STUDY

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European Parliament

Strengthening cooperation with the Council of Europe

Policy Department for Citizens' Rights and Constitutional Affairs
Directorate-General for Internal Policies
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Strengthening cooperation with the Council of Europe

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, assesses the possible strengthening of the cooperation of the European Union with the Council of Europe. It examines, on the one side, the participation of Council of Europe bodies in the EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, and, on the other, the accession of the European Union to Council of Europe Treaties, and particularly to the European Convention on Human Rights.

This document was requested by the European Parliament's Committee on Constitutional Affairs.

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LIST OF ABBREVIATIONS

CATS	Coordinating Committee in the Area of Police and Judicial Cooperation in Criminal Matters
CDDH	Steering Committee for Human Rights
CEPEJ	European Commission for the Efficiency of Justice
CFREU	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign Security Policy
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CPT	Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRI	European Commission against Racism and Intolerance
EEC	European Economic Community
EU	European Union
GRECO	Group of States against Corruption
GRETA	Group of Experts on Action against Trafficking in Human Beings
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence
HELP	Human Rights Education for Legal Professionals
MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism

MSI-MED	Committee of Experts on Media Pluralism and Transparency of Media Ownership
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

Background and aim of the study

1. There has been constant cooperation between the Council of Europe and the European Union in the attainment and promotion of their common goals of defending democracy, human rights and the rule of law throughout the two organisations' existence. This cooperation is underpinned not only by the existence of those common goals, but also by the experience and specialisation of the CoE in these matters, as well as by the added legitimacy that the CoE affords as an international organisation of recognised prestige comprising a broad number of member states beyond the ambit of the EU. This cooperation is even more necessary in the face of fresh challenges to the rule of law both inside and outside the EU.

2. This study aims to examine the adequacy and efficiency of existing cooperation mechanisms between the European Union and the Council of Europe, and analyse how to improve synergies between EU institutions and CoE bodies, considering how the Council of Europe can effectively contribute to the EU mechanism to protect and strengthen democracy, rule of law and fundamental rights. Thus, it explores how to address the objections raised in the CJEU Opinion 2/2013 of December 14 stressing the incompatibility of the draft accession agreement to the ECHR with EU law.

Key findings

3. As the two organisations have developed and evolved, so too have the forms of cooperation between them, and the legal instruments governing them. Prominent among these instruments is the Memorandum of Understanding of 2007, as well as, for the EU's external action, the Declaration of Intent of 2014. Still, they are documents of a general nature that need to be complemented by agreements for joint action on specific issues.

4. Cooperation between the CoE and EU has had to take into consideration the complexity of the CoE organisation, which along with its organisational structure includes a series of very diverse agencies and bodies, such as the Venice Commission, GRECO, CEPEJ, GREVIO, HELP or GRETA, among many others.

5. Cooperation between the CoE and EU is carried out through two types of procedures. On the one hand, through instrumental support from CoE bodies in the attainment of the EU's goals, particularly in the establishment of internal controls to promote and guarantee the values of democracy, human rights and the rule of law. On the other, and to a lesser extent so far, through the establishment of external controls by bodies in the ambit of the CoE over respect for those values by the EU and its member states.

6. On an internal level, the instruments of cooperation have been of a political nature (among governing bodies), in the shape of legal support (through the establishment of standards and assessments), or through the implementation of joint programmes.

7. On this internal level, the strengthening of these cooperation instruments would benefit if, in relations between the CoE and the EU, the principle of strategic partnership between the two

organisations were accentuated, beyond the action of the CoE bodies as instrumental agencies of support for the CoE's goals. That would not only favour synergies between the two organisations, but also greater legitimacy for the internal controls of the EU.

8. An initial channel for that strategic partnership could be greater EU integration into the various bodies of the CoE, such as the GRECO, CEPEJ, GREVIO, or MONEYVAL, among others. In some cases, that would require EU inclusion into CoE treaties.

9. A second way, and particularly relevant to the mechanism for the defence of the rule of law, would be the formal establishment, beyond the general provisions deriving from the Memorandum of Understanding, of a global and more precise partnership, specifying the role of the CoE agencies in the various pillars of the mechanism and its different phases.

10. EU accession to the ECHR is particularly important as far as cooperation deriving from the establishment of external controls is concerned. While the objections raised by the CJEU in its Opinion 2/13 pose a considerable challenge to accession, they do not preclude it. It is possible to make changes to the initial draft agreement that overcome those objections, respecting the principle of autonomy of EU law.

11. Also in the area of external control, EU integration into the various CoE treaties, such as the Istanbul Convention or the European Social Charter, and the control and assessment bodies established in them, would strengthen the strategic partnership between the two organisations.

12. Lastly, and in the long-term, EU integration into the CoE would ensure the fullest cooperation between the two organisations.

1. INTRODUCTION

Cooperation between the European Union (EU) and the Council of Europe (CoE) has been a constant feature of the development of both organisations, in defence of the shared values of democracy, human rights and the rule of law. This cooperation is particularly important at a time when these values are seriously threatened, both inside and outside the EU, highlighting the need to strengthen both institutions in order to prevent these values from being further undermined.

Cooperation between the EU and the CoE currently takes place through three channels.

- Firstly, in light of the CoE's experience in democracy, human rights and the rule of law, through the actions of CoE agencies to support EU bodies to establish procedures and mechanisms within the EU to promote these values. This is achieved primarily by developing standards and monitoring their application, and through participation in programmes to ensure the effective implementation of these standards within the EU.

- Secondly, in a phase that is currently under negotiation, EU-CoE cooperation will be enacted through the establishment of external monitoring bodies to provide standards and instruments to evaluate the effective implementation of these values within the EU. This role could be fulfilled by the monitoring and control bodies created by international treaties under the auspices of the CoE, to which the EU adheres.

- Thirdly, there is cooperation between the EU and the CoE to promote these values outside the EU, both in neighbouring regions and further afield, given the interconnection between economic, political and legal developments both within and outside the EU.

2. THE REASONS FOR COOPERATION BETWEEN THE EU AND THE COE

CoE cooperation in EU activities to defend and maintain a high level of respect for democracy, human rights and the rule of law has stemmed from a number of causes.

Firstly, due to values that are shared between the two organisations, as reflected in the founding texts of the EU, both in the explicit reference to the CoE in the Founding Treaty of the European Economic Community (EEC) in 1957[1] and also, following the Maastricht Treaty, in the recognition of the principles of the European Convention on Human Rights, drafted by the CoE, in the Primary Law of the EU. The EU has consistently recognised the CoE as "the Europe-wide reference source for human rights".[2]

Furthermore, EU-CoE cooperation is warranted given the CoE's specialization in the defence and promotion of these values. While the EU's activities encompass a broad range of areas, which have gradually expanded and touch on almost every aspect of economic and social life, the actions of the CoE focus more narrowly on democracy, human rights and the rule of law, as a result of which the CoE has accumulated a great deal of experience in these fields. The EU has repeatedly recognised this experience and the benefits to be gained from applying it to the defence of shared values.

An additional reason for cooperation between the EU and the CoE derives both from the nature of the organisation itself and its working methods. The actions of the CoE enjoy a high level of legitimacy as a result of its acceptance by almost all European states (whether they belong to the EU or not) and the recognition by these states of the importance and convenience of its actions. This legitimacy is further enhanced by the fact that numerous CoE initiatives (for example, the many Conventions it has given rise to) have been adhered to by states outside of Europe, with the result that the profile and prestige of the CoE extend beyond the European continent. Cooperation between the EU and the CoE is thus a source of added value both in terms of its instrumental utility and also due to the legitimacy it affords.

[1] Article 230 of the Treaty Establishing the European Economic Community: "*The Community shall establish all appropriate forms of cooperation with the Council of Europe*".

[2] See *Memorandum of Understanding between the Council of Europe and the European Union,* 2007. http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045bc99

3. DEVELOPMENT OF THE FRAMEWORK FOR COOPERATION BETWEEN THE EU AND THE COE

3.1. Development of the content of cooperation

In order to understand the nature of the cooperation between the EU and the CoE, it is important to bear in mind that this cooperation has evolved significantly over time, as the EU's sphere of action has grown, both in geographical terms and in its material scope. Initially, the objectives and functions of the European Union (originally the European Economic Community or EEC) related to economic and trade questions, and only gradually expanded to encompass a range of subjects that affect every aspect of social and economic life. As a result, in light of the more limited objectives and functions of the CoE, the common interests of the two organisations were originally minimal and, despite the aforementioned reference to article 230 of the Treaty of the EEC, relations between the CoE and the EEC were very limited and could be defined as being characterised by reciprocal indifference. But the changes in the political and economic situation in Europe and the parallel growth of the EU have meant that the areas where the two organisations' interests overlap have increased significantly and, as a result, that relations between them have intensified, given the advantages to be gained from such collaboration: the EU benefits from the experience and legitimacy the CoE offers, while the latter gains from the help and support it receives from the EU, which provides resources to implement CoE projects. This was driven, in particular, by the spread of democracy in Central and Eastern Europe from 1989 onwards and the CoE's cooperation in EU expansion, followed by the growing overlap between the functions of the EU and the CoE as the functions of the latter grew to cover issues linked to the protection of democracy, human rights and the rule of law. This extension was evidenced, for example, in the adoption of the Charter of Fundamental Rights in 2000 and its incorporation into law in the Treaty of the European Union in 2009. As a result, the relationship between the two organisations has often been characterized as a strategic partnership.[3]

3.2. The legal framework for EU-CoE cooperation

Reflecting the development of the relationship between the two organisations, the legal framework of these relations has also undergone significant changes. Initially, and despite the provisions of article 230 of the Treaty of the European Economic Community in 1957, the process of formalising the legal relationship was slow and limited. In 1959, a "provisional agreement" was signed between the EEC and the Council of Europe by means of an exchange of letters between the two organisations, and the nature of this relationship was confirmed by subsequent agreements formalised by the same method.[4]

[3] See, for example, *the Summary Report of the CoE Committee of Ministers on cooperation between the Council of Europe and the European Union of 2019, CM(2019)67-final.*

[4] Agreement adopted on the basis of an exchange of letters between the Committee of Ministers of the CoE and the Commission of the European Economic Community of 18 August 1959, defined as an agreement "which provisionally governs relations between the COE and the European Communities". This formula was repeated as the basis for signing a further Agreement in 1987, and a fresh exchange of letters in 1996 complemented the 1987 Agreement. Furthermore, there was an exchange of letters on 10 October 1959 between the President of the Consultative Assembly of the CoE and the Presidents of the EEC Commissions and of Euratom.

Following the fall of the Berlin Wall in 1989 and as a result of the growing overlap between the spheres of action of the CoE and the EEC, relations between the two were put on a more formal footing. To reflect their shared activities and following approval of the Charter of Fundamental Rights of the European Union at Nice in 2000, the two organisations approved a "Joint Declaration of Cooperation and Partnership between the Council of Europe and the European Union" (3 April 2001).[5] This declaration is more detailed than previous agreements and refers to new areas of cooperation, such as social cohesion, research, education and culture.

A turning point in the formalisation of relations between the EU and the CoE was the "Juncker Report",[6] presented to heads of state and heads of government of member states of the Council of Europe in 2006. Partially reflecting the proposals in that report, the following year a general text was agreed which continues to regulate EU-CoE relations. This is the Memorandum of Understanding between the Council of Europe and the European Union,[7] and represents significant progress with respect to the preceding documents. The Memorandum, while not having the status of a full-blown treaty, represents a greater level of commitment on the part of the European Union, as it is signed both by representatives of the Council and of the Commission. Although the lines of cooperation it establishes are very general and it does not offer greater detail, it represents clear progress in determining relations between the EU and the CoE. It establishes a series of thematic priorities with respect to the goals of cooperation, while also including a series of mechanisms and links for the institutional relationship between the organisations, and states the intention of both to avoid duplication and redundancy in their work. Significantly, it states that "The European Union regards the Council of Europe as the Europe-wide reference source for human rights" and mentions two key aspects of future cooperation. These are, on the one hand, the desirability of early adhesion of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; and, on the other, the provision that "the concrete cooperation between the Council of Europe and the Agency (European Agency for Fundamental Rights) will be the subject of a bilateral co-operation agreement between the Council of Europe and the Community".

This last mandate was expressed in the Agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe, signed on 18 June 2008.[8] This agreement sets out a series of more detailed provisions with respect to cooperation between the Agency and the CoE, which are indicative of the general orientation of relations between the EU and the CoE described in the Memorandum of the previous year. Thus, the agreement establishes that the Agency's activities focus on the defence of fundamental rights, "including the rights and freedoms guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950", and mentions the experience and specialisation of the CoE in this sphere, along with the role of the Commissioner for Human Rights. And, in line with the Memorandum of Understanding and other documents relating to cooperation between the two organisations, it insists on the need to avoid duplication and to ensure complementarity. To this end, it establishes a general framework for cooperation and lists a series of

[5] *Joint Declaration of Cooperation and Partnership between the Council of Europe and the European Union* http://rm.coe.int./CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804595c4

[6] *Council of Europe–European Union: "A sole ambition for the European Continent" Report by Jean-Claude Juncker, Prime Minister of the Grand Duchy of Luxembourg to the attention of the Heads of State or Government of the Member States of the Council of Europe, 11.04.2006.*

[7] See note 2.

[8] http://www.coe.int/t/der/docs/UEFRACoEAgreement_en.pdf

mechanisms for institutional relations between the Agency and the CoE. Of similar importance is the specific provision that "cooperation between the Agency and the Council of Europe may be further promoted through grants awarded by the Agency to the Council of Europe" (article 15). No less important is the wish to make the Agreement permanent, with the provision that its application would be evaluated by 2013 at the latest, although at that date this was deemed unnecessary.

As stated, all of these documents are of a fundamentally general and programmatic character. However, taking into account the results of the Evaluation of relations between the EU and the CoE in 2012,[9] a basic document was compiled with respect to the specific topic of cooperation between the EU and the CoE outside of the EU, the Statement of Intent for the Cooperation between the Council of Europe and the European Commission in the EU Enlargement Region and the Eastern Partnership and Southern Mediterranean countries (EU Neighbourhood Region) of 1 April 2014,[10] which stressed the "triangle" of "standard setting, monitoring and cooperation", highlighting the advantages and benefits of cooperation between the EU and the CoE. The Statement of Intent, drawing on past experience, also highlighted the need to establish a more predictable and specific framework for cooperation with the CoE in areas of shared interest.

The most recent documents of this type have been the various releases of "EU Priorities for Cooperation with the Council of Europe", most recently for the period 2020–2022. The latter[11] is important because it sets out the objectives to be pursued by both organisations, with a wider scope than in preceding documents, and with explicit reference to the "European Union Action Plan on Human Rights and Democracy 2020–2024".

It is important to remember that, although they have different degrees of precision, practically all of these documents (with the exception of the Declaration of Intent) basically contain general guidelines which must be supplemented by additional agreements relating both to specific actions and to relations between the EU and the various agencies of the CoE, both as regards the implementation of specific actions and with respect to the objectives these are designed to achieve, within the framework of the agreed priorities. As will be seen, it is within this context that there are broad opportunities to develop the relationship between the EU and the CoE.

[9] *Evaluation of Commission's cooperation with the Council of Europe. An assessment focused on EU funding of Joint Programmes.* By a consortium of -ADE–DIE–DRN-ECDPM-ODI A, c/o Particip GmbH, leading company, September 2012. http://aei.pitt.edu/50176/

[10] *Statement of Intent for the Cooperation between the Council of Europe and the European Commission in the EU Enlargement Region and the Eastern Partnership and Southern Mediterranean countries (EU Neighbourhood Region)* http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680473d74

[11] Council of the European Union, 13 July 2020, COSCE 7 COPS 239 CFSP/PESC 6060.

3.3. Areas of cooperation between the EU and the CoE

3.3.1. Cooperation within the EU

Recently, the European Commission Communication which includes the 2020 Rule of Law Report[12] and the Resolution of the European Parliament on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights[13] have emphasised cooperation between the EU and the CoE within the context of the Union and member states, and on the establishment of a mechanism to defend the rule of law in the face of new threats and challenges within the Union. Both documents (along with many others issued by the EU) stress the growing importance of cooperation to defend the values shared by the two organisations within EU member states, and highlight the need for cooperation through the establishment of standards for human rights and the rule of law, and monitoring, particularly with respect to guaranteeing judicial independence, the fight against corruption, pluralism in the media, and constitutional checks and balances. In this area, both documents underline the importance of cooperation between the EU and CoE agencies such as the Venice Commission or the Group of States against Corruption (GRECO). These documents build on earlier practice in so far as, in developing relations between the EU and the CoE, cooperation has often been conducted not just in non-EU countries but also within the EU itself, with the intervention both of the agencies named above and of other CoE bodies. As discussed below, this includes the work of the European Commission for the Efficiency of justice (CEPEJ) and the implementation of programmes of joint activities such as those organised by the European Programme for Human Rights Education for Legal Professionals (HELP).

With respect to cooperation within the EU, it is important to mention the EU-CoE cooperation which occurs as a result of the EU's incorporation of agreements and conventions developed by the CoE. At present, the most significant aspect of such incorporation relates to the EU's adhesion to the European Convention on Human Rights, in compliance with the mandate of article 6 of the Treaty of the European Union. Moreover, the EU has already acceded to other conventions, while other integration processes remain ongoing (See Section 11, below).

3.3.2. Cooperation outside the EU

Along with the CoE's collaboration with the European Union to promote and defend democracy, human rights and the rule of law within the context of the EU, its activities in non-EU countries are also of great importance. As the European Commission 2020 Communication on the Rule of Law states, "the rule of law is also an important issue for the EU beyond its borders". And in its document setting out its priorities for 2020, the Council of the EU underlines the importance of cooperation between the EU and the CoE (particularly with the Venice Commission) in promoting democracy in Latin America and North

[12] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. 2020 Rule of Law Report. The rule of law situation in the European Union*, 30 September 2020, COM(2020)580 final.

[13] *European Parliament resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights (*2020/2072(INI)).

Africa (§24). Cooperation between the EU and the CoE occurs outside the EU, and important lessons can be drawn from such experiences and from the results of the methodology applied.

Cooperation between the EU and the CoE has had a key role in the process of expanding the Union in central and Eastern Europe, with the Venice Commission playing a leading part. Cooperation is currently taking place in a number of geographical arenas. Within Europe, there is the European Union/Council of Europe Horizontal Facility for the Western Balkans and Turkey (Horizontal Facility II) 2019–2022, which includes Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, Serbia and Turkey, as well as the Partnership for Good Governance, which includes Armenia, Azerbaijan, Moldova, Georgia, Belarus and Ukraine (2015–2020). Finally, outside of Europe, EU-CoE cooperation is implemented through the South Programmes (2012–2020) which include Morocco, Tunisia, Jordan, Egypt, Algeria, Lebanon, Mauretania and Palestine. To this we may add the series of joint programmes in central Asia: a EU-CoE joint programme to develop the rule of law in central Asia was launched in November 2019.

4. COE BODIES INVOLVED IN COOPERATION

Cooperation between the EU and the CoE has been implemented through a range of pathways and agencies, due to the nature and structure of the two organisations. With respect to the CoE, it should be noted that its actions are implemented through various bodies. To start with, there are those that form part of the CoE's basic structure, which includes the Committee of Ministers, the Parliamentary Assembly and the Secretariat General – consisting of a Treaties Office and seven general directorates, made up in turn by a series of departments and committees. In addition, the CoE includes bodies initially created by agreements between member states of the Council: agreements that may solely cover member states of the CoE (Partial Agreements) or which may also include states that do not belong to the CoE (Partial Enlarged Agreements, or Enlarged Agreements if they include all the member states of the Council and other states). Examples of this type are the Venice Commission and the Group of States against Corruption (GRECO). Moreover, the CoE also includes agencies and committees created to supervise the implementation of international treaties, examples of which include the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the Group of Experts on Action against Trafficking in Human Beings (GRETA) and the European Court of Human Rights (ECHR). The Council of Europe, then, can be seen as an umbrella organisation. The result is that the CoE encompasses a range of bodies with different features and functions, which each have specific ways of relating to the EU. To date (and until the EU accedes to the European Convention on Human Rights) these relations are above all instrumental in nature, in the sense that these bodies provide their experience and specialisation in support of the common goals of the EU and the CoE, usually with a predominance of EU funding. In particular, EU-CoE cooperation through these bodies has consisted of providing EU bodies with the means and instruments to implement internal monitoring and evaluation tasks in order to better defend and promote shared values, both in non-EU countries and within the EU itself.

4.1. The Venice Commission

The European Commission for Democracy Through Law, known as the Venice Commission after the city where its plenary meetings are held, is arguably one of the most high-profile CoE bodies, at least in terms of public recognition, and is defined in its statutes as "an independent consultative body which co-operates with the member states of the Council of Europe, as well as with interested non-member states and interested international organisations and bodies" as an advisor in subjects relating to democracy, human rights and the rule of law.[14] The current Commission, first established in 1990, is the result of an Enlarged Agreement, which incorporated the 47 member states of the CoE and another 15 states. The European Union has a special status on the Commission, with a permanent representative.

Cooperation between the Venice Commission and the EU currently takes two forms. Firstly, and with respect to the internal operation of the Union, in addition to the exchange of information and advice with the agencies and institutions of the EU, the Commission develops standards in a range of areas,

[14] CDL(2002)027-e Resolution RES (2002) 3 *Adopting the Revised Statute of the European Commission for Democracy through Law*

which are adopted and taken into consideration by the Union, whether in the form of general statements (for example, the Code of Good Practice in Electoral Matters of 2002,[15] or the Rule of Law Checklist of 2016[16]), or with reference to a specific country (for example, when considering a country as a candidate for membership).[17] The second form of cooperation has been external to the EU, in the form of participation in and implementation of joint programmes in the aforementioned Horizontal Facility, the Partnership for Good Governance and the Southern Programme.

4.2. Group of States against Corruption (GRECO)

A second actor within the Council of Europe with a significant role in cooperation with European Union institutions, and frequently cited in EU documents in the defence and promotion of the rule of law, is the Group of States against Corruption (GRECO) which is the "anti-corruption monitoring body of the Council of Europe". Created by resolution of the Committee of Ministers on 1 May 1999,[18] it was established as an "enlarged partial agreement", focused on evaluating rules and practices relating to corruption. All members states of the Council of Europe are members of GRECO, as are Kazakhstan and the United States of America. The European Union's involvement with GRECO (for which provision is made in principle in article 5 of its Statutes) has been partial and uneven. In 2012, a Communication of the European Commission[19] provided for EU accession to GRECO in two phases, firstly as an observer and then, immediately after, as a full member. However, this accession has been slow: it was not until 2019 that the EU acquired observer status,[20] giving it only limited participation. GRECO undertakes regular evaluation of member states, focusing on thematic issues established for each round. The Fifth Round, started in 2017, addresses "Corruption prevention and promoting integrity in central government and law enforcement agencies". On the basis of its evaluation, GRECO draws up recommendations and issues an opinion on compliance by member states. With respect to the European Union, the role of GRECO has consisted of providing data to evaluate the situation of member states with reference to phenomena linked to corruption, and this evaluation is based in large part on the Twenty Guiding Principles for the Fight Against Corruption, adopted by the Council of Europe.[21] The lack of full integration by the EU in GRECO means that GRECO's evaluation, recommendation and verification activities cannot be applied to European Union bodies, although it can still undertake information and advisory tasks.

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[15] *Code of Good Practice in Electoral Matters. Guidelines and explanatory report. Adopted by the Venice Commission at its 51st and 52nd sessions (Venice, 5–6 July and 18–19 October 2002).* CDL-AD (2002) 23.

[16] *Rule of Law Checklist. Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016).*

[17] For example, the *Serbia 2007 Progress Report*, SEC(2007) 1435, at 6, available at: http://uer-lex.Europa.ue

[18] *Resolution of the Committee of Ministers of the Council of Europe (99)5 establishing the Group of States Against Corruption*, 1 May 1999.

[19] *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. Participation of the European Union in the Council of Europe Group of States against Corruption (GRECO)* COM(2012) 604 final, Brussels, 19.10.2012.

[20] "European Union becomes an observer to Council of Europe's anticorruption body GRECO" European Commission Statement, Brussels, 1 July 2019, https://ec.Europa.ue/commission/presscorner/detail/en/STATEMENT_19_4034

[21] *Committee of Ministers Resolution* R (97)24

4.3. European Commission for the Efficiency of Justice (CEPEJ)

Of particular importance is the role of the European Commission for the Efficiency of Justice (CEPEJ), created by the Committee of Ministers in 2002,[22] with a remit to examine the outcomes of different judicial systems, identify problems in these systems, define solutions and, where applicable, provide assistance in legal matters.[23] At present, the CEPEJ consists of the member states of the Council of Europe and, in accordance with the Statute of the CEPEJ (art. 6.2) the EU's status derives from the provisions of an earlier agreement dating back to 15 June 1986, which was modified in 1996 (see section 2). As a result, the EU's participation is limited to participating as an observer in the working groups of the CEPEJ. Cooperation between the CEPEJ and the EU occurs in a number of areas. Perhaps the most important of these is cooperation with the European Commission, consisting of the annual publication of a "Study of the operation of judicial systems", based on CEPEJ methodology for evaluating judicial systems, which is used to compile the "EU Justice Scoreboard", collaboration that is funded by the EU. In addition, it provides information and consultancy services for EU institutions and agencies. And

it also compiles studies of judicial systems in the EU (for example, "Two studies prepared for the European Commission by CEPEJ on the functioning of judicial systems in the EU Member States, 2018"[24]) and specific advisory programmes with EU member states (targeted cooperation) such as Latvia, Malta, Slovakia, Spain, Bulgaria and Croatia,[25] while general guidelines developed by the CEPEJ and used by the EU to promote the rule of law include the "Checklist for promoting the quality of justice and the courts".[26] Finally, mention should be made of the joint cooperation programmes in non-EU states, within the framework of the EU-CoE programmes, "Enhancing judicial reform in the Eastern Partnership".

4.4. Other CoE agencies

The aforementioned agencies, other institutions and bodies included within the umbrella organisation of the Council of Europe have contributed to the promotion of democracy, human rights and the rule of law by the European Union. The European Union does not usually participate in the activities of such bodies (with some exceptions, such as MONEYVAL) but in some situations (such as the HELP Programme) engages in joint actions or uses the results of the work of these agencies as a source of documentation and information to develop its own programmes.

- The European Commission against Racism and Intolerance (ECRI), established in 1993, is included in the Directorate General of Democracy of the CoE, and undertakes evaluation and

[22] *Resolution Res (2002)12, establishing the European Commission for the Efficiency of Justice.*

[23] For the Statute of the CEPEJ and related documents, see https://www.coe.int/en/web/cepej/documentation/legal-instruments.

[24] Available at https://ec.Europa.ue/info/publications/cepej-studies-2019_en

[25] For an explanation, see CEPEJ (2019)19REV, European Commission for the Efficiency of Justice (CEPEJ) *2020–2021 Activity Programme of the CEPEJ.*

[26] CEPEJ-GT-QUAL, *Checklist for promoting the quality of justice and the courts*, Strasbourg, 2–3 July 2008, CEPEJ (2008) 2E.

monitoring of the situation of members of the Council of Europe with respect to "racism, racial discrimination, xenophobia, antisemitism and intolerance". The Commission, made up of specialists from each of the 47 states of the Council of Europe, operates through cyclical inspection visits of members of the CoE, focusing on specific topics, and issues country reports. In general, and as part of the process of establishing standards in specific areas, its General Policy Recommendations establish evaluation criteria applicable to racism and intolerance. While the statutes of the ECRI[27] do not refer to its relationship with the European Union, the EU participates in its sessions and the ECRI's reports are a valuable source of information for the EU.

- The Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), established in 1997, is also an important player in collaboration to promote the rule of law in the European Union. According to its Statute,[28] "MONEYVAL shall be a monitoring body of the Council of Europe entrusted with the task of assessing compliance with the principal international standards to counter money laundering, the financing of terrorism and the financing of proliferation of weapons of mass destruction, the effectiveness of their implementation, as well as with the task of making recommendations to national authorities in respect of necessary improvements to their systems". The European Commission can take part in its work but does not have the right to vote. The reports of MONEYVAL are an important source of information for the European Union, bearing in mind, moreover, that one of its tasks is the evaluation of compliance by states with regard to money laundering and the financing of terrorism, as per Directive 2005/60/EC.

- Another example of cooperation between the EU and the CoE is the CoE's HELP programme (European Programme for Human Rights Education for Legal Professionals) which has a specific focus on the EU through its HELP in the European Union member states programme, providing training and education for judges, prosecutors, lawyers and other legal professionals. To date (2017–2019) the Help in the European Union programme has been funded by the European Union.[29]

- The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) was created by the European Convention for the Prevention of Torture or Degrading Treatment or Punishment in 1987. Although the EU has not signed this treaty, and is thus not a member of the Committee (made up of representatives of the 47 CoE states), its reports – based on regular visits and inspections of Convention member states and on ad hoc visits– are a valuable source of information in the EU's evaluation and monitoring processes.

- Another body that was also created by an international treaty to which the EU was not a signatory is the Group of Experts on Action against Trafficking in Human Beings (GRETA), which

[27] Statute of the European Commission against Racism and Intolerance (ECRI), Appendix to Res. (2002)8 on the Statute of the European Commission against Racism and Intolerance, Council of Eur., Comm. of Ministers, 799th mtg. (2002) http://hrlibrary.umn.edu/ecri-statute2002.html

[28] Resolution CM/Res(2010)12 on the Statute of the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL).

[29] This funding was worth €1,119,000. See https://www.coe.int/en/web/help/help-in -the-eu

conducts evaluations, supervising specific aspects of the actions of Convention signatories, compiling reports and offering recommendations.

- The Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) was also created by an international treaty, the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), to which the European Union has not yet adhered. GREVIO conducts evaluations, compiles reports and issues recommendations with respect to member states, and its work complements that of another body also created by the treaty: the Committee of the Parties to the Convention.

- Another example of a body that forms part of the structure of the CoE is the now defunct Committee of Experts on Media Pluralism and Transparency of Media Ownership (MSI-MED), active from 2016 to 2017.

- Finally, in the list of CoE institutions of relevance to cooperation to promote human rights and the rule of law in the European Union, there is the Commissioner for Human Rights of the CoE,[30] a non-judicial institution responsible for defending and promoting human rights, whose duties include promoting reform in EU states with regard to respect for human rights, and compiling reports, both on its own initiative or at the request of the CoE, which are a valuable source of information.

[30] Created by Resolution (99)50, of 7 May, of the Committee of Ministers.

5. CONTROLS WITHIN AND OUTSIDE THE EU

In light of the legal instruments that regulate the two organisations, their shared experience of collaboration, the range of bodies under the umbrella of the CoE and the tasks that these perform, cooperation between the EU and the CoE to defend shared values can be strengthened in two distinct areas. Firstly, by cooperating to establish internal mechanisms and controls within the EU to defend democracy, human rights and the rule of law. And secondly, by establishing external controls to guarantee the defence of these principles not only by EU member states but also by the institutions of the EU.

5.1. Supporting the establishment of internal controls within the EU

With respect to the first of these areas (EU-CoE cooperation to establish internal control mechanisms) the institutions of the European Union are pursuing a series of actions to address these challenges and problems with respect to the defence and promotion of the basic values of the Union. At present, these actions include the provision of a mechanism to defend the rule of law, which facilitates ongoing supervision by the institutions of the EU of the situation with respect to the rule of law and related values in the Union's member states. This supervision entails regular and ongoing internal monitoring undertaken by EU institutions and, in particular, by the European Commission, and this action consists of gathering and evaluating information, and making proposals on the basis of this evaluation with respect to the four pillars of judicial independence, the fight against corruption, freedom of the press and institutional relations, in addition to any other control measures which may derive from the evaluation, such as recourse to article 7 of the Treaty of the European Union.

The relevant EU documents recognise that the Council of Europe can provide significant instrumental support to facilitate achievement of the EU's objectives with respect to the shared objectives of the two organisations in these internal control processes. This cooperation by CoE bodies, particularly in the case of the rule of law mechanism, will not be conditioned by the fact that it is EU institutions that adopt the corresponding conclusions and decisions. The CoE's contribution will consist of the provision of resources and technical experience in procedures designed and directed by the institutions of the EU.

From this perspective, the cooperation of CoE agencies and institutions with the EU to develop and defend shared values is designed to be implemented primarily through CoE support for initiatives of EU institutions (both the European Commission and the European Parliament) designed to ensure and promote respect for these values in EU and non-EU states alike. With regard to EU states, the CoE's planned cooperation within the EU mechanism to defend the rule of law would translate into support for the establishment of internal controls within the EU, through advisory actions at the political level and through participation in the establishment of evaluation criteria, the implementation of evaluation, and through any support programmes for states that might arise from the evaluation process.

5.2. Establishing external controls

The internal cooperation mechanisms outlined above are very different from the ones in which CoE institutions review EU actions, performing external control functions to safeguard and defend common values. These values would be developed and defended not only through internal controls and mechanisms at the heart of the EU but also, by virtue of a process that is currently being developed (in some cases as a consequence of the Treaty of Union itself), would be supported by external controls which would be exercised as a result of commitments assumed by the Union. The obligations of the EU in this regard would be a consequence of its integration into Council of Europe Conventions which give rise to international commitments. By virtue of these commitments, the planned intervention of institutions in the ambit of the Council of Europe would not represent an instrumental action to achieve objectives established by the Union but would instead constitute an independent guarantee that both the actions of member states and of the institutions of the Union would reflect the principles of the democracy, respect for human rights and the rule of law.

6. STRENGTHENING EU-COE COOPERATION WITHIN THE EU (I): INSTRUMENTS OF INTERNAL COOPERATION

Usually, when defining the pathways for instrumental cooperation between the EU and the CoE, a distinction is drawn between three different levels of cooperation, of varying intensity: cooperation at the political level, legal cooperation and cooperation through joint programmes.[31] Although there are plans for closer cooperation between the organisations, as indicated by the Commission Communication and the Resolution of the European Parliament cited above, with a greater focus on defending the rule of law within the Union, it should be remembered that cooperation at these three levels also relates to external actions in non-member states and thus, as both the Commission and the European Parliament indicate, defence of the rule of law also has an external component both in Europe and further afield. The opportunities for strengthening EU-CoE cooperation have different features in each of these pathways.

6.1. Instruments for cooperation at the political level

The first level of cooperation is the exchange of information, consultation and reciprocal advice between the governing bodies of the two organisations with respect to the general direction and orientation of their activities. At this level, it is important to note the role of the CoE delegation to the EU and of the EU delegation to the CoE. With respect to the latter, as a consequence of the exchange of letters between the European Commission and the Secretary General of the CoE in 2009,[32] the head of the EU delegation takes part in meetings of Ministers' delegates, their Rapporteur Groups and Steering Committees.

The highest level of dialogue and cooperation includes meetings between the Secretary General of the CoE and leaders of the EU (President of the European Commission, Commissioner for Foreign Affairs, and other Commissioners, and members of the European Parliament). At the parliamentary level, relations between the European Parliament and the Parliamentary Assembly of the Council of Europe are covered by article 225 of the Regulation of the European Parliament,[33] and article 66 of the Rules of Procedure of the Parliamentary Assembly of the Council of Europe[34] and have given rise, for example, to the "Agreement on the strengthening of cooperation between the Parliamentary Assembly and the

[31] For example, *Summary report on cooperation between the Council of Europe and the European Union*, 129th Session of the Council of Ministers, May 2019, https//search.coe.int/cm/pages/result_details.aspx?ObjectId=09

[32] Exchange of letters between the Commission of the European Communities and the Secretary General of the Council of Europe, 25–30 November 2009. "The Secretariat General of the Council of Europe

(….) concerning the entry into force of the Lisbon treaty (….) has the honour to inform the Council of the European Union and the Commission of the European Communities that it will take the necessary steps in this respect and records the 'Delegation of the European Commission' as the 'Delegation of the European Union' in the list of Diplomatic Missions with effect 1 December 2009." PROT/RB/if/EC30112009.

[33] Rule 225: Cooperation with the Parliamentary Assembly of the Council of Europe: 1. Parliament's bodies, and in particular its committees, shall cooperate with their counterparts at the Parliamentary Assembly of the Council of Europe in fields of mutual interest, with the aim in particular of improving the efficiency of their work and avoiding duplication of effort. 2. The Conference of Presidents, in agreement with the competent authorities of the Parliamentary Assembly of the Council of Europe, shall decide on the arrangements for that cooperation.

[34] https://assembly.coe.int/nw/xml/RoP/RoP-XML2HTML-EN.asp

European Parliament" of 28 November 2007.[35] Cooperation at the political level also encompasses the consultation meetings between the European Union's Troika of the Article 36 Committee (CATS) and the Council of Europe.

At the political-administrative level, reciprocal information and advice are provided through the Annual Meeting of EU-CoE Senior Officials, which is responsible for coordinating cooperation between the organisations. In addition, at the regional and local levels, the Congress of Local and Regional Authorities of the CoE has concluded a Revised Cooperation Agreement with the European Committee of the Regions.[36]

One form of cooperation that could be defined as political in so far as it relies on the exchange of information and discussion of general lines of action can be found in the informal annual meetings between the European Court of Human Rights and the Court of Justice of the European Union. These meetings have at times produced important documents with respect to the EU's accession to the European Convention of Human Rights (still pending – see Section 10).[37]

6.2. Instruments of legal cooperation in the specific tasks of setting standards and evaluations

Beyond cooperation in the form of the exchange of information and advice in general areas and strategic approaches by the institutions of both organisations, the agencies and bodies of the CoE are also engaged in legal cooperation with the EU with respect to specific actions within the objectives established by the Union. In this cooperative undertaking, CoE agencies provide instrumental support to the institutions of the EU. Given the distribution of functions within the Union, this support is primarily provided to the European Commission, as the representative of the executive power of the EU. But there are also plenty of examples of instrumental support for the European Parliament from CoE agencies in the form of practical advice and information on specific issues. An example can be found in the European Commission Communication's[38] mention of the European Parliament's request to the Venice Commission for an opinion on the measures adopted in member states with respect to the COVID pandemic and their impact on democracy, fundamental rights and the rule of law.[39]

This type of legal cooperation around concrete actions is particularly important with respect to the defence of the rule of law, which is in turn closely linked to respect for democracy and human rights. The Commission's 2020 Report on the Rule of Law and the European Parliament Resolution of the same year on the establishment of a mechanism on democracy, fundamental rights and the rule of law[40] underline the importance of CoE cooperation in the defence and promotion of the rule of law by the

[35] See Annex XXIII to the Rules of Procedure of the Parliamentary Assembly.

[36] *Revised Cooperation Agreement between the European Committee of the Regions and the Congress of Local and Regional Authorities of the Council of Europe* COR-2018-00607-10-01-nb-tra (en) 1/7.

[37] See the Joint Communication of Presidents Costa and Skouris on the accession of the EU to the European Convention on Human Rights, 17 Jan. 2011.

[38] See note 7.

[39] *Commission Communication* cit. p. 7. See www.venice.coe.int/webforms/events/?id=2967

[40] Notes 7 and 8.

EU, following the guidelines set out in the EU's Framework to Strengthen the Rule of Law, drawn up by the Commission in 2014.[41]

CoE cooperation in the tasks set out in the mechanism to defend the rule of law is important at three points in the process: establishing standards or criteria to evaluate the situation with respect to EU member states; the process of undertaking the evaluation; and the adoption of measures to address any problems observed as a result of the evaluation.

With respect to establishing standards or criteria, the work of CoE agencies has shown itself to be of great importance in establishing benchmarks against which to measure the situation of the rule of law in member states. Information sources used by EU institutions to establish these standards include the checklists compiled by the CoE (for example, the Venice Commission's Checklist on the Rule of Law[42]) and reports commissioned from CoE agencies by the EU, such as the annual Study on the Functioning of Judicial Systems, commissioned from the CEPEJ by the EU, as part of the EU Justice Scoreboard.[43] Another important source of information for the development of evaluation standards by the EU are the regular reports on topics linked to the rule of law issued by CoE agencies, particularly in areas specifically covered by the pillars of the European mechanism on the rule of law, such as the independence of the judiciary and the fight against corruption. The former includes CEPEJ reports on the situation of the judiciary in EU states,[44] while the latter includes the regular reports issued by GRECO on specific aspects of corruption in European states, taking into account EU directives in this regard.

With respect to the evaluation phase of the situation of the rule of law in EU states, CoE agencies have specialist expertise in the three pillars of the rule of law mechanism: CEPEJ has expertise in judicial systems; GRECO has expertise in the fight against corruption; and the Venice Commission has expertise in checks and balances between institutional powers.

6.3. Cooperation through joint programmes

With respect to the third aspect of EU-CoE cooperation, through specific actions, a key instrument, of clear relevance to the process of strengthening and defending the rule of law has been the use of joint programmes involving both organisations, programmes which have primarily been developed by agencies of the CoE. These are actions to support states –both EU members and others– the objectives of which are established jointly by the two organisations and which are implemented either fully or primarily by CoE agencies, with the majority of funding coming from the EU: indeed, EU contributions provide the core external funding for CoE projects. The joint programmes focus primarily on legal and institutional reforms, carrying out a wide range of activities and drawing on the cooperation of governments in the countries affected. These activities consist of training courses for legal staff,

[41] *Communication from the Commission to the European Parliament and the Council. A new EU Framework to Strengthen the Rule of Law*. /* com/2014/0158 final */

[42] *Check List on the Rule of Law adopted by the Venice Commission* on 11–12 March 2016, formally endorsed by the Council of Ministers in September 2016 and by the Parliamentary Assembly in October Resolution 2187 (2017).

[43] *European Commission for the Efficiency of Justice(cepej) 2020–2021 activity programme*. CEPEJ(2019)19rev.

[44] The most recent of these is the 2020 report on the evaluation of judicial systems in Europe.

seminars and workshops (activities that often give rise to publications) along with expert advice and cooperation in the drafting of legal texts.[45]

Joint projects can be restricted to a single country (country projects), extend to a geographic region (regional projects) or address a specific theme within a number of different countries (thematic projects). The EU-CoE joint projects started in 1993; in 2012, a study of EU policies and strategies in the areas of cooperation was undertaken[46] and this proposed a series of reforms, as a result of which the cooperation was restructured, with a greater stress on regional cooperation.[47]

The majority of cooperation programmes linked to democracy, human rights and the rule of law have been implemented in non-EU states, with many of them being conducted in neighbouring regions to facilitate the accession of candidate states. The joint programmes are currently concentrated in Eastern Europe (Eastern Partnership) and the Mediterranean (Southern Partnership). However, there are also numerous programmes of this type in EU member states. This is the case of thematic programmes, which encompass a number of states (such as ROMACT programmes 1 to 4) and, in particular, the programmes to train legal professionals developed by HELP in the EU.

[45] For a list of joint programmes, see: https://www.coe.int/en/web/programmes/ue-coe-programmes

[46] *Evaluation of Commission Cooperation with the Council of Europe. An assessment of EU funding of Joint Programmes*. http://aei.pitt.edu/50176/. See note 9.

[47] *Statement of Intent for the Cooperation between the Council of Europe and the European Commission in the EU Enlargement Region and the Eastern Partnership and Southern Mediterranean Countries (EU Neighbourhood Region*). See note 10.

7. STRENGTHENING EU-COE COOPERATION WITHIN THE EU (II): IMPROVING INSTRUMENTS OF COOPERATION

7.1. From "junior partnership" to "strategic partnership

The forms of cooperation between the CoE and the EU are the result of a process of evolution, in which quite different practices, legal instruments and mechanisms have gradually accrued, giving rise to a complex network of relations. The desire on the part of both organisations to strengthen the rule of law and confront the current challenges to it in the present circumstances requires a better development of cooperation between them to rationalise its structure and maximise synergies.

A basic principle for this development, in the face of certain criticism levelled in the academic field,[48] would be to underscore that cooperation between the CoE and EU is based on the principle of strategic partnership, as organisations of equal standing on an international level. The relationship between the CoE and EU cannot be defined as one in which one of the parties (the CoE and the bodies that make it up) acts solely as an agency in the service of the other (the EU). This type of undesirable appreciation might arise, among other reasons, from the evident financial imbalance between the two organisations, and the CoE's economic dependence on the EU in certain aspects. It has often been stated that the EU accounts for the CoE's biggest source of extra-budgetary income for implementing programmes to extend democracy, human rights and the rule of law. The Committee of Ministers of the CoE stated that to 2018 of the accumulated 154.8 million euros allocated to joint programmes the EU had provided 121.4 million, compared to 23.4 million on the part of the CoE.[49] For 2019, EU contributions accounted for 57% of the CoE's extra-budgetary resources.[50] And the EU's contributions are also a significant element for the action of CoE bodies and programmes such as the CEPEJ or HELP.

A perception of the CoE as a "junior partner" of the EU would place serious handicaps on the latter's action in favour of the rule of law and particularly on the development of the mechanism to uphold the rule of law envisaged by the European Commission. It should be borne in mind that the CoE's cooperation with the EU is not only justified by the community of values shared by the two organisations and by the experience accumulated by CoE agencies regarding democracy, human rights and the rule of law. Additionally, the measures envisaged in the mechanism for the rule of law put forward by the European Commission require enhanced legitimacy insofar as they can affect the policies of member states on highly sensitive issues. Cooperation on these measures by the CoE can provide that legitimacy if the CoE is perceived as an independent body from the EU with international prestige, made up, moreover, of members both in the EU and outside it and therefore not subject to indications or pressure in its action. CoE and EU cooperation in the framework of the EU's mechanism in defence of the rule of law would be interpreted as an added factor of legitimisation and as a

[48] See: *Briefing. European Union-Council of Europe cooperation and joint programmes*, EPRS/European Parliament Research Service, September 2018, p. 5 "Points of criticism"

[49], "*Summary Report on cooperation between the CoE and EU*" CM(2019)67-final

[50] *129th Session of the Committee of Ministers (Helsinki, 16-17 May 2019) Joint Programmes between the Council of Europe and the European Union in 2018 –Information document.* CM (2019)67-addfinal.

guarantee of independence and impartiality in its functioning. The pan-European nature of the CoE and the inclusion, therefore, of experts not only from EU member countries, but also from another 20 non-member countries would thus lend a considerable presumption of veracity and strength of conviction to the result of its tasks, providing added value to the decisions that the EU institutions make in view of the reports and recommendations of the CoE agencies.

The assertion and strengthening of the CoE's condition as a strategic partner of the EU and not as an instrumental agency, then, appears to be something to aim for. There are several possible channels to achieve it, both a) in the sense of strengthening EU integration in the framework of the CoE and b) in the formalisation and rationalisation of cooperation between the two organisations, moving beyond practices based on partial and ad hoc agreements.

7.2. Cooperation through integration: strengthening the EU's presence in CoE bodies

An initial channel for an effective relationship of enhanced partnership between the CoE and the EU would be the full integration of EU representatives into the CoE agencies and bodies responsible for specific tasks in the field of the defence of democracy, human rights and the rule of law. The EU is already represented in some of these agencies; in others, in a limited manner. In a third group it is not represented, or there are legal difficulties impeding its integration, which it would be necessary to resolve. True, in one significant CoE body, the Venice Commission, the EU is represented with a special status participation, but in other bodies and agencies the EU has limited involvement:

- In GRECO, and following lengthy negotiations, the EU takes part only as an observer, which reduces it intervention and decision capabilities. As a result, it is not the subject of the organisation's studies and analyses.
- In MONEYVAL, its participation in the body's work is provided for, but without the right to vote.
- In CEPEJ the EU participates only as an observer.
- In the ECRI, European Committee Against Racism and Intolerance, it participates only as an observer.
-

Meanwhile, there is a series of CoE bodies, resulting from the adoption of an international convention, in which taking part in its work is dependent on signing and ratifying the convention. These include:

- GREVIO, Group of Experts on Action against Violence against Women and Domestic Violence, responsible for monitoring the application of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), not ratified by the EU.
- Committee on Social Rights, in charge of overseeing the application of the European Social Charter, not ratified by the EU.
- The Committee for the Prevention of Torture (CPT), created by the European Convention for the Prevention of Torture or Degrading Treatment or Punishment. The EU has not ratified the Convention and participation in the CPT is reserved for experts from the member countries appointed by the Parliamentary Assembly of the Council of Europe.

It seems reasonable to assume that the EU's full integration into these CoE bodies would constitute a notable advancement of the cooperation between the two organisations, in order to avoid duplication and to facilitate coordination and communication between them. We must recall that to the end the CoE is represented on the Management Board of the EU Agency for Fundamental Rights, pursuant to the Cooperation Agreement of 2008. The EU's full integration into CoE bodies should take different forms according to the nature of the body in question. In some cases, an EU agreement with the CoE's governing bodies would do, in others it would require the EU's accession to the relevant CoE convention.

7.3. Cooperation through global planning: a partnership in defence of the rule of law

Thanks to the gradual evolution of relations between the EU and CoE described above, the forms of cooperation between the two organisations have developed in a most varied way, largely responding to the needs and expediencies of the specific moment. This has resulted in multiple agreements and forms of collaboration, with more or less precision according to the EU and CoE agents and the matter in question, as well as the EU body concerned. While it was a considerable improvement on the previous situation, the Memorandum of Understanding of 2007 is still very generic and has given rise to a wide variety of action, though it has not necessarily been coordinated. We might note, in examples already mentioned, collaboration in cases of the CoE's instrumental support for the EU such as the Agreement between the Parliamentary Assembly and the European Parliament of 28 November 2007, the Revised Cooperation Agreement of 27 March 2018 between the CoE Congress of Local and Regional Authorities and the EU Committee of the Regions, the Agreement between FRA and the CoE of 2008, and in the case of specific action, the Two Studies prepared for the European Commission by the CEPEJ on the functioning of judicial systems in the EU Members States of 2018, the Venice Commission studies commissioned by the European Parliament, or the HELP programme for Legal Professionals in the European Members States, among many others.

However, the establishment of a consolidated and continuous (annual) mechanism in defence of the rule of law like the one envisaged by the European Commission also requires cooperation between the CoE and EU on this matter to take place in a consolidated and regular manner, on formalised and stable grounds of a general and regular nature, moving beyond dispersed situations of circumstantial and episodic cooperation. We must recall that in an initial phase of cooperation between the EU and the CoE on joint programmes outside the EU (particularly in EU candidate countries) the cooperation was conducted in a dispersed and circumstantial manner. The Assessment Report on EU-CoE Cooperation, drawn up in 2012, pointed to the drawbacks of this system and as a result a stable plan of joint action was drawn up in the previously mentioned Statement of Intent for the Cooperation between the CoE and the European Commission, which led to the structuring of cooperation into various enhanced partnerships.

It is not hard to conclude that the cooperation between the CoE and EU in the envisaged mechanism for the defence of the rule of law would benefit greatly from a similar plan, a formal partnership agreement, this time concerning the EU's mechanism for the rule of law and involving the CoE and its various agencies. The agreement on the matter (in parallel with the partnerships envisaged in the Declaration of Intent of 2014, relating to outside the EU) could specify the goals of the collaboration (keeping to the four pillars of the mechanism), the CoE bodies committed (both from the CoE's central structure and from its specialised agencies) and the various tasks assigned to each one.

In view of the various channels of cooperation stated above (political, legal, of execution), we can see that the work of the Council's agencies should focus above all on the second of those channels (legal cooperation) in the shape of the drawing up of standards, monitoring and assessment. On those matters, the CoE's specialised bodies are particularly suited to the four pillars of the EU mechanism. The CEPJ specialises in tasks relating to the protection of judicial independence integral to the first pillar; the GRECO works on the struggle against corruption of the second pillar; the Venice Commission has acquired considerable experience in the field of institutional relations, the object of the third pillar. As for the pillar relating to the press, a new version of the CoE's Committee of experts on Media Pluralism and Transparency of Media Ownership MSI-MED could prove to be of invaluable use. The experience gained by the CoE in all these areas (reflected, for instance, in the CoE's Project Management Methodology[51]) would doubtless prove useful.

Nor should we rule out the partnership agreement providing for cooperation by the CoE and its various bodies in the collaboration stage of specific tasks in the various states, as a result of the assessments and recommendations within the mechanism. Considering the European Commission's previsions on the possible need for "support to Member States and national stakeholders in addressing rule of law challenges", [52] the carrying out of joint EU-CoE programmes in the Union would appear to be an ideal instrument for applying the rule of law mechanism in those support processes. The Commission communication anticipates providing technical and financial assistance in the areas of public administration, justice, anticorruption, and media pluralism and makes express reference to cooperation on the part of the CoE in this action.[53] This cooperation is especially appropriate in view of the results of the HELP programmes as far as training of legal personnel is concerned and nor should we forget the possible application of the information obtained by the CEPEJ in terms of the duration of legal proceedings or digitalisation, to mention just a few examples. In light of the experience, we should not rule out these technical assistance programmes within the rule of law mechanism taking place in parallel with specific cooperation programmes between the States and the CoE, in view of the assessments that it has made on specific matters.

Without excluding cooperation work on a political level between the executive bodies of the two organisations, as well as among the Parliamentary Assembly, the European Parliament and the respective national parliaments, as laid down in their respective Rules of Procedure,[54] a new a formal partnership between the CoE and the EU, inserted into the mechanism for the defence of the rule of law would give special prominence to the European Commission and to the instruments of legal cooperation and establishment of joint programmes. The formal establishment of a cooperation agreement of this type, specifically focused on the mechanism for the defence of the rule of law, would create a powerful means of rationalisation and coordination between the EU and the CoE. In that regard, the CoE and the EU have already reached agreements of this type in other areas, for instance regarding cooperation on economic structures, in the Framework agreement between the EU Structural Reform Support Service and the CoE in 2019.

[51] https://www.coe.int/en/web/project-management-methodology

[52] *Communication from the Commission*, cit., p. 3.

[53] "Reforms would also benefit from expertise from recognised international bodies, in particular the Council of Europe, as well as from exchanges with practitioners from other Member States". *Communication*…, cit. Ibidem.

[54] See notes 33,34 and 35.

8. STRENGTHENING EU-COE COOPERATION THROUGH THE ESTABLISHMENT OF EXTERNAL CONTROLS

As stated (see section 5.2), a second channel of joint EU-CoE action in defence of the values shared by the two organisations is the one arising from agreements that establish external checks on the European Union by bodies in the orbit of the CoE. As the Court of Justice of the European Union (CJEU) has acknowledged, as a legal entity in international law the Union can make international commitments via its inclusion in international treaties and conventions that stipulate this type of review and monitoring body.

To date, the European Union has ratified 13 Council of Europe conventions (some so important in the field of the rule of law and human rights as the Council of Europe Convention on the Prevention of Terrorism and its Additional Protocol) and has signed a further four pending ratification (including the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, or the "Istanbul Convention" and the Council of Europe Convention on Laundering, Search Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism).[55] The commitment made by the EU on forming part of those Conventions means that, on the one hand, the EU is subject to the control of its compliance by the international community in accordance with the principles of international law of the treaties; but on the other, we must take into consideration that certain treaties in the sphere of the Council of Europe establish specific institutions intended for conducting specific oversight of the states and organisations that are parties to them. In such cases, we might speak of external control over the parties to the treaty. Therefore, the EU's possible integration into some of those treaties implies that its institutions are subject to the supervision of the body stipulated in them.

The added value of CoE cooperation to the EU's work in defence of the rule of law would surely increase if the EU formed part of those conventions that stipulate some form of external control over its activities. The legitimacy of the EU's action would be reinforced by the backing that the approval, express or tacit, of international bodies of recognised prestige represents. That is particularly the case as far as the EU's accession to the European Convention on Human Rights (ECHR) is concerned, laid down in Article 6 of the Treaty on European Union (TEU) and which has encountered considerable difficulties so far. The question is primarily raised relative to the explicit stipulation in the Convention of the existence of an institution responsible for external control, an institution that also has a jurisdictional nature, that is, the European Court of Human Rights (ECtHR). However, there are other Council of Europe conventions that establish bodies of external control over the signatories and which are significant instruments for the defence and promotion of the rule of law, which means that the EU's possible integration into them has sometimes been raised as an appropriate channel for guaranteeing the common values of the EU and CoE.

[55] A list of those Treaties can be found at the website of the Treaty Office of the Council of Europe.

9. EU ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The EU's accession to the European Convention on Human Rights, provided for by Article 6 of the TEU and Article 59.2 of the ECHR, would certainly give considerable added value to the task of promoting and defending human rights, the rule of law and democracy on the part of the European Union institutions. Indeed, accession would not only provide confirmation of the EU's identification with the values enshrined in the Convention (values that already form part of the basic principles of the EU) and the rights proclaimed in it (rights also included in Union law via the Charter of Fundamental Rights of the European Union, CFREU), but also acknowledgement of the existence of external control of the action of EU institutions relative to those rights, by the European Court of Human Rights. The 27 member states of the Union are already members of the Convention and, therefore, subject to the control of that Court. EU accession to the Convention would mean that the control would also extend to the action of the Union institutions regarding human rights. So far, the absence of that external control has given rise to certain difficulties, in instances in which action and complaints regarding the Union have been brought before the Strasbourg Court relating to action by EU institutions allegedly contrary to the rights recognised in the Convention, or to action by member states in mandatory execution of EU law. On the other hand, the existence of two competent jurisdictions on human rights matters, that is, the Strasbourg Court as the interpreter of the Convention and the Court of Justice of the EU (CJEU) as the interpreter of the Charter of Fundamental Rights, opens up the possibility of the creation of non-converging case laws, with the resulting problems of consistency and interpretation on the part of the member states of the two organisations.

In view of the provision of Article 6 of the TEU, the European Council gave the European Commission a mandate, dated 4 June 2010, with specific terms of reference to commence accession negotiations. On the CoE's part, the Committee of Ministers gave a mandate to the Steering Committee for Human Rights (CDDH) to conduct the necessary negotiations with the EU and prepare an agreement for the EU's accession to the ECHR.

The Working Group created by the CDDH met representatives of the EU and a draft agreement was drawn up.[56] As it was a draft international treaty binding on the EU, in accordance with Article 218 of the Treaty on the Functioning of the EU (TFEU) it should be subject to an opinion from the Court of Justice on its compatibility with Union law. The European Commission requested this opinion from the CJEU in July 2013. In its Opinion 2/2013, the Court in Luxembourg held that the draft agreement on EU accession to the ECHR was incompatible with Union law and therefore accession under the terms of the draft agreement was not possible.

[56] *Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms*. 47+1(2013)008rev2

10. ANALYSIS OF THE COURT OF JUSTICE'S OBJECTIONS TO THE DRAFT AGREEMENT AND POSSIBLE ANSWERS

10.1. The autonomy of EU law and standards of human rights protection

The first objection to the draft agreement raised in the CJEU Opinion focuses on a matter of such considerable importance as the extent of the autonomy of EU law with regard to external powers and institutions. The Court examines the compatibility of the draft agreement with that autonomy and comes to a negative conclusion. However, it can be gathered from the text of the Opinion that the incompatibility flagged by the Court in its first objection derives from a specific point of the draft agreement and that, as the Court itself states, it can be remedied by the provision of specific measures on the matter.

The Court begins by stating that as a result of the European Union's possible accession to the European Convention on Human Rights, it would become a binding legislation for the Union, and it would have binding force (in view of Article 26.2 of the TFEU) for the EU institutions and member states. The Convention would become an integral part of EU law. Consequently, and pursuant to the Convention's mandates, the European Union would be subject to external control, the one represented by the jurisdiction of the European Court of Human Rights.

The CJEU acknowledges that the existence of an external control of this type is not, in principle, incompatible with EU law. As a subject of international law, the Union can agree to international treaties by which it submits to controls of this type. In the case of the European Convention on Human Rights, moreover, accession is expressly provided for in Article 6 of the Treaty on European Union. However, the Court also states that the Union's accession to international treaties is conditional on those treaties respecting the nature of the Union's competences and on not jeopardising the autonomy of the community legal order. According to the Court of Justice, this autonomy means that a power outside the Union cannot impose a particular interpretation of Union law on its institutions.

At first, this assertion would appear to cast doubt on the very possibility of EU accession to the European Convention. Indeed, as far as human rights are concerned, the fundamental EU legislation on the matter, that is, the Charter of Fundamental Rights of the European Union, covers rights that are also regulated in the Convention; and in accordance with it, the interpretation of those rights falls to the European Court (Article 32.1 of the Convention). From that point of view, the Court of Justice and the rest of the Union institutions must conform to the interpretation on the matter made by the Strasbourg Court.

The Opinion in any case limits the scope of its observations to one specific point.[57] The Court of Justice focuses the draft agreement's problem of compatibility with EU law on a matter of a practical nature.

[57] The Opinion also states the European Court of Human Rights would not be competent to replace the Court of Justice on matters relating to the sphere of material application of EU law "for the purposes, in particular, of determining whether a Member State is bound by fundamental rights of the EU." (§186). The Court therefore is referring to the fact that it falls solely to it to determine whether an act by the member states falls within its competences and thus such action is bound by the fundamental rights laid down in EU law. It is, then, a general assertion that does not affect the provisions of the draft agreement.

The Court of Justice states that national levels or standards of protection of human rights of the member states "must not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU Law". However, Article 53 of the ECHR reserves for the contracting parties the power to establish higher standards of protection of fundamental rights than those guaranteed by said Convention. It may be come to pass that, pursuant to that empowerment, should the EU accede to the Convention, the states of the Union proceed to adopt standards of protection of human rights that contradict or jeopardise the unity and effectiveness of EU law.

It should be noted that the Court of Justice itself indicates a possible means to a solution. It is necessary to ensure coordination between that provision (Article 53 of the ECHR) and Article 53 of the Charter (§189) and states that "However, there is no provision in the agreement envisaged to ensure such coordination" (§190).

In view of that, a possible way of overcoming this difficulty would be to insert a provision of this type into the accession agreement to guarantee the level of protection of the Charter and the primacy, unity and effectiveness of EU law. That could consist of a modification of Article 53 of the ECHR, through the procedure of reform required to adapt it to the accession agreement, adding that the possibility of ECHR member states laying down higher standards than the Convention must be understood without prejudice to the commitments entered into by those states through other treaties or agreements. In that way it would be clear that EU accession to the Convention does not imply granting to the member states of the EU the capacity to alter their relations with it under Article 53 of the ECHR.

10.2. Mutual trust among EU states

Secondly, the CJEU believes that the proposed agreement is not compatible with EU law insomuch that it affects the principle of mutual trust among EU states. Deriving from this principle is the obligation of each of the states to consider that all the other states respect EU law and particularly the fundamental rights recognised in that law (§§ 168, 191). Thus, one state of the Union cannot demand a higher level of fundamental rights from another state than that provided by the Union. And it cannot, save in exceptional cases, check whether that other member state actually respects those rights.

The problem might lie in the fact that, in observance of the Convention mandates, one state could assess the level of protection of fundamental rights of another state, on extradition procedures or the expulsion of aliens for instance, and consequently, following that example, it could refuse an extradition procedure or to comply with the mandates covering the granting of asylum if it considers that compliance (for example, sending the asylum seeker to the country of entry into the EU) could harm the expellee's rights, for want of guarantees on the part of the receiving state. When that assessment takes place in areas subject to EU law, the principal of mutual trust would be harmed.

Unquestionably, the principle of mutual trust is a fundamental element in the functioning of the European Union as far as the single market is concerned and in the effective development of the Union's area of freedom, security and justice. Yet it should be pointed out that with regard to fundamental rights it is an objection with little practical application and, in fact, the Advocate General

did not mention it in her arguments before the Court and the use of this argument by the Court has been described as unexpected. The same Court states that mutual trust implies a presumption (not a positive assessment in any case) of observance of the fundamental rights by other states. However, it also acknowledges that presumption may be omitted "in exceptional cases".

Given the growing convergence between the legal guarantees deriving from the European Charter and the Convention and from the positions of the Courts in Strasbourg and Luxembourg, the possibility that on matters submitted to the application of EU law a difference of perceptions should arise between two states of the Union relating to the fundamental rights recognised in the Convention is relatively small, though it cannot be ruled out; for example, regarding the application of the Schengen accord in terms of handing over persons subject to trial in another country of the Union. But if that were the case, the exception indicated by the Court of Justice that presumption may not apply owing to the existence of exceptional circumstances should come into play. In addition, if a judicial body of a member state has doubts about the guarantees existing in another state, it can refer the matter to the Court of Justice for a preliminary ruling relative to the interpretation of EU law applicable in this case. And finally, if a situation of this type reached the Strasbourg Court, initiating the Court of Justice's prior involvement procedure (see below, 10.7) cannot be ruled out if the application of EU law were indeed compromised.

10.3. Giving advisory opinions under Protocol No.16

A third objection raised by the Court of Justice Opinion refers to the entry into force of Protocol No. 16 in the European Convention, a protocol that establishes the possibility of the high courts of the countries to have signed the Convention turning to the ECtHR to request it issue an advisory opinion on questions of principle relating to the interpretation or application of the rights and freedoms enshrined in the Convention or its protocols. These advisory opinions, which will be issued by the Grand Chamber of the ECtHR, will be reasoned and not binding. The requests for advisory opinions will be made in the framework of the matter to be resolved by the court seeking the opinion.

The Court of Justice states that EU law requires the courts of the member countries to refer matters to the Court of Justice for a preliminary ruling when problems arise regarding the interpretation of the rights and freedoms recognised in EU law, under Article 267 of the TFEU. Since the Convention would become an integral part of EU law, the mechanism established by Protocol No. 16 could, in cases where the request for an opinion concerns rights guaranteed by the Charter of Fundamental Rights equivalent to those contained in the Convention, affect the autonomy and effectiveness of the preliminary ruling procedure of Article 267 TFEU. Thus, it cannot be ruled out that the use of the advisory opinion procedure could serve to circumvent the preliminary ruling procedure, which is an essential feature of the Union's judicial system. The Court of Justice states that the draft agreement does not contain any provision regarding the relationship between the Protocol No. 16 mechanism and the preliminary ruling procedure provided for in Article 267 TFEU. Consequently, the accession proposed under those conditions would adversely affect Union law.

In view of the wording of the CJEU opinion, that objection is not difficult to resolve. Firstly, the request for an advisory opinion submitted to the ECtHR does not represent an obligation on the national courts (contrary to what occurs with the preliminary ruling procedure of Article 267 TFEU), rather a discretional possibility, which is only open to the highest courts. Furthermore, the Strasbourg Court can argue that

the request is inadmissible if it considers that it does not fall within its competence. All that considerably reduces the possibility of the Protocol No. 16 mechanism being used with a view to defraud Article 267 TFEU. Still, and in anticipation of that eventuality, the accession agreement could include a clause by which the Rules of Order of the Strasbourg Court relative to the application of Protocol No. 16 must state that any request or part of it relative to the interpretation of any regulation outside the Convention and its protocols should be declared inadmissible. In addition, the agreement could stipulate that the possibility is established, through the instrument of third-party involvement in the Protocol No. 16 procedure, of the Union institutions being able to inform the Strasbourg Court that the request for an opinion may concern matters of Union law that should be resolved by the preliminary ruling procedure of Article 267 TFEU.

10.4. Compatibility with Article 344 TFEU

An additional objection raised by the Court of Justice concerns the contradiction between the terms of the proposed accession agreement and the mandate of Article 344 of the Treaty on the Functioning of the European Union. This article states that the member states of the Union cannot submit disputes over the interpretation or application of the treaties establishing the Union to any procedure of settlement other than those provided for in the treaties. However, Article 33 of the Convention provides that any state signing the Convention can refer to the Strasbourg Court any failure to comply with the provisions of the Convention by another contracting state. Consequently, EU accession to the Convention would appear to confirm an eventuality contrary to a basic principle of the Union, that is, the referral of differences between member states on issues related to the Union to an external body.

Certainly, a radical solution to this objection might be the agreement expressly excluding the possible use of the mechanism of Article 33 of the Convention among member states of the Union (and by the Union itself) regarding possible breaches of Convention rights also gathered in EU law and on matters of EU jurisdiction. However, such a solution may well be incompatible with the very nature of the Convention, by introducing a factor of inequality among the contracting states, based on whether they were members of the European Union or not. A solution of this type would most likely be rejected by the states that were not members of the EU.

However, other solutions are possible. It is worth pointing out first that the procedure of Article 33 of the Convention, concerning interstate complaints, has been used very rarely in the almost 70 years that the Convention has been in effect, which would appear to make this issue highly hypothetical. Given that, a possible way could be to reduce the scope of Article 55 of the Convention for EU countries. This article stipulates that the contracting states renounce submitting their differences over the interpretation or application of the rights of the Convention to an authority or solution procedure other than those provided for in the Convention itself. The reduction of the scope of that provision with regard to EU member countries would facilitate their preferring to turn to the Union's internal channels to settle differences over fundamental rights on matters under Union jurisdiction, rather than preferring to turn to the jurisdiction of the European Court of Human Rights.

In any case, it is still possible that a state might decide to go directly to the Strasbourg Court, lodging an interstate complaint against another member state on matters included in EU law and relative to fundamental rights recognised in the Convention. In that case, evidently, that state would be committing an infringement of the mandates of Article 344 of the TFEU, which could give rise to an

internal procedure within the Union, such as the infringement procedure that can be initiated by the EU institutions.

In this case, one possible way would be that, upon initiation of the interstate complaint pursuant to Article 33 of the Convention, the Strasbourg Court would agree to suspend the procedure (which in these cases is of some considerable duration anyway) to give the EU institutions the opportunity to work through the internal infringement procedures for the breach of Article 344 by the complainant state. It would also be possible for the explanatory statements of the agreement, or the Rules of Order of the Strasbourg Court, to stipulate that a decision by the Court should only come once the Union's internal procedure is over and, where appropriate, with a decision made on the matter in the EU, the Court would take into consideration the content of that decision for the purpose of a final resolution.

10.5. Objections regarding the co-respondent mechanism

The Court of Justice also raises objections to the functioning of the co-respondent mechanism and its compatibility with the autonomy of EU law. The co-respondent mechanism is a formula for avoiding gaps in the procedure before the ECtHR owing to the complexity of the EU's legal system. Indeed, it is possible for a complaint to be lodged against a state when it limits itself to carrying out to the letter binding decisions of Union institutions; and nor can we rule out the opposite situation, that is, the filing of complaints against the Union for action that is in fact the competence of a member state. To prevent the problems arising from the absence from the procedure of one of those responsible for the alleged violation of the Convention the co-respondent mechanism, provided for in the draft accession agreement, establishes two possibilities. One, if EU competences could be affected, the ECtHR can invite the EU, in cases of complaints against a state, or, where appropriate, invite the state concerned, in complaints against the EU, to take part in the process as a co-respondent. A second option would be either the EU or the state in question asking the Court to accept it as a co-respondent in the procedure if it considered that its powers and competences were affected by the complaint. The Court would have to decide on admission as a co-respondent in view of that request. Meanwhile, in the event of a ruling for violation of the rights of the Convention, the Court could either declare the joint responsibility of the EU and the state in question or decide on the specific attribution of responsibility to one of the co-respondents.

In its Opinion, the Court of Justice considers that while there is no problem as regards the possible invitation by the ECtHR of a possible co-respondent, a problem certainly does arise regarding the Strasbourg Court's capacity to decide on the possible request by the EU or a member state to participate in the procedure as a co-respondent. Indeed, the ECtHR decision to accept the request or not presupposes a judgment on the part of that Court on the division of powers in the EU between the Union institutions and the member states. The Court of Justice expressly states that through the decision to accept the request or not the ECtHR is called upon to assess the rules of EU law governing the division of powers between the EU and the member states (§224). The ECtHR, then, would be assuming functions beyond its jurisdiction by passing judgment on internal affairs of the Union, contravening EU autonomy.

Similarly, in the event of a ruling establishing a violation, the possibility of the ECtHR apportioning responsibility for the violation on one of the co-respondents presupposes that the ECtHR could decide on who the holder of the exercised competence was. Since it is based on an assessment of the rules of EU law governing the division of powers, a decision on the division of responsibility for a violation of the Convention between the Union and its member states, then, is an encroachment on the powers of the Union, according to the CJEU.

This objection would certainly not be unfounded if the Strasbourg court were considered to have the capacity to decide on the internal division of competences between the EU and the member states. But it is of course the EU, and not the Strasbourg court that determines the interpretation and application of the rules on the division of competences in the Union. Furthermore, it is no less true that in its case law the Strasbourg Court has constantly avoided interfering in matters relative to the division of power in the states of the Convention. In the event of a ruling establishing a violation, the Court declares the responsibility of the state, not of one of its powers, and therefore it does not appear very likely that it would change direction to interfere in the division of powers within the Union. However, and to prevent that (unlikely) possibility, two solutions are possible:

- One possible solution would be to limit the ECtHR's scope of assessment when it came to accepting or not the request to act as a co-respondent. For example, the Court could only reject such a request if it proved manifestly arbitrary or unfounded.

- Another more radical solution would be to lay down that the Court must accept the request in every case and grant the applicant the status of co-respondent[58].

As regards the possibility of the Court, as an exception, not applying the rule of joint responsibility in the event of a ruling establishing a violation, there does not appear to be any problem with that exception disappearing, so that it would the Union institutions that applied the rules in EU law on the apportionment of responsibilities.

Either of these solutions could be introduced either in the agreement's explanatory report or, in the most suitable way for the purposes of legal certainty, in the text of the agreement itself to be transposed eventually to a possible reform of the text of the Convention.

10.6. Objections regarding the CJEU's prior involvement mechanism

Closely linked to the objection over the co-respondent mechanism is the one raised by the Court of Justice Opinion regarding the mechanism provided for in the agreement on the Court of Justice's prior involvement in those cases in which, with the EU acting as co-respondent, a state is accused of violating

[58] The mechanism could be similar (mutatis mutandis) to the one laid down in Article 36.1 of the Convention for the involvement of third states: "In all cases (…) a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings". Of course, in the case of the co-respondent, their situation would be different (possibly joint responsibility) from the one that goes to a third state, but if that solution were followed, the invocation by a state or the EU of the possible effect on their competences on the subject matter of the complaint would be sufficient grounds for admission of their request.

the rights of the Convention by the mandatory application of an EU rule; in other words, when, on complying with an EU mandate, the state in question has no other course of action and that course, according to the claimant, leads to a violation of the rights recognised in the Convention. Article 35.1 of the Convention establishes the principle of subsidiarity, that is, that an appeal cannot be lodged with the Strasbourg Court until all internal channels have been exhausted. However, given the structure of the EU's judicial system, it may be that the complaint is filed with the Strasbourg Court without the Court of Justice having had the opportunity to check whether the EU rule applied in the case conforms to EU primary law, that is, the treaties establishing the Union and the Charter of Rights, in the interpretation given to them by the Court of Justice of the EU.

The solution proposed by the draft agreement is that, in the cases in which the proceedings are directed against a state in the execution of an EU law and in which the EU is a co-respondent, if the Court of Justice has not already issued a ruling on the compatibility of the regulation applied with the rights of the Convention, the Court will suspend the proceedings so that the Court of Justice can give its opinion on the matter (§ 3.6 of the draft agreement). In that way, the subsidiary nature of ECtHR jurisdiction is guaranteed.

The Court of Justice finds two problems with the provision of the agreement. First, the decision on whether the Court of Justice has already given a ruling on the compatibility of the EU rule with EU primary law cannot be made by the Strasbourg Court, but by an EU institution (that is, the Court of Justice itself), whose decision should be binding on the ECtHR. But the draft agreement does not exclude the ECtHR's competence in this respect.

Second, the Court of Justice states that in view of the agreement's explanatory report prior involvement of the Court of Justice should only concern the validity of the EU rule applied (that is, whether it conforms to EU primary law) or the interpretation of primary law. However, the agreement does not require that involvement when a problem of interpretation of secondary law is raised, when the rule applied is open to several interpretations. In that case, the Court of Justice should give a ruling on what the appropriate interpretation of the rule in question is. Therefore, the prior involvement procedure does not enable the specific characteristics of the EU and its law to be preserved (§248).

The objections raised by the Opinion are not insurmountable. An adequate system of information on the proceedings before the European Court of Human Rights that may concern EU law, and which may give rise to the application of the mechanisms of co-respondent and prior involvement, would enable both the EU institutions and the member states to appear on their own initiative as co-respondents where appropriate, as stated above, as well as, for the Union, indicate the propriety of initiating the prior involvement mechanism. The difficulties on this point are more of a logistical nature (in view of the large quantity of matters brought before the Strasbourg Court) than fundamental. On the other hand, nor do there appear to be fundamental problems regarding the insertion, in the explanatory report or in the agreement itself, of a reference stating that the ruling of the Court of Justice in the prior involvement process could refer both to the interpretation of EU primary law and EU rule applying to the case.

10.7. Objections regarding the Common Foreign and Security Policy (CFSP)

The Court of Justice's final objection to the draft accession agreement covers the effects of accession on the decisions of the EU in the context of the Common Foreign and Security Policy (CFSP). The Court of Justice states that from Article 24 of the Treaty on European Union it follows that the Court of Justice has limited competence to examine certain decisions of the EU regarding the CFSP. And it states that on the date of the Opinion (2014) the Court had not had the opportunity to specify the extent of the limitations of its competence as regards the CFSP. However, in any case it is clear that certain acts of the EU in this context fall outside the judicial control of the Court of Justice.

However, by virtue of EU accession to the European Convention on Human Rights, the Strasbourg Court would indeed be empowered "to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights" (§ 254 of the Opinion). This means that judicial review of those acts would fall exclusively to a body outside the EU.

The CJEU goes on to state that it has already declared that jurisdiction to conduct a judicial review of EU acts cannot be conferred exclusively on an international judicial body outside the framework of the EU. And the Court concludes, therefore, that the proposed agreement fails to take into consideration the specific characteristics of EU law regarding the judicial review of EU acts in CFSP matters.

It is an objection that derives from the peculiar characteristics of EU law, although it does not consider the purpose of the Convention, which is the protection of fundamental rights against the action of contracting states (or organisations), even when those states or organisations have not provided for their protection in internal law. In this respect, several observations can be made:

- First, Court of Justice case law since 2014 has extended its jurisdiction in the CFSP area and, therefore, reduced the areas excluded from its jurisdiction in that framework. According to the Court, these areas must be interpreted restrictively.

- On the other hand, the system of the Convention does not permit the protection of the rights recognised in it to be limited by "exempt areas" or "black holes" excluded from that protection, which means that it would not be possible for EU accession to the Convention to take place on the condition that the action in CFSP matters excluded from the jurisdiction of the Court of Justice also remains outside the jurisdiction of the Strasbourg Court

The possible solution to this objection is complex. The Court of Justice doesn't take into account the nature of the Convention as a guardian of fundamental rights. On the one hand, Court of Justice case law may be expected to gradually reduce the areas exempt from its jurisdiction. Yet on the other, it should be noted that at the present, even without EU accession to the Convention, all acts of the member states of the EU in application of EU law contrary to the rights of the Convention can be tried by the Strasbourg Court in the terms expressed in its doctrine as of the *Bosphorus* case. In the EU/CoE negotiating committee it has been noted that the problem can perhaps be tackled from the perspective of the attribution clause of Article 1 of the agreement, which defines the position of the member states and the Union via the appropriate "adjustment".

11. REOPENING NEGOTIATIONS

Nearly five years after the Luxembourg Court issued its Opinion, the EU and CoE resumed negotiations on EU accession to the ECHR. In October 2019, the European Commission informed the Secretary General of the EU of the EU's willingness to resume negotiations. In January 2020, the Committee of Ministers (Ministers' Deputies) of the CoE approved the continuation of the negotiations by the Steering Committee for Human Rights (CDDH) with the representatives of the Commission. On 20 June, the first meeting of the EU-CoE Working Group (47+1) took place and they have continued up to now.[59]

It must be borne in mind that even if an agreement were reached and the draft were accepted by the Court of Justice in a fresh examination, the process of approval of the agreement would be complex. Article 218(6)(a)(ii) of the TFEU provides that, following the CJEU opinion, the European Council must unanimously adopt the appropriate decision, after obtaining the consent of the European Parliament, plus the agreement will require the approval of the member states. In parallel, the member states of the CoE will need to approve the necessary reform of the Convention to adapt it to the terms of the accession agreement.

[59] Last reference available, *7th Meeting of the CDDH ad hoc negotiation group (47+1) on the Accession of the European Union to the European Convention on Human Rights. Meeting Report, 26 November 2020*, 47+1(2020)R7

12. EU ACCESSION TO OTHER CONVENTIONS OF THE COUNCIL OF EUROPE

Along with possible accession to the European Convention on Human Rights, the EU's strategic partnership with the CoE, and the legitimacy of European Union action, would undoubtedly be strengthened if it acceded to other significant Conventions in the framework of the CoE. On the one hand, because of the contribution of accession to a greater legitimacy of the institutions of the EU by undertaking international commitments in defence of common values in which EU member states already participate. On the other, because it would facilitate cooperation and coordination between the EU and CoE as accession to those Conventions would mean EU integration into the supervisory bodies laid down in the Conventions.

Several CoE bodies have previously been mentioned (Section 7.2.c) in which the EU is not represented since it has not signed or ratified the relevant treaty. Such is the case of the Istanbul Convention and its supervisory bodies (the GREVIO and the Committee of the Parties) as well as the European Convention for the Prevention of Torture or Degrading Treatment or Punishment and its supervisory body, the Committee for the Prevention of Torture (CPT). Meanwhile, and as has already been indicated, the lack of EU integration into the founding treaty of the European Social Charter excludes it from an external control body such as the Council of Europe's Committee of Social Rights.

In all these cases, EU accession certainly poses some difficulties. Because each case must take into consideration the EU's peculiarity as a party to a treaty, in that the EU is a supranational organisation made up of states that may or may not be a party to the treaty in question too. That means that the Union's integration into an international treaty is complex. Guaranteeing the obligations of the member states of the Union among one another and with the Union in those cases has sometimes led to employing formulas to prevent a conflict between the obligations deriving from the treaty and those deriving from membership of the European Union. One of those formulas is the so-called "disconnection clause" "in order to indicate that European Union Member States cannot invoke and apply the rights and obligations deriving from the convention directly among themselves (or between themselves and the European Community/Union)".[60] Mutatis mutandis, the application of a similar clause could facilitate EU accession to CoE Conventions.

As a final point, it is worth recalling the proposal of former European Commission President Jean Claude Juncker, in his previously mentioned report "A sole ambition for the European Continent", from 2006:[61]

> "It follows logically from the complementary relationship between the Council of Europe and the EU, which I have described at some length, and from the increased cooperation between the two bodies, which is necessary for the democratic security of people in our continent, that a further step in the relationship should be envisaged once the EU has acquired legal personality - EU membership by 2010".

[60] "A sole ambition for the European Continent" Report by Jean-Claude Juncker, Prime Minister of the Grand Duchy of Luxembourg to the attention of the Heads of State or Government of the Member Status of the Council of Europe, p. 15. See note 4.

[61] See note above.

Even when the date put forward by President Juncker is overly optimistic today, his proposal remains valid. Possible EU accession to the CoE would provide a direct channel for introducing the mechanisms of integration indicated in this study and would enable the EU to be present in all the CoE bodies that affect its interests and areas of competence

13. POLICY RECOMMENDATIONS

The perception of the growing challenges to democracy, the rule of law and fundamental rights, and the need to protect these values within the EU confirm the importance of EU-CoE cooperation. As shown in the present study, such cooperation would include, on the one hand, participation of CoE agencies in the internal mechanisms and controls established by EU bodies to guarantee respect for these values on the part of EU states; and, on the other hand, the accession of the EU to CoE treaties, providing an external control on EU activities in the realm of human rights, particularly those relating to the European Convention on Human Rights.

When seeking ways to strengthen EU-CoE cooperation it should be noted that cooperation of this nature has existed since the beginning of the EU (previously, the EEC), conditioned by the particular quantitative and qualitative circumstances and evolution of both organizations. Regarding the EU (EEC), its initial objectives and functions concerned economic and trade matters, and only progressively developed to encompass areas of interest to the CoE. As a result, the relations between both organizations have grown gradually, being limited to different and separate matters. As examples, aspects of this study focus on cooperation facilitating the EU's enlargement to include the countries of Central and Eastern Europe, or agreements and programmes to promote the rule of law, democracy and human rights after the entry into force of the European Charter of Fundamental Rights.

In that same vein, EU-CoE cooperation has been conditioned by the very nature of the CoE as an "umbrella organization" including a variety of agencies, committees and other bodies, each of which has developed specific ways of relating to EU authorities. As a result, cooperation has developed in diverse forms by way of multiple agreements and means of collaboration. At present there is no single instrument that in any manner coordinates and organizes cooperation between the two organizations. As indicated in this report, the 2007 Memorandum of Understanding is a very generic document, limited to providing indicative directions.

It should also be noted that when providing policy recommendations, and due to the piecemeal progress of EU-CoE cooperation focused on separate individual tasks performed by different CoE agencies, in most cases cooperation has taken the form of an "agency relationship" in which one of the parties (the CoE) performs the role of agent serving the goals of the other (the EU), the latter furthermore being the main source of the CoE's non-budgetary resources. But the CoE's apparent position as the EU's "junior partner" or instrumental agency severely handicaps the efficiency of its cooperation with the EU, likewise depriving this cooperation of its legitimizing value, derived from the CoE's role as an organization with international prestige extending beyond the EU's borders.

In consequence, the following policy recommendations, which seek to strengthen EU-CoE cooperation in defence of their common values of democracy, rule of law and fundamental rights, derive from three types of considerations:

a) The need to enhance and promote synergies between the EU and the various CoE bodies in charge of the defence and promotion of their shared values;

b) The need to rationalize and formalize different existing ways of cooperation, preferably in one or various cooperation instruments; and

c) The consolidation of a true partnership between the EU and the CoE, extending beyond their present "agency partnership", which would entail including the EU in CoE treaties and agreements involving EU duties and external controls on EU bodies and activities, particularly the European Convention on Human Rights.

1. *Increasing EU participation through full membership in CoE bodies and agencies.*

Cooperation between the EU and the CoE would benefit from EU representatives' full participation in CoE agencies. The CoE performs its functions through a variety of bodies which specialize in different aspects of promoting and defending democracy, the rule of law and fundamental rights. EU-CoE cooperation has been developed through separate agreements between the EU and these bodies, and in many cases by implementing joint programmes. However, despite the fact that these programmes are executed on its behalf, the EU is not a participant (or only participates in a limited way) in their direction or execution. For instance, and concerning CoE agencies performing programmes or other activities for the EU, representatives of the EU only have limited participation in the management bodies of GRECO, CEPJ and ECRI (merely acting as observers), or have non-voting rights in MONEYVAL. The EU has no representatives on the managing bodies of GREVIO or the CPT.

Undoubtedly, full membership of the EU in these agencies, exercising full rights, would favour synergies and facilitate EU-CoE coordination, as well as avoiding duplications. It must be noted that useful experience may be obtained from the fact that this full membership already exists with respect to the Venice Commission (of which the EU is a member, with special status); and that, reciprocally, the CoE has two representatives on the Management Board of the EU Agency for Fundamental Rights.

Given the different legal nature of the various CoE bodies, granting the EU full CoE membership would also require different procedures: either specific agreements with CoE authorities, amendment of the bylaws of some of these bodies, or even the EU's signature and ratificaction of preexisting CoE Treaties or Conventions establishing specific agencies. For instance, full EU membership in GREVIO would require the EU to ratify the Istanbul Convention, while including EU representatives in the CPT would require the EU to sign and ratify the European Convention for the Prevention of Torture and Degrading Treatment or Punishment.

In that regard, special mention should be made of the EU's accession to CoE treaties that create bodies of supervisory or even jurisdictional control, on which the EU is not yet represented, such as the European Convention on Human Rights and the European Social Charter (see Policy Recommendation 5 below).

2. *The formal establishment of a global partnership concerning the European Mechanism in defence of the rule of law*

As mentioned above, EU-CoE cooperation has been developed through multiple and diverse agreements and joint projects, conditioned by the evolution of both organizations. However, in the present state of EU development it is evident that formalizing a more precise and global partnership agreement would greatly benefit EU-CoE cooperation. This global partnership instrument would be particularly advisable with respect to the CoE's participation in the mechanism in defence of the rule of law envisioned by the European Commission. As shown in this study (section 7) the specialization of CoE bodies (such as the Venice Commission, CEPEJ and GRECO regarding the establishment of standards and monitoring and evaluating their application) is closely related to the mechanism pillars. A formal agreement setting forth the cooperation goals, the CoE bodies involved, and a timetable for

tasks concerning the four mechanism pillars would undoubtedly contribute to the efficacy and success of the EU's internal rule of law controls.

3. *The extension of the global partnership agreement to joint EU-CoE projects*

In addition to establishing a consolidated framework for CoE bodies to participate in internal control tasks within the EU, the proposed global partnership instrument for EU-CoE cooperation in the mechanism for the defence of the rule of law could also include provisions with respect to the CoE's implementation of joint programmes in EU member states (see section 6.3) to apply the findings of the mechanism's internal controls. Particularly relevant in that regard is HELP's work in training legal personnel, and CEPEJ in designing and improving legal proceedings.

4. Completing the EU-ECHR accession process

Article 6 of the TEU provides for the accession of the EU to the ECHR, which is also envisioned in Convention article 59.2. It is clear that accession would greatly promote the values of democracy, the rule of law and fundamental rights within the EU, as it would add an external control (by the ECtHR, as the ECHR's jurisdictional body) to the EU's already-existing or future internal controls in the EU mechanism for the defence of the rule of law. Accession would also limit the possibility of conflicting case law on human rights matters between the CJEU and the ECtHR.

The EU's accession to the ECHR has been delayed by the CJEU's ruling in Opinion 2/2013 that the proposed Draft Agreement on accession was contrary to EU law. However, as shown in this study (section 10), the CJEU's objections do not preclude the EU's accession to the ECHR, but rather propose amendments to the Draft Agreement.

It should be noted that in its objections to the Draft Agreement the CJEU expressly or tacitly indicated deficiencies in its provisions that can be remedied. The most sensible way to successfully continue the accession process would be to follow the Court's express or implied indications by introducing in the Draft Agreement or in its Explanatory Report the safeguard clauses that the CJEU considers missing. Such is the case, for instance, concerning the meaning and application of Convention article 53 and the compatibility of Convention article 33 with article 344 TFEU (see sections 10.1 and 10.4). Also, to address the CJEU's objections, amendments should be made in the Draft Agreement with respect to the co-respondent and the CJEU's prior involvement mechanisms (see sections 10 and 10.6), as well as in the application of Convention Protocol 16 (section 10.3). Certainly, overcoming CJEU objections may require amending the ECHR or the EctHR Rules of Court, which should be included in the Draft Agreement or its Explanatory Report.

5. Accession of the EU to other CoE Treaties

EU-CoE cooperation in the defence of democracy, the rule of law and fundamental rights could also be significantly improved by the EU's accession to the CoE treaties establishing non-judicial bodies of external control on the parties to these treaties. Such is the case of the European Social Charter and its external supervisory body, the European Committee on Social Rights; the Istanbul Convention with its supervisory agencies GREVIO and the Committee of the Parties; and the Convention against Torture and Inhuman and Degrading Treatment or Punishment with its supervisory agency CPT (see section 12).

Accession to CoE treaties would not only increase EU legitimacy, but also the presence of EU representatives on their supervisory bodies would further strengthen cooperation between the two organizations toward achieving the treaties' goals.

6. Accession of the EU to the CoE

The difficulties that have arisen with respect to the EU's accession to the ECHR reveal that even a partial integration of the EU in the CoE's organization would be quite complicated. A high level of integration, such as the EU's accession to full CoE membership would require considerable changes of both a legal and political nature. If certainly not possible within the timeframe optimistically proposed by Jean Claude Juncker (see section 12) such accession would imply full EU-CoE cooperation that extends far beyond the (necessarily partial) policy proposals offered in this study.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the AFCO Committee, assesses the possible strengthening of the cooperation of the European Union with the Council of Europe. It examines, on the one side, the participation of Council of Europe bodies in the EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, and, on the other, the accession of the European Union to Council of Europe Treaties, and particularly to the European Convention on Human Rights.

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