These complex interrelations make the determination of the degree of individual protection a rather complex undertaking with a great variety of different criteria.

2.1. Evolution of the EU’s FR Instruments prior to the ToL

This first part will provide a brief analysis of the evolution of post-World War FR instruments in the EC/EU. Their basic structures, developments, and interrelations will be dealt with in order to better understand the changes that were triggered by the ToL.

The initial treaties of the European Communities did not contain any FR provisions. As the institutions had therefore very limited competences in dealing with FR, the ECJ must be credited for incorporating a comprehensive FR regime into the acquis communautaire through its own jurisdiction.

First, the ECJ refused to accept complaints based on FR by following the concerns of national constitutional courts about the protection of FR in national constitutional orders. In the Stauder judgment of 1969, the court responded positively for the first time to an application based on a violation of FR. The ECJ stated that there were:

“ […] fundamental human rights enshrined in the general principles of Community law and protected by the Court.”

From the 1960s on, “the direct effect and supremacy doctrines developed by the ECJ were met with resistance by MS” (Rincon-Eizaga 2008, p. 126) who questioned the effectiveness of the Community’s FR regime.

“Confronted with […] this réserve constitutionnelle […], the ECJ was impelled to fill existing gaps in its regime in a praetorian way in order to endorse the supremacy of EU law” (Scheeck 2005, p. 849) and
started protecting FR through its jurisdiction. “It is also clear that the Court's activist posture with respect to FR was a response to the increasing capacity of the Community to regulate and affect those rights” (Defeis 2007, p.1112).

In other key judgments like Internationale Handelsgesellschaft and Nold the ECJ reiterated that FR were protected as general principles of Community law. Sources for such rights were found in constitutional provisions of MS, international HR treaties, and the ECHR whose special significance was emphasised by the court on several occasions. The substance of this unwritten “bill of rights” has gradually been incorporated into the treaties starting with the Single European Act (SEA) in 1987. “Since those early days, […] the textual basis in the treaties has advanced considerably by […] playing catch-up on the case law of the ECJ” (Murray 2011, p. 1390).

Not only EU institutions are bound by the general principles of law, but also MS when they implement EC/EU law. Even when MS derogate from EC/EU law they are bound by these principles, a stance that has been confirmed many times. The court has also confirmed that the protection of FR in itself constitutes a legitimate interest that can justify a restriction on EC free movement rules.

In conclusion, this “jurisprudential” case-by-case approach did not make it easy to determine the material scope of this regime. The exact degree of protection was not always easy to conceptualise, as the ECJ’s case law was not consistent in this matter.

3. Effectiveness and Adequateness of the Protection Guaranteed by the ECJ Under Art. 6 TEU pre-Lisbon

This part will demonstrate that the above-mentioned regime was, regardless of its complex and rather opaque character, effective and appropriate within the legal order of the EU. The EU’s FR regime has always been a compromise between the protection of individual rights and the economic/political ends of the Union. The following parts will elaborate on the incremental increase in effectiveness and the most vital shortcomings of the system before 2009.

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1 Reference to national constitutions has been proven to be rather sporadic.
3 See : Rutili v. Minister for the Interior.
4 See: Elliniki Radiophonia Tileorassi AE (ERT) v. Dimotiki Etairia Pliroforissis and Sotiriois Kouvelas and al.
5 See: Schmidberger v. Austria.
6 One good example is the fact that the ECJ sometimes even denies well established rights under the ECHR such as the right not to incriminate oneself, Art. 6 ECHR (See case 27/88). The principle of “dawn raid” as used by European Commission officials under REG 1/2003 can also be called into question in the context of Art 8 ECHR.
3.1. Incremental Increase in Effectiveness

The ECJ declined the existence of FR within the EC legal order\(^7\) until MS’ supreme courts explicitly questioned the supremacy of EC law due to this lack of FR protection. Even after the explicit recognition of FR as general principles of EC law, supreme courts of certain MS were very active in assessing the adequacy of this implicit FR protection at the EC level. In the judgment of Solange I\(^8\), the German Constitutional Court stated that as long as there is no “Community bill of rights”, measures of Community law may still be subject to checks against the FR protected by the German Constitution.

In 1986, the same German Constitutional Court declared in its judgment of “Solange II”\(^9\) that as long as a “sufficient degree of HR protection could be expected” it would no longer examine the constitutionality of EC measures. It changed its view that a binding EC bill of rights was necessary in order to create FR instruments that are in accordance with the German constitutional requirements. This was a clear commitment of the German court to the increased effectiveness of the EC’s FR regime.

Nevertheless, especially in the early years of European integration, many scholars like Balfour argued that FR were only protected where the ECJ instrumentalised them to secure the supremacy of its own legal order, and where such a protection did not considerably restrict EC activities (Balfour 2005, pp. 41-45). In the Internationale Handelsgesellschaft judgment, for example, the ECJ stated that:

“[…] the protection of rights must be ensured within the framework of the structure and objectives of the Community.”

FR protection was thus a politically motivated act whose sincere motivations were highly debatable in the beginning. The ECJ also faced considerable challenges whenever there was an open clash between economic freedoms and FR. Doğan argues that “economic freedoms were given priority over HR as economic integration was the primary objective of the treaties” (Doğan, p.6). We will see later, that even today, the ECJ’s jurisdiction shows signs of the influence of economic considerations. FR values are still interpreted in light of the demands of European integration in order to safeguard the integrity of the supranational legal order of the EU.

Weiler and Lockhart responded to these limitations by stating that the mere fact that the ECJ’s case law on FR is motivated by a desire to establish EC law as supreme, and that rights may be subordinated to EC objectives does not prove the Court’s protection of HR to be inadequate.

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\(^7\) See: Friedrich Stork & Co v. High Authority of the ECSC.


There are many cases where the court’s rulings show a clear primary concern for individual FR\textsuperscript{10} (Weiler, J. & Lockhart, N. 1995).

In recent years, the ECJ developed a more principled approach toward FR protection (Doğan 2009, p.6). The next paragraphs will provide evidence for this substantial improvement of individual protection. The ECJ has constantly been expanding its jurisdiction on FR protection. In Schmidberger, for example, the court recognised the right of an MS to derogate from economic freedoms on the basis of FR protection. The ECJ made it clear in Omega that it was willing to accept more complex and uncommon FR that do not have a common European basis and provide for judicial protection.

As the judgment of ERT shows, measures could be declared invalid on the sole ground that they violated FR. At the same time ERT shows that FR were not given priority as a general rule, but the ECJ balanced the involved interests. In Schmidberger the court held, for example, that neither the free movement of goods nor the protection of FR was absolute, but subject to individual analysis whenever limitations were applied.

The procedures before 2009 seemed to be dominated by a proportionality test that was applied to each case. Certain individual rights could be restricted as long as such restrictions “corresponded to objectives of public interest pursued by the Community and […] did not constitute, with regard to the aim pursued, a disproportionate and intolerable interference impairing the very substance of those rights.”\textsuperscript{11}

There is no clear trend in the relevant literature as to the initial question if the system of EC/EU FR protection is or is not adequate: Coppel and O’Neill, for example, come to the conclusion that FR are not protected as an end in itself (Coppel & O’Neill 1992, p.232). Other authors, like Weiler and Lockhart, came to a different conclusion in 1995. According to them, the Community rule does not prevail in the court’s consideration as a general principle (Weiler, J. & Lockhart, N.J.S. 1995).

3.2. Most Pressing Shortcomings of Individual Protection before 1 December 2009

The previously described system of judicial protection was not optimal as there were a considerable number of problematic aspects that curtailed the degree of individual protection.

\textsuperscript{10} See: Carpenter.
\textsuperscript{11} See: Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft Federal Republic of Germany.
First, “the principal problem to the Community standard of protection was that FR were only indirectly protected as general principles of law and not as well defined rights. The sources of inspiration […] that the ECJ used in defining the FR were not conclusive […]” (Hansson, L. 2007, p.61), and the ECJ could only rule on matters that fell within the scope of Community law. Technically, it did not have power to review strictly internal national situations. The boundaries between EC law and purely national spheres have always been very difficult to draw, but the court’s attitude towards this problem has changed in recent years. According to Murray “even if matters appear prima facie as purely internal, they may be subject to review by the ECJ” (Murray 2011, p.1396). There has been clear evidence that the ECJ has approached such borderline cases by a substantial broadening of its competences into the national sphere. Nevertheless, individuals could not easily conceptualise their rights due to the unclear material scope of the protected rights with a clear trend toward pragmatic case-by-case evaluation (Craig, P. & de Burca 2008, p. 394).

Second, the system of direct and indirect judicial protection within the FR legal pluralism did not, contrary to ECJ claims, create a complete system of remedies. Especially, the EU legal system did not satisfy the minimum requirements for individual access to the ECJ as the most competent court. This deficiency was caused by an extremely restrictive approach to legal standing requirements for potential victims. According to many scholars like Usher, the judicial review procedure under Art. 230\textsuperscript{12} was not sufficient to guarantee appropriate protection for non-privileged applicants\textsuperscript{13} and could in some cases even lead to a denial of justice (Usher 2005, pp. 575-600). The requirements of individual and direct concern have been “so narrowly interpreted by the ECJ […] that private parties have rarely been able to surmount these formidable admissibility barriers when challenging Community acts” (Albors-Llorens 2004, p.72).

This strict approach must be seen in the context of the pro-integration role of the court. Too many challenges against legislative acts would disrupt the functioning of the supranational legal order. The pragmatic self-interest of the court was to avoid an overload of cases (Doğan 2009, p. 58 ff.). The question that remains to be answered is whether this is deemed legitimate in the context of FR protection. The fact that most cases brought by individuals before the ECJ under the auspices of Art. 230 were declared inadmissible does indeed question this approach as it renders judicial protection in this sense rather unrealistic.

In the author’s point of view, the concept of a “complete system of remedies” as developed by the ECJ does not justify these strict access requirements. The Union court has been arguing that Art. 230 and Art.

\textsuperscript{12} Now Article 263(4) TFEU

\textsuperscript{13} The TEU differentiates between privileged and non-privileged applicants in the context of judicial review of EU acts before the ECJ. MS and EU institutions as privileged applicants have relatively relaxed legal standing requirements before the ECJ, whereas individuals as non-privileged applicants face strict requirements in order to access the ECJ in a particular case.
234 TEU provided for such a complete system, as inadmissible cases before the ECJ could indirectly be challenged through preliminary ruling procedures. In theory, allegedly flawed EU acts could indirectly be challenged at the national level, but relying on Art. 234 turned out to be rather cumbersome and costly for many potential victims. In addition, in specific cases this system led to a denial of justice. Elantonio and Kas, for example, point out in their paper that if there is no national implementation act required for an EU act, an individual can only challenge such an act by breaching the rules of the EU measure in question and then relying on the invalidity of this act before national courts (Elantonio & Kas 2010, p.124). Nevertheless, it was in most cases more promising to start national proceedings than looking for a loophole to satisfy the legal standing requirements before the ECJ. As the ECJ held in Francovich\textsuperscript{14}, MS can be held liable for breaches of EC law. Potential victims can therefore try to rely on the concept of state liability if the violation of Community FR can be attributed to a MS action or a lack thereof and if the applicant can prove that direct loss was sustained.

Third, there was no formal external control mechanism for FR issues, as the EU was not a member to the ECHR. As we will see in chapter 3.4, there were some weak informal control mechanisms exerted by the ECtHR, but they did not satisfy the minimum standards of scrutiny. For an individual, there was also no way to challenge a potential incorrect interpretation of the ECHR by the ECJ. Along with the still limited internal judicial control, Scheeck has developed the concept of Europe’s binary HR discontinuity. The internal control mechanisms have been continuously improved in the time before 2009, but external control did, formally, not exist (Scheeck 2005).

3.3. Relationship Between the ECJ and the ECtHR Before Lisbon – Fragmentation or Intrinsic Coherence?

One main assumption of this paper is that divergence between the two relevant courts on overlapping issues such as the interpretation of ECHR articles is per se negative for individual protection as it curtails legal certainty and clarity\textsuperscript{15}. The same is true for incoherent competences and blurred legal boundaries in the judicial triangle between MS, the ECJ, and the ECtHR. This part will briefly answer the question if the situation before 2009 was characterised by a clear trend of divergence and inconsistency or gradual parallelisation.

Neither of the courts had jurisdiction over EC law in the beginning of European integration, but both European courts “effectively circumvented this dilemma of non-jurisdiction by reciprocally intruding into their respective legal orders” (Scheeck 2005, p.838). Before 2009, there was no formal coordination

\textsuperscript{14} See: Andrea Francovich and Danila Bonifaci and others v Italian Republic.

\textsuperscript{15} MS could in such situations be obliged to derogate from its ECHR obligations in order to fulfill their obligations under EC law.
between the ECJ and the ECtHR. Nevertheless, both courts have developed an intrinsic willingness for cooperation and symbiosis. The ECJ, rather early, recognised the ECHR’s “special significance” among the international HR treaties upon which it has been drawing inspiration in order to develop the general principles of law. The last decades were characterised by what Scheeck calls an “incremental valorisation” of ECHR standards, which are more and more reflected by ECJ judgments (Scheeck 2005). Although the ECJ did not have formal jurisdiction to apply the ECHR directly as it was not an official formal source of EC law, the Union court made extensive reference to the ECtHR’s case law starting in the 1990s. “It has even followed the Strasbourg case-law to the extent of re-considering its own previous case-law in the light of later Strasbourg case-law” (Jacobs 2006, p. 291). The high number of judgments in which the ECJ directly referred to the ECtHR shows clearly that the Convention acquis has been incrementally inserted into the ECJ’s case law. Although the EU committed itself to the ECHR as a minimum standard, it could, in general, not be held liable to having infringed the Convention. ECtHR mechanisms do, in theory, not apply to EU actions, but the ECtHR has also recently reconsidered its own judgments in the light of new ECJ case law. The ECtHR “has acknowledged the extent of review by the ECJ for compliance with the European Convention on Human Rights, and has accepted that review as limiting the need for intensive scrutiny by the Strasbourg Court itself” (Jacobs 2006, p. 292).

There was some kind of catch-22 as “over time, it could come to denude the ECHR of relevance, as the scope of EU action has been increasing. Moreover, Strasbourg would cease to be the focal point of HR jurisprudence. For the ECJ, on the other hand, a finding by the ECtHR of a violation of FR would imperil its assertion of the autonomy of the Community legal order and undermine its own arrogated FR role. Their respective vulnerabilities have not led to conflict, but rather to a mutually reinforcing accommodation” (Costello 2006, p.2).

Due to their divergent priorities “inter-institutional rivalry became just as unavoidable as the classic opposition between an “economic Europe”, embodied by the EU, and a “human rights Europe”, symbolised by the Council of Europe” (Scheeck 2005, p. 843). The ECtHR and the ECJ did not always interpret the Convention in the same way, which resulted in a number of conflicting judgments. As long as the ECHR served as the described minimum basis, this divergence was not problematic in itself. Whenever the ECJ could not guarantee this minimum standard, this divergence resulted in a lower

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16 See : Joined Cases 46/87 et 227/88.
17 See: P/S and Cornwall County Council.
18 In the judgment of Roquette (2002) the ECJ seemed to reconsider its Hoechst (1989) judgment in the context of the ECtHR case of Chappell where the scope of Art 8 was at stake.
19 See : Goodwin v. UK.
20 See for example: Hoechst AG and Niemitz (ECtHR) on the interpretation of Art. 8 ECHR. In this case both courts have interpreted the material scope of the right to inviolability of business premises differently. The ECHR decided that business sights fell under Art 8 ECHR, whereas the ECJ decided against it.
21 See: X v Commission.
degree of individual protection\textsuperscript{22}. If there was a judgment by the Strasbourg court, the ECJ did, in general, not openly contradict this judgment. Contradicting judgments also enhanced legal uncertainty on national level, as judges were confronted with two different interpretations of the ECHR. Before 2009, there was a clear trend towards fewer cases of open divergences due to the ECJ’s willingness to readjustment. This fact further supports the claim of gradual parallelisation although it is also obvious that the ECJ did not want to jeopardise its autonomy by choosing a very cautious wording in its judgments.

Nevertheless, the claim of non-divergence as advocated for by Varju prevails over arguments of fragmentation and conflict (Varju 2008). Major differences are mitigated by flexibility and similarity and points of contact did, in general, not cause rejection but accommodation. Flexibility on the side of the ECHR was fostered by the mechanisms of “margin of appreciation” and “flexibility of scope”. As we have seen in previous chapters, also the EC/EU regime was surprisingly flexible. The most obvious flaw of this argument is the fact that this subtle form of cooperation is not based on legal commitments, but on voluntary comity. Although very unlikely, both courts could unilaterally decide to move away from these described mechanisms.

3.4. Implicit Scrutiny of EC/EU Acts by the ECtHR

Over the years, the sovereignty transfer from the MS to the Union and its failure to join the ECHR has created a considerable gap in the protection of FR. The EU itself is exempt from scrutiny as it is not a contracting party to the ECHR. If the transfer of sovereignty is complete, the MS can no longer exercise discretionary powers and it can therefore not be held liable to have infringed rights protected by the ECHR by simply carrying out its obligations under EU law (Beselink 2010, p.7). Before 2009, the ECtHR has never accepted complaints brought against EC/EU actions directly. This part will show that, regardless of this lack of a formal scrutiny, the ECtHR has developed a complex system of abstract indirect jurisdiction over EU actions. These subtle mechanisms allowed for a considerable increase in individual protection as they enabled the ECtHR to exert some degree of external control over EU actions and contributed to more coherency between EC/EU law and the ECHR. On the other hand, this scrutiny was also problematic as it caused blurred legal competences and was of very little practical relevance for individual applicants.

In 1990, the ECtHR developed the doctrine of “equivalent protection” in its judgment of \textit{M. & Co. vs. Germany} by stating that “the transfer of powers does not necessarily exclude a State’s responsibility under the Convention with regard to the exercise of transferred powers”. “Claims against MS concerning

\textsuperscript{22} Such cases are abundant. One good example is the following: \textit{Informationsverein Lentia v Austria}. 
material acts of Community law were *ratione materiae* inadmissible […] provided that within the EU, FR […] received an equivalent protection" (Kuhnert 2006, p. 180). The ECtHR was not ready to review EC actions in themselves, but more indirectly in the context of MS actions.

In *Matthews* the ECtHR for the first time explicitly reviewed EC primary law and found a violation of the ECHR. With this judgment, the ECtHR made clear that "it had no intention of waiting until the EU finally adhered to the ECHR" (Scheeck 2005, p. 859) before reviewing EC law on the compatibility with the Convention. Although the ECtHR came to the conclusion that it was incompetent to review EC law as such, MS were deemed fully responsible for the execution of EC acts or the lack thereof. This judgment also seems to indicate that whenever there is no possibility for an intra-Community judicial review, MS can be held responsible for implementing EU acts.

In the case of *Bosphorus* “the Court applied a more concrete test to conclude to the general equivalence of HR protection at the Community level by reviewing the Community’s substantive guarantees and procedural mechanisms for a potential ‘manifest deficiency’” (Kuhnert 2006, p. 185). The ECtHR made also clear that “any […] finding of equivalence could not be final and would be susceptible to review in light of any relevant change in FR protection” (Scheeck 2005, p. 862). The ECtHR has accepted a significant self-restraint by officially stating that it would not treat the EU in the same way as contracting parties, unless the EU decided to join the ECHR. In general, this informal jurisdiction was pre-2009 substantially only an *in abstracto* review. On the other hand, it is also clear that the EU no longer enjoyed full immunity with regard to the ECHR.

In practice, this limited EU scrutiny was not important for a potential victim as it has never happened before 2009 that the ECtHR has come to the conclusion that there are manifest deficiencies in the Union’s FR protection mechanisms. More relevant is the clear commitment of the ECtHR to the EU’s FR standards as equivalent to its own protection. Before the accession of the EU to the ECHR, the ECtHR had jurisdiction to examine EU actions on a case-by-case basis in order to make sure that contracting parties to the ECHR could not escape their obligations by transferring power to the EU. This fact further supports the author’s claim of voluntary and implicit review *in abstracto*. Craig provides for a very succinct summary of the not always straightforward approach of the ECtHR in this area: “Where an EU act […] leaves room for implementation choices to MS […] a challenge can be brought before the ECtHR against the implementing state. Where, however, an EU act as […] in Bosphorus leaves no discretion in implementation to MS, the State will be presumed […] to have acted compatibly with the ECHR” (Craig, P. & de Burca, G. 2008, p.424) unless a manifest deficiency can be proven.
3.5. Conclusion

This chapter has shown that, regardless of its numerous shortcomings, the existing system was very elaborate and indirectly relied on the ECHR. The level of individual protection is not as satisfying as it could theoretically be, but considering the difficult balancing act of the court, the system is deemed adequate. When it comes to the importance of the ECHR there has been a clear evolution: the status of the Convention in the Community legal order has been constantly enhanced over the last decades and gained momentum before the entry into force of the ToL.

4. Judicial Relevance of the Charter of Fundamental Rights for Individual Protection in the EU Prior to the Entry into Force of the Treaty of Lisbon

This part will deal with the impact of the legally non-binding Charter that was proclaimed in December 2000. "It was drafted “as if” it was to have full legal effect, but the question of its ultimate legal status was left open" (Craig, de Burca 2007, p. 412). “Based on, variously, the European Convention on Human Rights, the Community Social Charter […], the Council of Europe’s Social Charter […], as well as the constitutional traditions common to the MS, the Charter was intended to codify – and act as a showcase for existing rights” (Barnard 2010, p. 2). It was common attitude among the masters of the Charter that its proclamation was primarily a symbolic act in order to make existing rights more tangible, but did not create any new rights.\(^{23}\) The preamble of Protocol 30 of the ChFR also states that “the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles” (Preamble to the Protocol of the Charter).

Although it is difficult for potential victims to conceptualise the impact of a “nonbinding re-affirmation of mostly existing norms compiled on the presumption of being capable of having legal force” (Morijn 2009, p.3) the Charter developed considerable soft law implications prior to the entry into force of the ToL. With the Charter, the ECJ’s case law became codified, and a concrete content was given to Art. 6(2) TEU. Most important in this context is the fact that the Charter is a document that not only summarises the current civil and political rights protection of the ECHR, but also includes a great variety of progressive socio-economic rights. According to Wouters, the Charter is a “fully up-to-date lus Commune Europaeum of HR protection in Europe” (Wouters 2001, p.1). One of the most striking characteristics of this text is that it visualises the indivisibility and interdependence of all layers of FR in a much clearer way than ever

\(^{23}\) See:
Also: European Council Cologne 1999 – Presidency Conclusions, par. 44.
before. The justiciability of second generation HR is limited by the fact that they are referred to as principles and not as rights, which makes them not directly enforceable at national courts. “[...] The stumbling block remains that the Charter does not identify which provisions contain rights and which principles” (Barnard 2010, p.3). Cases like Viking have shown that the differentiation between these two layers is not straight forward and some articles can contain rights and principles at the same time.

It is not primarily the legal status that determined the importance of the Charter, but the use thereof. As Mr. Sevon, judge at the ECJ points out, the missing legal force of the Charter was compensated by the fact that many rights were already protected by the ECJ through its HR jurisprudence” (Sevon, 2000, p. 404). Practically, a potential victim could not directly rely on the Charter in complaint procedures, but use it as a source of information on which rights are protected, and then try to find ways to bring a complaint before the Union courts by relying on other concepts like the general principles of law. A reference to the Charter was only likely to be successful in connection with other sources of FR.

On the other hand the Charter triggered a certain degree of political activism that increased the degree of individual protection in a more implicit manner. The main EU institutions, with the exception of the Council, committed themselves to the Charter right after its proclamation. The Commission, for example, made regular reference to the Charter when drafting new proposals, regardless of its missing legal force. In 2005 an intra-institutional monitoring system for the Commission’s compliance was established.24 In some cases the Charter was even incorporated into Community legislation such as REG 1/2003. “The enhanced activism of European institutions […] led to the establishing of the European Union Agency for Fundamental Rights in 2007. Albeit not enforceable in a trial by citizens, no one could deny any juridical relevance to this dimension of the Charter” (Gianfrancesco 2010, p. 3).

Another possibility to give the Charter judicial relevance was through the activism of the ECJ. Many scholars like de Witte predicted an active approach of the ECJ to integrate the Charter into the general principles (De Witte 2001, p.84). Although the Community court would have had the competence to make at least parts of the Charter legally binding by expanding its own FR portfolio, the next part will show that the degree of judicial activism of the ECJ in this field was rather modest.

4.1. The Union Courts’ Reference to the Charter

24 Commission’s communication on compliance with the Charter of Fundamental Rights in the Commission’s legislative proposals (COM (2005)0172)
In general, the ECJ was very cautious with making explicit reference to the Charter and declined many invitations from Advocates General (AG) to include explicit Charter content into its judgments. In *KB v. National Health Service Pensions Agency* the ECJ made it clear that it preferred to treat the ECHR as its primary source of reference for HR. In *Unibet v. Justitiekanslern* the ECJ stated that the Charter only reaffirms the court’s case law.

In *Unión de Pequeños Agricultores v Council*, the Court of First Instance (CFI) seems to have gone beyond this re-confirmation status of the Charter by using its provisions in its reasoning in a rather independent manner. The ECJ did not follow the proposal to make explicit reference to the Charter in the same case. In the case of *Jégo Quéré* the CFI made a reference in order to suggest a new interpretation of Art. 230(4) about the individual access to the Community courts. In 2006, the ECJ eventually started following the practice of the AG and the CFI by stating in his judgment of *Reynolds Tobacco Holdings v. Commission* that

“although this document does not have legally binding force, it does show the importance of the rights it sets out in the Community legal order."

The main characteristic of such references was that they were all heterogeneous in their structure and wording. Sometimes only a specific article was mentioned as a point of reference by stressing the legally non-binding status of the Charter. The AG texts do, in general, not make reference to the legal status of the Charter. Their judicial relevance is curtailed by the fact that there is also no clear line in their reasoning. Structurally, these references showed a focus on reaffirmed rights that have been protected in the context of the general principles of law. More controversial rights such as socio-economic rights have not been mentioned in this context. These references were of little practical relevance for individuals, as it did not change the overall status of the Charter.

There was a clear pattern between 2000 and 2009: First the AG included the Charter in their legal opinions, followed by a rather open CFI, with the ECJ being mostly resistant to a readjustment of its well established FR jurisdiction towards the Charter. Scholars offer various reasons for the ECJ’s reluctance in this matter. Morijn argues that it wanted to keep full control over FR jurisdiction (Morijn 2010, p. 18). A reference to the Charter would imply the acknowledgement by the Court that the initiative of FR definition in the EU has been taken over by the highest and most legitimate political body, the Masters of the Treaties” (Morijn 2010, p.19). A strong commitment to the Charter also makes it more difficult for the ECJ to rule on FR issues in the described flexible way in order to balance the various involved interests.
4.2. The *locus standi* of individual non-privileged applicants under the Charter before Lisbon

It was extremely difficult for a potential victim to rely on the Charter to lodge a complaint before the ECJ. First, individuals who wanted to rely on the Charter before the ECJ had to fulfill the strict *locus standi* requirements described in chapter 3.2.

Second, individuals could not explicitly rely on the Charter in order to lodge a complaint, as it was not a proper legal basis for such a claim. The Charter alone does therefore not fulfill the requirement of *Ubi ius – ibi remedium* before 2009, although Art. 47 of the Charter calls for an opening of the conditions on admissibility. One can read in this article:

‘Everyone whose rights and freedoms guaranteed by the Union are violated has the right to an effective remedy before a tribunal.’

On the other hand, one can read in the “Praesidium’s Explanatory Notes accompanying this article, that the inclusion in the Charter [...] is not intended to change the appeal system laid down by the Treaties, and particularly the rules relating to admissibility” (Morijn 2010, p.11).

4.3. Conclusion

The solemn proclamation of a legally non-binding Charter did not explicitly increase the degree of individual protection for various reasons: The limited *locus standi* of individual complainants has not evolved as a result of the Charter, nor in light of the ECJ’s judgments prior to 2009. This chapter has also demonstrated that the lack of legal force was not adequately compensated by a substantial judicial activism of the ECJ. The regular reference by both Luxemburg courts has not given the Charter more than a vague status with some kind of diffuse legal impact. The Charter did not significantly change the way the EU courts approached FR. Although it brought together first and second generation HR in one document, the indivisibility existed only on paper due to the clear trend in the ECJ’s jurisdiction before 2009 to focus on civil and political rights.

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25 It seems rather obvious that the term tribunal should be interpreted broadly as to encompass the national as well as the Community level.
Before 2009, the ECJ clearly continued to rely on its own principles developed in the field of FR instead of giving priority to the Charter. The non-binding nature of this act was confirmed before 2009, as the Charter did not become the core of the ECJ's FR jurisdiction.

The proclamation of the Charter did not constitute a dramatic change in the existing FR regime, but a rather modest start of gradual change that encompassed the following aspects:

- Increase of public awareness of FR instruments and their relevance
- Increased moral authority of existing rights
- Activism of EU institutions in the field of FR
- Cautious reference of the Charter in ECJ’s judgments

Contrary to this assessment, there are various more subtle arguments for a noteworthy impact of the Charter on the existing regime. The first part of the dissertation has shown that it is not always easy to guarantee a uniform application of the ECHR in all legal spheres of the European Union. The Charter was and still is the most promising approach of harmonising the two HR regimes and further prepared the ground for the accession of the EU to the ECHR. The overall relevance of the Charter gained momentum in the last years before the ToL, a fact that can either be attributed to an increased willingness of the courts to focus on the Charter or the upcoming ratification of the ToL.

5. Status Quo Before 2009

Before we elaborate on the changes triggered by the ToL, this part will briefly summarise the main findings of the first part of this dissertation. The protection of FR within the EU was on the one hand highly elaborated and codified by a strong case law of the ECJ, but on the other hand the list of shortcomings was also relatively long. The best way to tackle the initial hypotheses and questions is to focus on the main unresolved challenges before 2009 and analyse in the following section if the latest treaty amendments have the potential to tackle these challenges in any substantial way.

The main challenges do not primarily lie in the material scope of the relevant instruments, but in their structures, and especially in the practical access and use thereof. FR protection in the EU is, contrary to the ECHR, highly technical and difficult to conceptualise for ordinary EU citizens. The enforcement of the protected rights is, in general, not guaranteed by a clear and large-scale individual complaint mechanism before the ECJ, but through a great variety of different channels, involving national courts, preliminary rulings, and the ECJ itself. The most obvious limitation is the fact that the entire system only covers EU actions and MS actions based thereupon.
In addition to this complex structure, the individual applicant was confronted with even more technical aspects of EU scrutiny by the ECtHR and an opaque relationship between the two HR courts in Europe. The main finding of this paper is that the EU FR regime before 2009 was too complex and opaque, included two separate systems without clear cut legal competences and formal cooperation, and was too restrictive in its accessibility for individual complainants. Undoubtedly, the Charter of Fundamental Rights made protected rights more visible, but its weak legal status prevented it from becoming vital in the ECJ’s case law.

The EU secured FR protection by growing a considerable respect for the ECHR minimum standards as provided for in Art. 6 TEU and thereby appeased its critics without abandoning its autonomy through accession to the ECHR. This was on the one hand a very clever way of securing FR compliance by the EU without jeopardising its legal order that evolved over the last decades, but on the other hand it contributed to the vagueness of the ECJ’s FR protection.


This section will determine the added value of the new provisions of Art. 6 TEU on the effectiveness of the existing regime under Art. 6 TEU post-Nice by primarily working on the most pressing shortcomings of FR protection as defined in part one of this paper.

From a legal perspective the ToL did not bring a radical change, but as Groussot and Pech call it “a qualitative and quantitative step towards a more elaborate FR protection system” (Groussot, X. & Pech, L. 2010, p. 3). Like the failed Constitutional Treaty it preserves the interwoven three pillar structure of FR protection with the following major reforms: Art. 6 (1) introduces the legally binding status of the Charter and Art. 6(3) reconfirms the Union’s commitment to the ECHR by establishing the obligation of the EU to join the Convention. Although the Charter has acquired a more prominent rule in this triangle, the importance of the general principles of law will, most likely, not be negatively affected by the treaty amendment.26 The new Art. 6 did not bring a significant simplification of existing structures, but a clear reaffirmation of the well-established principle of multi-constitutionalism.

The first part of this section will analyse the impact of the new status of the Charter in Art. 6(1) TEU by elaborating on the aspects of practical relevance for individual applicants, the change in the ECJ’s case

26 In 2005 the ECJ reconfirmed in its Mangold decision that these principles will continue to play a vital role in the future.
law, the justiciability of socio-economic rights, and potential conflicts between the Charter and primary law articles. The second part will deal with the legal status of the ECHR in Art. 6 before the accession of the EU, and the last part will elaborate on the changes in legal standing requirements before the ECJ.

6.1. New Charter of Fundamental Rights Post Lisbon

The ToL makes the new Charter part of EU primary law. “The FR of the Charter have been put on an equal footing with the EU fundamental freedoms […]” (Ekardt & Kornack 2010, p. 89). In the words of the president of the ECJ, Vassilios Skouris, the Charter has become the reference text and the starting point for the court’s assessment of FR […]27 The ToL addressed one of the most pressing shortcomings of the pre-Lisbon era by making the Charter legally binding. This part will determine if the shift from soft law to an explicit legally binding status of the Charter triggered a qualitative enhancement in the individual protection of HR or if the new system merely consolidates the status quo.28

a) General Remarks

The best way to get an all-encompassing view of the most relevant aspects is a comparative analysis of the relevant treaty articles, the Charter, the ECJ’s case law, and the various explanatory documents provided by EU institutions. “Art. 6 (1) subparagraph 3 TEU, which refers to Title VII of the Charter, demands, for example, ‘due regard’ to the explanations of the Charter’s Convention’s Presidium, although the they have no binding effect and only serve as a “tool of interpretation intended to clarify the provisions of the Charter” (Ekardt & Kornack 2010, p. 91).

There has been a great deal of negotiations around the question of if and how to make the Charter legally binding. It is especially due to the opposition of the UK government and the final opt-out clauses, that the Charter has been removed from the Treaty itself. The Charter is, unlike in the failed Constitutional Treaty, not part of the treaties, but acquires the same legal value as EU primary law in an indirect manner: It is an independent document to which Art. 6 (1) TEU establishes a legally binding cross reference. Although this special status might turn out to be problematic in the interpretation of Charter rights and their scope, most scholars like Gianfrancesco agree that no relevant legal harm has been done to the Charter by the removing it from the treaties29 (Gianfrancesco 2009, p.10).

b) Practical Impact of the Upgraded Charter

27 Joint communication from Presidents Costa and Skouris of ECtHR, par. 1.
28 Due to the limited breadth of this paper many aspects like the national opt-out provisions of the Charter will not be analysed.
29 Chapter 6.1.6 will elaborate on the constitutional aspect of this cross-reference.
The new Charter does not entail any new rights, but strengthens the status of its existing rights by making them legally binding upon the EU and its MS. It closes the gap between the generous affirmation of a great variety of progressive FR and the hitherto weak corresponding enforcement mechanisms.

The ToL has extended the material scope of the Charter only in a rather modest way: As the ECJ competences in the area of police and judicial cooperation in criminal matters were enlarged, this area is now subject to judicial control on the basis of FR (Ekardt & Kornack 2010, p. 90). The revised Charter also contains some new rights that the ECJ has not yet declared part of the general principles of law, and some rights that were protected in international instruments have not yet been guaranteed in the EU context. This new “labeling” in the revised Charter does not, however, automatically transform them into directly enforceable individual rights as we will see in chapter 6.1.5.

One main criticism of part one was that the FR regime of the EU could not rely on a single document with a set of well defined rights, but its various co-existing sources caused a high level of complexity and legal uncertainty. Although the Charter can finally take over its role as legally binding bill of rights of the EU, it is still only one out of three sources of FR rights.

As the Charter has now become primary law, its status among the other instruments has, undoubtedly, become more prominent. The major consequence for an individual applicant is that he/she can rely on the Charter provisions before EU courts and national courts in proceedings that are within the scope of EU law. The ECJ is now able to overturn EU acts as well as national measures that fall within the scope of EU law on the sole ground that they violate Charter rights. The ECJ no longer has to rely on judge-made law, but can use a proper FR catalogue for its reasoning. “Nevertheless, questions on the judicial development of the law may still occur when it comes to the precise contents of a FR, the range of its application and when it is weighed against conflicting interests” (Kokott & Sobotta 2010, p. 4). In addition, one should not forget that the new Charter does not, in general, change existing rights or lessen their degree of protection, which means in practical terms that the entire case law of the ECJ remains in effect (ibidem, p. 4).

c) The ECJ’s Methodology in the Reference to the Charter after 1 December 2009

The new status of the Charter can only develop its full relevance if the ECJ makes reference to it in its judgments; otherwise the reforms stay mere treaty prose30. After the entry into force of the ToL, such reference by the ECJ has gained considerable momentum. The Luxemburg Court seems to have embarked on a more active approach towards the Charter by clearly abandoning its reluctance during the

30 Specific aspects linked to the court’s preliminary rulings will be left out in this part.
years before Lisbon. This is a clear result of the enhanced legal status of the Charter. The number of cases that include a textual reference to the Charter has continuously increased over the last two years.\(^\text{31}\)

It was in the joint cases *Volker und Markus Schecke GbR and Hartmut Eifert* where the ECJ declared an EU act for the first time invalid on the sole ground of violating Charter rights. In the case *Alassini* reference was made to the principle of effective judicial protection as "a general principle of EU law… which has also been reaffirmed by Article 47 of the Charter" In the case *Kükükdeveci* the ECJ held in January 2010 that the Charter is binding upon MS. In December 2010 the ECJ decided in the case *Deutsche Energiehandels- und Beratungsgesellschaft* where the court confirmed that legal persons can also enjoy Charter rights. In *Association Belge des Consommateurs Test-Achats and Others* the court decided in March 2011 that different gender-based premiums for insurances are incompatible with Arts. 21 and 23 of the Charter.

Although no detailed analysis of the most recent case law can be provided here, it is obvious that the substance of such a reference varies. In many cases it is just a short mentioning of some specific Charter articles, and only few cases base a great part of their judgment on the Charter. In conclusion, the ECJ has intensified its usage of the Charter over the last two years and started to rely on the Charter’s provision in a much more direct way than before 2009. Nevertheless the court kept using the general principles of EU law and made reference to the ECHR on a very regular basis, which makes it rather difficult for an individual applicant to conceptualise the difference between the courts’ approach before and after 2009. Mathisen argues that there are […] no signs for a significantly new methodology of the ECJ and it is simply too early to make definitive conclusion on this matter (*ibidem*, p. 18).

On the other hand, there is some evidence that clearly indicates a broadening of the scope of FR via the new authority of the Charter. One such finding of the legal research for this paper was an interesting development in the material scope of the Charter in the *Kücükdevici* judgment of 2010 that contradicts the court’s case law on the limitation of the Charter’s application. The judges came to the conclusion in this case between private parties that the provisions of the Charter concerning age discrimination must be enforced, even if there is contradicting national legislation.

This prohibition of discrimination applies to the horizontal relationship between two private parties. Art. 51 of the Charter does not provide for such a direct effect. It only refers to official institutions and bodies of the EU and MS, but not to private entities. This judgment is very important for the further development of FR in the EU as it shows that specific additional content can be added to existing rights of the Charter. This judgment is indeed new as it might open the door for more such deviations from the common practice.

\(^{31}\) This statement is based on empiric evidence gathered by using the ECJ’s case law search engine.
The Charter’s (Still) Limited Scope

Although the Charter is now binding on EU institutions and MS alike, a number of post-Lisbon provisions significantly reduce its importance. Art. 6(1) dedicates more than half of its text to two main limitations. First, the Charter does not, like before Lisbon, apply to purely national situations. Art. 5(1) TEU states that MS are only bound by the Charter when they implement EU law. Art. 51 of the Charter establishes the same general restriction clause. The explanations on the same Charter article use a slightly different wording by stating that the Charter is “only binding on MS when they act in the scope of Union law.” By stating that this follows “unambiguously from the case-law of the Court of Justice” and by quoting its most relevant judgments, the drafters of these explanations made sure that there is no doubt about the scope of the Charter when it comes to MS obligations (Explanations relating to the Charter of Fundamental Rights 2007, p. 16). Kokott & Sobotta argue that the dogmatic structure is neither extended nor constrained (Kokott & Sobotta 2010, p. 11) after Lisbon, as this was not considered desirable by the masters of the treaty. The EU FR regime continues to be subsidiary to the national FR protection mechanisms and its main aim is not to harmonise FR in the EU, but to secure a coherent interpretation of EU law throughout the Union, a premise that has not changed after Lisbon.  

As the notion of “implementing Union law” is open to a wide range of interpretations, it will be up to the ECJ to provide guidance in this matter. Past ECJ judgments like ERT provide for some temporary interpretative authority by stating that MS may also be obliged to respect FR in situations when MS are technically not implementing EU measures. The most recent case law like Kücükdeveci shows that “within the scope of EU law” is the more appropriate term in this context.

“Citizens might mistakenly be under the illusion that the Charter will now always be obligatory for their national authorities even when they are not implementing EU law” (Piris 2010, p. 159). It is still not possible for individuals to start proceedings against any national measure by relying on the Charter text as the EU is not entitled to impose obligations to MS that are outside of its conferred competences. In addition, the term “Union law” is not defined in the treaties nor is it in related documents, which creates a high degree of semantic vagueness of the new provisions. Bearing this in mind, it is not always easy for an applicant to determine if a certain situation is or is not covered by “implementing Union law”.

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32 Although the ECJ does not seem to be willing yet to abandon its wholly internal approach, AG like Sharpston advocated in Government of the French Community and Walloon Government v. Flemish Government for an extension of the material scope of the Charter to strictly internal situations.
Second, although Art. 6 TEU states that the Charter has “the same legal value as the Treaties”, the same article restricts the Charter’s applicability in a way that “the provisions of the Charter shall not extend in any way the competence of the Union as defined in the Treaties”. Accordingly, Art. 51(2) of the Charter states the following:

*This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.*

These and other provisions have been integrated in the new instruments at the request of a number of MS who feared a disproportionate increase in EU competences after the entry into force of the ToL. From a legal point of view it seems that such concerns are often more politically motivated than actually necessary given the principles of subsidiarity and conferred competences. Legally, the Charter does not under any circumstances constitute a legal basis for EU institutions to legislate.

For potential victims it is important to know which rights are protected under what circumstances and how they can be enforced. Unfortunately, the ToL did not substantially improve the situation in terms of clarity and transparency due to a great number of complex interwoven provisions that aim at restricting the scope of the Charter.

e) **Justiciability of Socio-Economic Rights of the Legally Binding Charter**

The socio-economic rights as laid down in the principles of Title IV of the Charter go beyond the degree of protection guaranteed by the ECHR and the general principles of law. Contrary to many critics, these socio-economic rights are, after 2009, not enforceable in the same manner as more traditional civil and political rights. Art. 52(5) of the Charter defines the justiciability of these principles as follows:

“*The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality*”.

The concept of justiciability in this area is rather complex and led to some confusion. Still only classical FR are said to be completely actionable before courts after Lisbon. They “confer on any legal person an individual prerogative that can be judicially enforced on a third party and, in particular, on public authorities without the need for legislative implementation” (Groussot, X. & Pech, L. 2010, p. 7).

The new Art. 52 (5) established once for all the dichotomy of rights and principles in the Charter. The tenth report of the House of Lords on the European Union of 2008 states that it is still not clear how the distinction between these two can be drawn and the ToL and its connected documents do not provide for
a clear guidance which Charter articles involve rights and which ones principles. As before Lisbon, it will be the future ECJ case law that determines this (House of Lords 10th report 2008 Art 5.22).

It is difficult for a potential victim to understand to what extent socio-economic rights are enforceable. The fact that some of them, such as the right to join a union or the right to strike, are indeed partially enforceable contributes to the complexity. The situation gets even more complex with regard to positive socio-economic rights such as the right to education that require actions by national authorities. These rights are not directly enforceable without legislative implementation. Individuals can therefore not directly rely on them before national courts. National courts are only required to take this set of rights into account. This concept leads to legal uncertainty and especially in view of the strong protection mechanisms for civil and political rights before 2009 the added value of the Charter in this context must be questioned. The second and third generations of FR as laid down in the Charter are still programmatic rights with a rather weak enforceability. The ECJ's FR jurisdiction still does not have a significant "positive dimension" in order make the enforcement of socio-economic rights more tangible.

f) Conflicts Between Fundamental Rights and Fundamental Freedoms after 2009

This part will shortly analyse how the ToL affected the way conflicts between FR and other primary law articles are solved. One might assume that due to the new status of the Charter, the ECJ is under a certain obligation to address FR in a more direct way. Although scholars like Doğan argue that the earlier mentioned balancing of economic freedoms against FR as part of the general principles of law should come to an end due to the stronger status of the Charter (Doğan 2008, p.18), there are many signs that this will, most probably, not be the case. The most important argument against such a paradigm change is Art. 52 of the Charter itself, which states the following:

*Any limitation on the exercise of the rights [...] must be provided for by law and respect the essence of those rights [...] limitations may be made only if they are necessary and genuinely meet objectives of general interest [...] or need to protect the rights and freedoms of others.*

This wording is mainly based on the well-established case law of the ECJ. Recent judgments such as *Laval* and *Rüffert* have shown that in the case of conflict, the ECJ does not rule in favor of FR as a general rule, but is still inclined to take vital economic interests into consideration. The two years following the entry into force of the ToL have not brought a significant change to the case-by-case approach yet. The initial assumption that the ECJ would embark on a more FR orientated approach cannot be upheld in light of the most recent judgments.
As conflicts between co-existing legal layers are, in general, solved by referring to the involved hierarchy of norms, it is worthwhile to look at the potentially new hierarchies of norms within the EU legal system after Lisbon. There are three possible positions the Charter can theoretically hold in this context: It can be inferior, equal or superior to EU primary law.

There is evidence for the argument that FR before Lisbon were through their strong status within the general principles of law de facto equal to primary law, and this status has not been significantly changed with the ToL. This argument results in the following minimalistic reading of the intrinsic motivation underlying the Charter’s proclamation and entry into force in 2009: Only those rights that were not part of the general principles of EU law before have acquired a stronger legal status through the ToL. For well-established FR legally most relevant seems to be the fact that their material scope has become more concrete and transparent via the Charter.

It is not clear though if the implications of Art. 6.1 are such that they elevate FR above ordinary treaty articles. FR are lex superior to all EU law that is not primary law. Superiority in the area of primary law is difficult to establish as the EU does not (yet) have a constitutional order, and the Charter does not result from international obligations either. For Mathisen the mere fact that the Charter was introduced as some kind of bill of right into EU law is proof enough that FR needs to be treated differently from fundamental freedoms, for example. By making reference to the elevated position of FR in national legal systems and the society itself he advocates for a special status within EU law (Mathisen 2010, p.48). One can discuss this issue from a different angle: The strong activism of the ECJ pre-Lisbon helped elevate FR to a practically equal status to primary law. The clear intention of the new provisions after 2009 is to increase the visibility, the practical relevance, and the status of FR within the legal system of the EU. Bearing this in mind, it is difficult not to attribute some kind of special status to FR in the post-Lisbon era.

The Kadi case provides for some additional guidance in this matter. The ECJ stated in this case that all Community acts must respect FR among the constitutional principles of the Treaty. Such a principle is also known as the “Ewigkeitsklausel” in German law. Provisions that are not constitutional in nature would be interpreted as to be in conformity with constitutional principles, such as FR” (Kokott & Sobotta 2010, p.6). Even if such a concept could be established, it would not be of practical importance as it is very unlikely that the ECJ would annul non-constitutional provisions of primary law for the simple reason that it is not competent to do so.

Although the accession of the EU to the ECHR might trigger a noteworthy change, there is definitely no general primacy of FR over other areas of EU primary law as of 2011. Bearing this in mind, many scholars argue that the ToL did not have any significant impact in this context and that, like before 2009, conflicts will be solved through reconciliation and the well-established balancing act of the ECJ.
Nevertheless, the ECJ could decide to attribute a special status to FR via Art. 6 TEU and give the Charter the power to overrule other EU primary law in a situation of divergence. The present situation does not allow for a clear conclusion in this matter so that only upcoming events will show how much of a quasi primacy FR enjoy in practical terms.

6.2. Legal Status of the ECHR in Art. 6 TEU Post-Lisbon - Relationship Between the New Charter and the Convention

The ToL has initiated the process of making the EU the first non-state member of the ECHR. The first step of this process, the entry into force of the Charter and its implication on the status of the ECHR in EU law, will be analysed in this chapter. As the EU is not yet a party to the ECHR, “it is therefore not directly bound by it” (Lock 2009, p. 376) and cannot be held responsible for infringements of the Convention. Nevertheless, Art. 52(3) of the Charter and Art. 6 TEU establish an implicit multilayered dependency of the EU to the ECHR. The Convention no longer acts as the most prominent source of inspiration for the formation of general principles of law, but forms, according to Weiss, the main substantial foundation of FR within the EU legal order (Weiss 2011, p. 75). Art. 52 (3) of the Charter defines the relationship between the Charter and the ECHR in the following way:

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. [...] it shall not prevent Union law from providing more extensive protection.

This article establishes through its legally binding status a special significance of the ECHR by stating that the standard of Charter rights that are similar to the ones in the ECHR cannot offer a lower degree of protection than the Convention, but there is nothing that prevents the ECJ from developing a higher level of protection. “The aim of Article 52(3) is to prevent Member States from being subjected to two different standards of human rights protection when implementing EU law” (Lock 2009, p. 8). At first glance, these provisions seem to be rather straight forward, but if read in conjunction with Art. 6 TEU, they leave many crucial questions unanswered.

In the new TEU, the ECHR is mentioned in different contexts: Art. 6(1) states that the Convention is a source of FR. Art. 6(2) refers to it as an international instrument to which the EU shall accede, and Art. 6(3) renews the pre-Lisbon role of the Convention as a source of inspiration for general principles of law (Weiss 2011, p. 65). These contradictory statements make it rather difficult to assess the new role of the ECHR. According to Weiss, there are only two mutually exclusive ways of interpreting Art. 52(3): these
provisions can either be seen as interpretative guides that respect the autonomy of the EU legal order, or as a material incorporation of the Convention into EU law. Weiss argues that the wording of Art. 52(3) of the Charter and Art. 6(1) TEU indicates that the drafters of the treaty were in favor of the second option. Following this argument, those rights that the Charter drew from the Convention have been made part of the legal system of the EU (Weiss 2011, p.69).

In the event of conflict between the relevant sources of FR rights, the Convention rights will prevail unless other sources offer a higher degree of protection. Furthermore, FR law can never be interpreted in a way contradicting the Convention. Although it is true that, in general, no source of FR is superior to the other, the EU is now indirectly bound by the ECHR, whenever FR are restricted. Following this logic behind the new system, the mentioning of the ECHR in different contexts pursuant to Art. 6 TEU and Art. 52 of the Charter makes sense and allows for a flexible system of individual protection with legal guarantees at the bottom and room for higher standards at the upper end.

If one accepts the before mentioned interpretation of the ECHR as an implicit part of EU law, one also needs to answer the question of whether or not the ECJ is bound by the ECtHR’s case law. Art. 52(3) does not make an explicit reference to the ECtHR’s case law, and although the explanations for Art. 52(3) mention the Strasbourg court, they are not conclusive on this matter. Scholars therefore largely disagree about the relationship between the two courts in this matter after 2009. The flexible and autonomous approach in the ECJ’s jurisdiction, as described in the first part, has been considerably curtailed by Art. 52(3) of the Charter. If the ECJ is bound by the ECtHR’s case law, it would no longer be able to come to a divergent conclusion when it comes to Charter rights that also form part of the Convention. The incorporation of core rights of the ECHR into the Charter would indeed be incomplete if the ECJ could disregard the interpretations of the ECtHR thereof. If this were the case this would contradict the “very nature of the Convention as a living instrument” (Weiss 2011, p. 81).

On the other hand, the explanations for Article 52(7) only postulate a duty to duly regard the ECtHR’s case law. These explanations alone cannot provide for a “sufficient basis for the assumption that the ECJ would be bound by the ECtHR’s case law” (Lock 2009, p.10). One of the most convincing arguments against such a general dependency is that a principle of stare decisis is unknown to the EU legal order. Such a system would only make sense if there were a clear hierarchy and the existence of an appellative system. A stare decisis doctrine would therefore only make sense after the accession of the EU to the ECHR.

A strictly binding effect of the ECtHR’s case law on the ECJ might cause some practical problem. In a situation where both courts’ stances on a particular matter is contradictory, the ECJ would be in a legal dilemma as it would be bound by the Strasbourg case law as well as by its own case law. “This shows that in such a case the purpose of Article 52(3), which is to create coherence and consistency in
European human rights law, would not be better served if there was the legal duty to follow the other one’s case law” (Lock 2009, p.12) but further prepared the way for the ECHR to be a legally binding minimum standard of HR protection within the EU. Bearing the above-mentioned arguments in mind, one can conclude that the ToL did not create a general dependency of the ECJ to the ECtHR.

6.3. Relevant Reforms with Regard to the Judicial Review of EU Acts

The upgraded status of the Charter can only develop its full significance if individuals have the possibility to challenge alleged violations of the protected rights before EU courts and/or via national proceedings. Part one of this dissertation has shown that before 2009 there was a considerable gap in the judicial protection of EU citizens due to various shortcomings with regard to individual complaint mechanisms. This part will analyse the most important reforms in this area and explain their relevance for individual applicants in order to answer Eliantonio and Kas’s question if this gap has or has not been filled by the ToL (Eliantonio & Kas 2010, p. 127).

a) Legal Standing Requirements for Individual Applicants Before the ECJ

Although the main underlying policies have not been altered, the ToL brought some noteworthy amendments to the standing of individual non-privileged applicants before the ECJ. The relevant procedures were changed in two ways: There is now a greater variety of reviewable acts that qualify for such a challenge and the standing of individuals has been relaxed in a noteworthy way.

With regard to the reviewable acts the new Article 263 of the Treaty on the Functioning of the European Union (TFEU) stipulates the following:

_The Court of Justice shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, […] and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties._

Most relevant for individuals is the extension of the review to EU agencies, bodies and offices intended to produce legal effect on third parties. The first part of this paper has shown that EU treaties are, in general, less progressive than one might think as they often only catch up with the development of the ECJ’s case law in a certain area. Ever since the Sogelma judgment, the ECJ made it clear that an act from an EU agency that produces legal effects for third parties cannot escape judicial review. The practical relevance of the new Art. 263 is therefore highly debatable.
According to Art. 240(a)(2) TEU, the ECJ was also given jurisdiction to review decisions “providing for restrictive measures against natural or legal persons adopted by the Council under the Common Foreign and Security Policy (CFSP)”. Art. 240 along with Art. 188(n) about concluding international agreements represent the only two areas where the ECJ was given jurisdiction in the area of CFSP.

The other important aspect is the partial relaxation of individual standing requirements. According to Art. 263(4) TFEU “any natural or legal person may […] institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures”. The big innovation is the fact that individuals may now challenge regulatory acts which are of direct concern to them and do not require implementing measures. Individuals no longer have to prove individual concern for such regulatory acts. The requirement of individual concern was not just reformed but removed in certain cases.

In order to qualify for the relaxed standing procedure, a potential victim has to prove that the act in question is a regulatory act and that it does not entail implementation measures. In a situation where an individual tries to challenge a non-regulatory act that does not require any implementing measures and fails the Plauman test, the preliminary procedure would still not be open to such an applicant. There is still the risk to a complete lack of remedy after Lisbon as described in chapter 3.2.

Although the doors to the ECJ are now a bit more open than before, it is still extremely difficult for potential victims to get access to the Community courts. In addition, Art. 263 (4) TFEU causes a great deal of confusion for potential victims: first, in the beginning it was not completely clear how pending cases that were initiated before 2009 should be treated. Second, the definition of “regulatory acts” has already caused some confusion, as there is no explanation of this term available. The most useful definition comes from the Working Group II of the Convention that drafted the Constitutional Treaty. (CONV 572/03, p.4). Eliantonio and Kas argue that according to this group the main aim of the new term is to clarify the distinction between legislative and non-legislative acts The Community courts were ready to provide for a more open approach to non-legislative acts, whereas they were not ready to do so with regard to legislative acts (Eliantonio & Kas 2010, p.127).

b) **ECJ Practice of Judicial Review Post-Lisbon**

The issue of transitional cases was solved by the Grand Chamber judgment of Norilsk Nickel Harjavalta Oy of September 2010 (Dubova 2010, p.63). The question was if the case should be decided under Art. 230(4) or the new Art. 263(4). The ECJ decided in favor of the old provisions by stating that the admissibility of a case must be decided on the basis of the rules in force at the time of the application. At the moment the use of the new relaxed mechanisms is still rather limited, as the ECJ only allows for such
a relaxation if the complaint was lodged after 01 December 2009 and the contested act was also adopted after this date.

The material scope of the new mechanisms, most likely, covers Commission acts (Koch 2005, p. 525), whereas most Council and EP acts fall outside the new procedure. As there are often no implementing measures required, there is also no way to challenge such acts before national courts. According to Dubova “it is likely that the applicant has to prove individual and direct concern according to the Plauman test” (Dubova 2010, p. 72). Acts emanating from the ordinary legislative procedure are not treated under the new regime. Especially in this context the degree of individual protection has not improved as it is still almost impossible to access the ECJ with a complaint about a regulation.

When it comes to directives it is still rather difficult to challenge them via an annulment procedure. “Because directives always require implementing measures, they would certainly not fall under the ambit of regulatory acts” (ibidem, p. 73). After the ToL the only reasonable way to challenge a directive is still before national courts in the context of a preliminary ruling.

This short overview has shown that the reformed system after the ToL is substantively the same as before and no revolutionary changes have been implemented. The most pressing shortcomings have not been tackled in a satisfactory manner and the degree of individual protection has become dependent on the legal form of the act in question. This area seems to be trapped in a certain dilemma that manifests itself more clearly than ever: The restrictive standard of individual and direct concern has been defined by the ECJ in the first place and upheld over the last decades. ECJ judges have reiterated that a reform of the access to the ECJ is a political issue that the drafters of treaty reforms have to discuss. The ToL proves that politicians are not yet willing to commit to a revolutionary reform, but a considerable relaxation of the standing requirements can, for the moment, only come from judicial activism of the ECJ. The bottom line of this complex situation is that the drafters of the treaties as well as the ECJ are not yet ready to reform the existing regime in a manner that would once close the gap in the system of judicial protection for good.

6.4. Accession of the EU to the ECHR

Since the late 1970s there have been considerable efforts to make the accession of the EU to the ECHR possible. The ECJ made it clear in its Opinion 2/94 that the EC did not have the competence to accede to the ECHR. Also the ECHR was until recently not open to international organisations. With the ToL and Protocol Nr. 14 of the ECHR “the last legal obstacles have been overcome” (Kwiatkowska, A., Paulsson, H & Dahlin, G. 2010, p.1) in order make the EU the first non-state member of the ECHR. The Tol does not
simply provide for a legal basis for the accession, but made it an obligation by stating that “the Union shall accede [...]” (Art. 6(2) TEU).

Accession seems necessary for a myriad of reasons. The closing of the gap in FR protection caused by the sovereign immunity of the EU is the most tangible one.” Until now at the Union level there has been no correlation between the subjection of EU citizens and their legal protection by an external judicial review - although this is demanded by the principle of *subiectio trahit protectionem*” (Blanke 2010, chapter 4.3.1.). Chapter 6.4.3 will discuss this future external review of EU actions in detail. Other more implicit arguments are that accession can guarantee the legitimacy of the ever-expanding FR portfolio of the EU and makes sure that the ECHR’s role will not be lessened by the ever-increasing importance of the ECJ. The following part will briefly analyse the most important positive and negative aspects of accession on the degree of individual protection.\(^{33}\)

\(^{33}\) As the breadth of this paper is very limited, many institutional, procedural, and technical details will not be mentioned in the following chapters.
external control mechanisms over EU acts, including ECJ judgments. According to Art. 344 TFEU, the ECJ will keep its role as the only competent interpreter of EU primary law, but the ECHR will be legally entitled to rule on the compatibility of EU law with the ECHR.

In practical terms “the individual will have the right to submit […] acts, measures or omissions of the EU to the external control of the European Court of Human Rights” (CDDH-UE(2011)16, p. 1). This will end the unnatural character of individual complaints against the EU. So far individuals have to lodge a complaint before the ECtHR not against the perpetrator of the alleged violation, but against one or more MS. If the ECtHR finds a violation, this needs to be remedied by the EU as a third party.

There is also an ongoing debate if the EU should be held liable by the ECtHR for violations of the Convention rooted in EU primary law. As only the MS can change EU primary law via treaty amendments34 and not the ECJ, it is not certain yet if the accession agreement will include primary law. Advocates for a selective ECtHR competence argue that it does not make sense to provide for such a review if violations rooted in primary law cannot be remedied by the EU by amending the underlying legal basis. On the other hand, such a selective approach is difficult to defend in the post-accession era for the following reasons: although there are high hurdles for the amendment of national constitutional law similar to the Art. 48 TEU procedure, they are not excluded from ECtHR scrutiny. In addition, if the ECtHR had to differentiate between primary and secondary law, it would have to interpret EU law, which would endanger the autonomy of the EU legal order as referred to by Protocol 8. In more general terms, the objective of the EU to enhance the credibility of its FR regime via accession to the ECHR would be in danger if the highest-ranking norms of the Union were exempt from scrutiny.

c) The Attribution of Liability and the Prerogative of Exhausting Domestic Remedies Before the ECtHR

Due to the special characteristics of EU law, it will not always be clear who the respondent in cases involving EU law will be. Violations can either be based on an MS’s action implementing EU law or on the EU’s own sovereign rights. For laypersons it is rather difficult to distinguish between these two situations. Art. 1b of Protocol N. 8 to the ToL provides some guidance by stating that:

The agreement relating to the accession [...] shall make provision to preserving the specific characteristics of the [...] Union law in particular with regard to [...] the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.”

34 Art 48(2) TEU
The EU will either act as direct respondent if the challenged action stems from EU legislation alone, or the Union will be the co-respondent in a situation where the violation of FR occurred in a context where both the MS and the Union acted. As it is, in general, the MS that acts upon EU legislation vis-à-vis individuals, the second is the most likely scenario of enhanced external scrutiny. Such a shared liability would also improve the degree of protection, as the force of res judicata\textsuperscript{35} would apply to the MS and the EU in the same way. The draft agreement of 2011 provides an adjustment of Art. 36 ECHR as the future legal basis for such a procedure. The explanatory report on the draft accession of 2011 states that such a mechanism is necessary to "accommodate the specific situation of the EU as a non-State entity with an autonomous legal system that is becoming a Party to the Convention alongside its own member States" (CDDH-UE(2011)16, p.16).

The attribution of liability is closely connected to the principle of exhausting available domestic remedies as part of the admission criteria to the ECtHR. Art. 35 (2)(b) ECHR states that a case before the ECtHR will be declared inadmissible if it was already presented to another procedure of international investigation. For the purpose of this article, the ECJ will no longer be considered as international, but as a domestic court. In addition, Lock argues that an individual will have to seek remedy before the EU courts in order to satisfy the requirements of Art. 35 ECHR (Lock 2009, p. 385). This especially applies in Connolly-like cases where the EU is the primary respondent. In situations similar to Bosphorus where the EU acts as co-respondent, only national remedies must be exhausted.

In conclusion, establishing the most appropriate addressee of a complaint will not always be easy as the competences of the EU and the MS are not clear cut. The most critical problem for potential victims is the fact that there are no tangible criteria upon which to establish the addressee of a complaint, and the ECtHR does not have the competence to rule on the distribution of competences between the EU and its MS. According to Lock "the designation of the correct respondent should nevertheless not place a huge burden on the applicant" (ibidem, p. 19) as the individual applicant does, in general, not have a legal education.

The easiest but least likely solution to the attribution dilemma would be to hold the party that acted liable in a concrete case (ibidem, p.784). This would be positive from the applicant’s point of view as he/she would not have to identify the correct respondent. Even where MS have merely implemented EU law, potential victims could bring actions against the MS before the ECtHR. The ECJ would have the indirect possibility to remedy violations that are rooted in EU law via its judgments in the preliminary ruling

\textsuperscript{35} This legal rule claims that a court’s final judgment on the merits of a case is conclusive to all parties of the proceeding and all matters of the same case.
procedure. As future cases could be denied by the ECtHR on the sole ground that the applicant has chosen the wrong “route” to Strasbourg, this very straightforward scenario could solve this problem.

\[d\] The Future of the Bosphorus Presumption of Equivalent Protection

Although EU accession will establish a general EU scrutiny of the ECHR, it is debatable if this will bring a definitive end to the EU’s partial immunity of ECtHR scrutiny. The main argument of the ECtHR for the establishment of this doctrine was that the EU offers, in general, the same level for FR protection as the ECHR and the Strasbourg court would only act in a case of manifest deficiency. The underlying rationale of this principle in the context of transfer of power has not changed after 2009 and MS action scrutiny is as unnecessary as before (Beselink 2010, p.8). In addition, the now binding Charter along with the described improved judicial remedies have significantly increased the level of protection offered by the EU, and therefore the Bosphorus doctrine seems at this moment more valid than ever before. If one develops this argument further it can be said that after accession the EU protection will even be more “equivalent”, which would give the ECtHR even more reason to maintain the EU immunity.

There are also arguments why the Bosphorus doctrine should be abandoned after accession. One important reason stems from the rationale behind this concept: Lock argues that the most fundamental reason for the ECtHR to embark on the Bosphorus assumption was the pragmatic intention to avoid conflicts with the ECJ by showing its respect for the Union court in exchange for the its readiness to voluntarily follow ECtHR’s case law (Lock 2009, p.387). According to Costello, it allowed the ECtHR to adjust itself to the independence of EU legal order, while the ECJ was encouraged in a persuasive way to comply with the ECHR provisions (Costello, 2006, p.91).

After accession, the voluntary cooperation will come to an end as the ECJ will be under full ECtHR scrutiny. It will be difficult to justify that the EU’s “constitutional law” is treated differently than an MS’s constitutional law that might offer an even higher level of protection. For the individual applicant it is, undoubtedly, more beneficial if the Bosphorus doctrine was abandoned. Current cases show that it is difficult to rebut the equivalence presumption and the underlying procedures are extremely complex, cumbersome, and of very limited practical relevance. Also the wording of paragraph 7 of the explanatory report to the draft accession advocates for an end of the EU privileges by stating:

“As general principles, the Accession Agreement aims to preserve the equal rights of all individuals under the Convention, the rights of applicants in the Convention procedures, and the equality of all High Contracting Parties. The EU should [...] accede to the Convention on an equal footing with the other Contracting Parties” (CDDH-UE(2011)16, p.11).
Deputy Grand Chamber Registrar at the ECtHR Johan Callewaert also advocated for an equal status of all Convention members including the EU in an interview in 2010.

**e) Selected Legal Considerations Regarding the Competences of the ECJ and the ECtHR After Accession**

The claim of only jurisdiction of the ECJ conflicts with the ECtHR role in inter-state disputes according to Art. 55 ECHR. This article creates exclusive jurisdiction of the ECtHR over disputes between contracting parties. After accession, disputes between MS or MS and the EU could potentially be settled by both courts. A conflict of competence could arise if no special agreement is concluded in the future accession agreement. Art. 55 ECHR is not absolute as it allows for special dispute settlement agreements between the parties. Lock argues that Arts. 220 and 292 TEU could be interpreted as such a special agreement (Lock, 2009, p. 391). This argument is debatable given the fact that such an agreement needs to be concluded by all members and Art. 55 indirectly asks for an explicit mentioning of the ECHR.

Nevertheless, many scholars like Frowein see the existing articles as satisfying the requirements of Art. 55 (Frowein 1996, p. 23). If one looks at the different nature of the EU and the ECHR, the Convention cannot be seen as an autonomous legal order whose court needs to ensure the coherency of its own legal order. "Therefore the exclusive jurisdiction given to the ECtHR (...) does not seem to serve the purpose of protecting the ECHR from being interpreted by another forum" (Lock 2009, p. 393). The "travaux preparatoires" of the ECHR, the teleological interpretation of Art. 55 and the role of the ECtHR do, in general, allow for the conclusion that the TEU can be seen as a special agreement allowing for different adjudication by empowering the ECJ.

Some critics fear that accession to the ECHR might endanger the autonomy of the EU legal order. The following paragraphs will provide evidence that this is, most probably, not the case. Once the EU has become the 48th contracting party to the ECHR, the ECJ will no longer be considered as an international court for the purpose of the ECtHR, but as a domestic court. The ECtHR will then be an instrument of subsidiary protection in the same manner as it is to the legal systems of the MS. This fact shows that accession does not threaten the autonomy of EU law. It will still be the ECJ that has the primary task of securing the protection of Convention rights. The Strasbourg court will not be a higher court, but its main function is to guarantee a minimum level of protection of Convention rights via a special form of external review. Art. 35 (1) of ECHR supports the claim that recourse of the ECtHR will only be done as a last resort, as "the Court may only deal with the matter after all domestic remedies have been exhausted". In this case the principle of subsidiarity guarantees the autonomy of EU law. In addition, the procedural and institutional set-up of the ECtHR regime does not interpret national law, but only interprets its conformity.
with the ECHR on a case-by-case basis in concreto. “The application of these principles to EU institutions and EU law should preclude therefore any problem on that front” (Groussot & Pech 2010, p. 12).

It is generally accepted that the pre-accession phase as well as the accession will foster the convergence of both courts’ case law. The ECJ is more aware than ever that there will soon be formal review mechanisms of its judgements in FR matters. It is evident that the ECJ wants to avoid the blame of a conviction by the ECtHR. The most likely outcome will be a more detailed reasoning of the ECJ when it comes to FR issues. The decision in the Kadi case gives an important indication of the way the ECJ’s case law might develop in the next years. If one reads the judgment, it seems that the ECJ was at this point aware of the possibility of a review by the ECtHR if it had decided against the applicant and in favour of international obligations. The author of this paper assumes that if the ECtHR had reviewed this case after a negative judgment of the ECJ, it would have, for the first time, established a manifest deficiency in the EU FR protection. Once the EU is an official member of the Convention, the threat of being overruled will become even more important. Bearing this in mind, the ECJ will, most probably, embark on a more FR-orientated approach to its judgments in order to secure its autonomy.

f) The Post–Accession Regime in Practice – New European Appellative System?

Although the likelihood that ECJ judgments will soon become the subject of a case before the ECtHR is rather small in view of the mutual respect that has characterised the relationship of both courts in recent years, this part will briefly summarize the new possibilities before the ECtHR. Depending on the primary respondent, the ECtHR can attribute either direct or indirect liability of the ECJ.

Indirect Liability of the ECJ in a Case Against an MS.

The most likely scenario will be a slightly different form of indirect liability of the ECJ in “traditional” cases against MS of the CoE that are also MS of the EU. If there is an open divergence in the jurisdiction of both courts on the same matter, "the ECtHR would not rule directly against the EU, but its findings would indirectly entail that the EU had not respected the ECHR" (Mathisen 2010, p.37).

A case where a national court refers an issue to the ECJ for a preliminary ruling and the Luxemburg court does not see an FR infringement, all remaining national courts of appeal are still bound by the ECJ finding. As already before accession, the potential victim has the possibility to bring such a case before the ECtHR after having exhausted all national remedies. In such a case the relevant MS would be the primary respondent before the ECtHR.
The ECtHR can then decide on the matter based on the standards of the same right as set out in the ECHR. If the ECtHR finds a violation, only the respondent MS would be held liable and not the EU, although the first was obliged by EU law to follow the “incorrect” preliminary ruling. This indirect liability would mainly work with the principle of “name and shame”, as a judgment of the ECtHR against the ECJ would have a great potential for embarrassment. Accession will not fundamentally change these principles, but only strengthen the role of the ECtHR and enhance the role of the Charter in this context.

**Direct Liability of the ECJ in a Case Against the EU**

There will also be the possibility of direct liability which is, undoubtedly, still very theoretical at this early stage, but which could provide for an important remedy for individuals whose FR have been infringed by an ECJ ruling. The revolutionary character of the ToL seems far more evident than in the first case. After accession, the litigant of the above-mentioned case could also lodge a complaint before the ECtHR against the EU right after the preliminary ruling. In this case, the ECJ would be held directly responsible for an allegedly flawed interpretation of the ECHR. If the ECtHR finds an infringement of the ECHR, the legal implications of such a judgment are much more relevant for the EU than the first described case as the EU would be held directly liable. In this situation all national courts of appeal can then deviate from the preliminary procedure ruling on the ground of the ECtHR judgment.

As not all national courts are obliged by law to make a reference to the ECJ and potential victims cannot force the court to do so, the question of whether or not a potential victim can bring a case against a national judgment involving EU law before the ECtHR without a prior preliminary ruling should be discussed briefly here. In theory, only obligatory involvement of the ECJ will match the ECHR’s principle of subsidiarity. The main question in such a situation is how it is possible for the EU to put an end to an alleged violation of FR before the case is forwarded to the ECtHR. “From the perspective of EU law, it would thus be very frustrating if the ECtHR found an infringement without any participation of the ECJ. It seems desirable that the ECJ is given the right to rule on a case involving EU law before it is referred to the Strasbourg court.

One also has to recall that if an Art. 263 procedure was to be considered as part of the domestic remedies, the fact that an individual cannot force a national court to forward a question to the ECJ could drastically reduce the practical relevance of such a new regime. As the effectiveness of this remedy can be questioned and the scope of the new relaxed standing requirements before the ECJ is unclear, it is at this point not certain if an individual has to exhaust the remedies offered by the Union’s courts before lodging a complaint to the ECtHR. It can nevertheless be argued that the formal requirement for an individual to at least apply to the national court for such a reference can be considered as adequate. Art. 3(6) of the draft accession agreement of 2011 provides for the possibility of prior ECJ assessment before
the ECtHR decides a case to which the EU is a co-respondent (CDDH-UE(2011)16, p. 4). On the other hand, its relating explanatory report makes clear that Art. 263 rulings are, in general, not regarded as domestic remedies that need to be exhausted. Although no definitive agreement has been reached on this matter, it seems that some kind of prior ECJ involvement principle will be established.

In addition, potential victims whose case has been directly tried by Union courts will get the possibility of appeal to the ECtHR. This is the only truly revolutionary reform of direct liability, but at this point also the least likely one given the still very restrictive standing requirements of non-privileged applicants before the ECJ. One problematic factor in such a scenario is the delay in the final judgment caused by this new possibility of appeal. As the ECJ is no longer the “end of the story” as Celleweart calls it in his interview, the entire proceeding might become considerably longer, which could cause problems in terms of the requirement of a fair trial as defined in Art. 6 ECHR. Celleweart does not see any problems as the appeal to the ECtHR is an additional remedy potential victims do not have to use, but it represents a complementary layer of individual protection.

g) Conclusion

It is not easy to give a conclusive answer to the question of whether or not the accession will practically increase the level of individual protection, as the described reciprocal harmonisation of the two relevant regimes, along with the Bosphorus doctrine of the pre-Lisbon era, have created structures of quasi-accession. The increased jurisdiction of the ECJ after 2009 further lessens the impact of accession, as areas such as judicial and police cooperation in criminal matters are not open to ECJ scrutiny. Bearing the results of this dissertation in mind, the practical impact on the substance of the protection is far more modest than expected in the beginning of this paper.

Judge van Dijk argues that the main impact of the ToL is that the deference of the ECJ for the ECHR and the case law of the ECtHR has been formalised, and can be relied upon more consistently by potential individual applicants (Kwiatkowska, A., Paulsson, H & Dahlin, G. 2010, p. 3). Many scholars and professionals, like the former AG Jacobs, agree that accession is of political and symbolical significance as it makes it easier for the ordinary citizen to understand that the EU is formally bound by the ECHR and no longer “merely” commits itself to the ECHR via a complex and inconsistent form of comity.

This paper has shown that there are various unsettled questions that need to be addressed in the comings months. The most pressing are the following: the final relationship between the ECJ and the ECtHR, legal standing requirements of individuals in cases against the EU before the ECtHR, the attribution of liability, the autonomy of EU law, and the future status of the Bosphorus doctrine.
As of September 2011 it is rather difficult to assess how far the EU is still away from final accession. There are still a lot of divergent opinions on technical and structural questions. The political enthusiasm after the entry into force of the ToL seems to be slowly replaced by complex legal and political discussions about details of the future accession agreement. Along with some major political issues, such as the described controversy around the Bosphorus doctrine, the legal complexity of this topic has slowed the pace towards a definitive accession agreement considerably. Although accession is formulated as an obligation in the ToL, no one can tell at this point when the definitive accession will happen and what the permanent structures will look like. It is also not possible to assess the exact impact of accession on individual applicants, but it is safe to say that the degree of protection will increase through the explicit judicial review of EU acts by the ECtHR and through increased legitimacy of the EU FR regime.

7. Research Questions and Initial Hypotheses in the Light of the Results of the Dissertation

Did the ToL pave the way for a more complete and coherent regime of HR protection in Europe, or are the consequences less practical than symbolic in nature and therefore only consolidate the status quo?

The effects of the ToL on the protection of FR are significant as the ChFR acquired legally binding status, and the latest treaty amendments establish the obligation of the EU to join the ECHR. From an individual point of view the degree of protection has increased considerably, as complaints can be brought before the ECJ by relying on the new Charter. FR protection has become more complete as rights that have not been protected as general principles and are part of the new Charter are now directly enforceable. The regime is also more complete as a greater variety of EU acts are now open to direct annulment procedures initiated by individual non–privileged applicants. Although the available complaint mechanisms in the EU legal order are still not entirely satisfactory from an individual point of view, the degree of completeness has been considerably improved by the ToL provisions. Coherence has been increased via the clear status of the ECHR in the new Charter, as well as through increased cooperation between the ECtHR and the ECJ. The gap between the generous affirmation of FR in the old Charter and its enforcement mechanisms has also been closed for the most part. The future accession of the EU to the ECHR will constitute the most important step towards a truly coherent European system of FR protection, where the ECHR serves as an uncontested minimum standard. The consequences of the latest treaty amendments are clearly practical in their nature as this dissertation has demonstrated that they have a measurable impact on the degree of individual protection. The symbolic repercussions of the new Art. 6 are rather difficult to determine. The most relevant aspects are the following: the effect on the
concept of EU citizenship and the partially unintended consequences of the variable geometry in the context of the Charter.

Does the standard post-ToL potentially increase the degree of individual protection in terms of locus standi requirements, enforcement mechanisms and the material/personal scope of the relevant instruments?

Reforms of locus standi requirements before the ECJ are rather modest in the ToL. The new status of regulatory acts reduced the barriers individuals face when trying to get access to the ECJ. Positive is also the possibility to challenge acts of EU agencies and bodies that were exempt from such a judicial review before 2009. Although these reforms are positive as such, it is still extremely difficult for potential victims to get access to the ECJ. The ToL, as well as the most recent case law of the ECJ, shows that neither the MS nor the ECJ are ready to abandon the policy of restricted access to the ECJ. Due to the lack of semantic clarity and explanatory materials, it is not easy to determine which acts currently qualify as regulatory acts.

When it comes to enforcement mechanisms, it is especially the new legal status of the Charter that allows for a positive conclusion. Socio-economic rights are still mostly programmatic rights whose enforcement is still rather weak due to the persistent unwillingness of the ECJ to embark on a more positive FR protection approach. Although the ECJ has less legal leeway than before 2009, FR are still in many situations not absolute rights, but subject to limitations. The ECJ has therefore not given up its balancing role of guaranteeing the interests of European integration and an appropriate FR protection at the same time.

The relevant material scope of the reformed regimes has not been affected in any substantive manner. There have been minor adjustments like the new jurisdiction of the ECJ in the field of police and judicial cooperation in criminal matters and the theoretical increase of relevance of second generation HR in the Charter.

Is the ToL revolutionary in a way that it is a real turning point for FR protection within the EU, or does it just further develop pre-defined objectives?

The results of this paper have shown that the ToL is in itself a truly revolutionary document as it makes the most progressive HR document in Europe legally binding for the EU, its MS, and the citizens thereof. In addition, it enables the EU, through its newly gained legal personality, to join the ECHR as the first
non-state member. This accession is not only the most revolutionary aspect of the treaty that supports the claim of 2009 as being a turning point, but is also the result of a decade-long process which, on the contrary, reflects the treaty’s role as re-confirmation of existing trends.

In other words, the ToL is less revolutionary in the way that it establishes entirely new structures, but in the way that it takes pre-existing developments to the next level. In the case of the accession of the EU to the ECHR, the ToL brings a decade-long evolution of gradual interdependence to the last logical step, the full inclusion of the EU into the ECHR. The same is true for the Charter, as the ToL could bring the long debate about its final legal value to a satisfactory end. If one has to decide if the ToL is more of a revolution than a confirmation of pre-defined objectives, the second seems more adequate.

Analysis of initial hypotheses:

1. The new binding legal status of the EU Charter of Fundamental Rights is, in practice, not as significant as generally proclaimed given the jurisprudence of the ECJ pre-Lisbon in this field. The ToL is more of a consolidation than a revolution.

The results of this paper have shown that this initial hypothesis turned out to be flawed, as the new legal status of the Charter is vital in two ways: First, it allows potential victims to rely on the Charter in a case before the ECJ, which makes this document for the first time practically relevant with an explicit legal value. Second, it upgrades the legal status of the document in relation to other sources of FR protection, such as the ECHR and the constitutional traditions of MS. For the material scope of the Charter this means that especially socio-economic rights might become more important in the ECJ’s jurisdiction.

2. No major damage has been done to the Charter by removing it from the Treaty itself.

In practical terms this assessment turned out to be correct, as the described cross reference to the Charter as an independent document has not caused any obvious negative consequences for potential victims who want to rely on the Charter before the ECJ or national courts. The various national opt-outs seem to be much more acceptable for a document that is outside the treaty than for explicit treaty articles themselves. In this matter, the new status of the Charter has helped maintain the legitimacy of the treaty. The independent status of the Charter can also be positive as other institutions can refer to this document more easily as if it was part of the TEU. Future dynamic adjustments of the ChFR’s content also seem more likely thanks to the more flexible status.
3. **Accession of the EU to the ECHR will have symbolic consequences rather than a qualitative impact on the protection of HR in the short term. The most likely effect is a clearer hierarchical structure of norms.**

In theory, the accession of the EU to the ECHR will allow for the first time ever that an external court has jurisdiction to review acts of the ECJ. The significance of these new control mechanisms should not be underestimated, although their practical relevance for individual applicants will, most likely, be rather modest due to the long tradition of mutual respect of both HR courts. The initial claim of little practical impact on the degree of individual protection cannot be upheld, as the mere prospect of the future accession as a result of Art. 6.3 has made both courts’ case law more coherent. The most permanent impact of accession will be a considerably more complete harmonisation of the EU and the ECHR regime and the establishment of the ECtHR as the most superior FR court in Europe. This superiority is very likely to stay abstract in a similar way to the ECtHR review of EU acts was in the context of the *Bosphorus* doctrine as:

4. **Many serious shortcomings of the existing regime before 2009 have not been tackled in the latest Treaty amendment.**

Treaty amendments must be interpreted in the context of the corresponding political and legal developments. In the case of the ToL, many of the described shortcomings, such as the restricted standing requirements before the ECJ, or the gaps in the system of judicial protection in the EU were, although often criticised by scholars and FR professionals alike, not deemed to be dramatically changed by the most recent reform initiative. One might think that the constitutional dilemma after the failed Constitutional Treaty must be blamed for the lack of willingness to significantly change the structures in these matters, but it is foremost the fact that in some areas like the standing requirements for individuals, neither the ECJ nor the masters of the treaties wanted a large scale relaxation. One should not forget that any potential deficiency in the current protection mechanisms must be interpreted in the context of the overall goals and necessities of the European integration process. FR protection will never be absolute as this is simply not compatible with the goals of European integration. In conclusion, one can argue that there are indeed some deficiencies that need to be tackled in future reforms, among them being the lack of clarity in the definition of EU law, the gaps in the protection in the context of Art. 263 procedures, and the still unclear mechanisms connected to the external review of EU acts by the ECtHR are the most pressing.
8. Overall conclusion

Regardless of the great number of reforms in various areas, the new provisions reflect the difficult drafting and ratification procedure of the ToL. The lack of substantial far-reaching reforms is the result of the current political and societal framework that calls for broad consolidation of the status quo, rather than the blind continuation of the ever-closer union concept. There are many political reasons why it becomes more and more difficult to reach consensus on reforms. First, with social rights and defence policies, the EU’s competences have reached the core of national sovereignty, and many MS are not yet ready to yield power to the EU in these fields. Second, constitutional questions that need to be answered keep being postponed and very often go ignored due to the disaster that was caused by the progressive attempt to replace all treaties by one common European constitution.

The ToL did not abandon the pre-existing structures of EU FR protection, but allowed for a further increase of its legitimacy and judicial relevance for individual applicants. It is important to recall that, in general, the pre-Lisbon era offered a high degree of protection with some major debatable weaknesses. The ToL has partially reacted to some main criticisms, but the latest treaty reform has also shown that the masters of the treaties are not yet ready to abandon the well-established system of judicial protection with Art. 263 procedures as its most ubiquitous procedure.

Art. 6 TEU is therefore neither a revolutionary step nor a consolidation of pre-defined strategies, but a clear compromise of both. The described reforms show that there is willingness to improve the protection of potential victims via more direct and effective mechanisms, but they also convey a clear commitment of the masters of the treaties and the ECJ alike that the existing structures are effective and offer a high level of protection. Bearing this in mind, future treaty amendments in this matter seem rather unlikely in the short term with the only possibility of the ECJ’s judicial activism to further improve the current system. The Kıcıkdeveci case shows that this process has already started and, in view of the great unused potential of Art. 6 TEU, the next years might bring further considerable changes.
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