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## European Union accession to the European Convention on Human Rights: an institutional “marriage”

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# **European Union accession to the European Convention on Human Rights: an institutional “marriage”**

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**Keywords:** EU accession to ECHR, ECHR institutions, judicial relations among members of ECHR, human rights in Europe

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## **Introduction**

A possible accession of European Union (hereinafter: EU/the Union)<sup>1</sup> to the European Convention on Human Rights (ECHR/the Convention) has been discussed in legal society for more than thirty years. The topic had widely opened after the 1979 Commission Memorandum where the major pros and cons were underlined and practical problems were addressed. This discussion led to an official request to the European Court of Justice (ECJ/the Court) in relation to the legality of such accession; the outcome was included in opinion 2/94 that found such accession incompatible with the European Community (EC/the Community) Treaty. However,

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<sup>1</sup> The term “European Union” may not be the appropriate since the matter of accession started long before 1992 but is used for reasons of convenience.

within the EU agenda and subsequently was included in the Treaty of Lisbon which finally came into force on 1st of December 2009. According to the new article 6, para. 2, section 1 TEU:

“The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

The way that this provision is formulated describes the Union’s accession not simply as a wish or a general idea, but more as a duty.<sup>120</sup> The term “shall” exactly reflects that perception in the sense of containing an obligation within a future time instead of the term “may” that gives more freedom in acting.<sup>121</sup> Generally, provisions are technically enounced in either an obligatory or a more permissive mode within the EU legal system; this is usually expressed with the terms “shall” and “may” respectively. Article 8 TEU could be an example for both categories; para. 1 dictates that the Union shall develop good relations with neighbouring countries, whilst para. 2 states that the Union may conclude specific agreements with those countries. Hence, the terminology used in article 6, para. 2, section 2 underlines the importance on this issue.

The above mentioned provision should not be examined independently of article 2 TEU.<sup>122</sup> This provision, outcome of the Lisbon policy as well, illustrates the democratic qualities and values of the Union that form part of the common EU identity and inserts a general background for the protection of fundamental rights within the Union to be based on and therefore materialised. This basis has an explicit presence within the autonomous EU legal order and all the more in the forefront of the Treaty and takes a symbolic approach in providing the Union with the obligation to accede to ECHR.<sup>123</sup>

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<sup>120</sup> Contribution of Jacobs, *supra* note 3.

<sup>121</sup> For a more detailed view N. P. Tillman, S. B. Tillman, “A Fragment on *Shall* and *May*”, *American Journal of Legal History*, 50, 2010, pp. 453-458.

<sup>122</sup> “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

<sup>123</sup> J.-C. Piris, “*The Lisbon Treaty. A Legal and Political Analysis*”, Cambridge University Press, 2010, p. 71.