The EU and the European Social Charter: Never the Twain Shall Meet?

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Abstract

This article examines the relationship between the EU and the Council of Europe’s Social Charter. It considers the differing approaches to the protection of economic and social rights and the relationship between the two legal orders. It further examines whether the EU should consider acceding to the European Social Charter so as to ensure the effective protection of economic and social rights.

I. INTRODUCTION

The adequacy or otherwise of the protection of individual rights in the EU legal order has probably been subject to at least as much, if not more, analysis, discussion and scrutiny over the last 30 years as any other aspect of European integration. The long-discussed and drawn-out accession of the EU to the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the myriad legal and political issues which have to be overcome illustrate some of the sensitivities, particularities and difficulties of the EU acceding to an established international human rights mechanism.¹ Notwithstanding the scale of analysis and scrutiny there has been of these issues, there has been little recent discussion of the relationship between the EU and the Council of Europe’s economic and social rights.

¹ I am grateful to the anonymous referees and the participants at the CELS seminar for their questions, comments and suggestions. I am also, as always, immensely grateful to Robin Churchill for his insightful critique of the arguments in this article.

¹ Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No 5. It is of course different where the EU is one of the negotiating parties in such treaties, such as the UN Convention on the Rights of Persons with Disabilities, 2515 UNTS 3 (UNCRPD). See art 42 UNCRPD, which allows ‘regional integration organizations’ in addition to States to ratify the Convention.
treaty, the European Social Charter (ESC) and, further, the possibility of the EU acceding to it.2

Exercise of the EU’s competences and the actions of the institutions are in practice far more likely to have a detrimental impact upon economic and social rights than they are upon civil and political rights. The EU is most unlikely to be complicit in, for example, slavery, torture or arbitrary detention (as would fall within the scope of the ECHR), but the actions of the institutions in legislating or the Member States in implementing EU law will routinely deal with economic and social rights issues such as working conditions, employment rights and collective labour law, which are outside the scope of the ECHR. Considering the numerous statements in international human rights fora on behalf of the EU and by most of the Member States to the effect that all five categories of rights—civil, political, economic, social and cultural—are indivisible, interrelated and interdependent, the lack of interest in the EU possibly acceding to the ESC is noteworthy and, for those with an interest in the EU genuinely seeking to protect all types of individual rights, worrisome.3


3 See, eg, European Union Statement delivered by Rafael de Bustamante, Delegation of the European Union to the United Nations, at the United Nations 67th General Assembly Third Committee, Items 69 (a, d): Promotion and Protection of Human Rights, 23 October 2012, where it was stated that: ‘The EU reaffirms its commitment to the promotion and protection of all human rights, whether civil and political, or economic, social and cultural.’ The Charter of Fundamental Rights of the European Union [2007] OJ C303/1 refers, albeit rather obliquely, to the indivisibility of human rights at para 2 of the preamble. A number of EU Member States, in particular, Poland and the United Kingdom, continue to stress the ‘different’ nature of economic and social rights as compared to civil and political rights. See further below and also the so-called ‘opt-outs’ to the EU Charter of Fundamental Rights, Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom [2007] OJ C306/157. There is substantial uncertainty as to the exact nature of the ‘opt-out’. See C Barnard ‘The “Opt-Out” for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?’ in S Griller and J Ziller (eds), The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty? (Vienna, Springer, 2008) 257; P Craig, ‘The Charter, the ECJ and National Courts’ in D Ashiabor,
There are numerous considerations, dynamics and trajectories at play with regard to the relationship between the EU and the ESC that differentiate it markedly from the EU’s relationship with the ECHR. These are discussed below as part of a broader discussion which seeks to examine the relationship between EU law and the ESC, and, further, whether the EU can and should accede to the ESC; the discussion does not extend to the mechanics of any such accession. The structure of this article is as follows. The next section sets out briefly the essentials of the Charter system. This is followed by a discussion of the role of the Charter as a source of normative obligations in EU law. The fourth section of the article examines the role that EU law plays in standard setting under the ESC machinery and further how Charter standards are being used to gauge the EU’s approach to the protection of economic and social rights. The final section concludes and also examines whether the EU can or should accede to the ESC.

II. THE EUROPEAN SOCIAL CHARTER

The ESC is the counterpart, in the field of economic and social rights, of the Council of Europe’s much better-known civil and political rights treaty, the ECHR. The original version of the Charter was adopted in 1961 and by the 1980s, it was clear that it was a dated and limited document. To that end, a number of further rights were added by the Additional Protocol of 1988, and in the 1990s a more thoroughgoing revision of the Charter was undertaken, when many of the existing rights were substantially amended and updated, and a number of new rights were added and included in a new treaty, the 1996 Revised European Social Charter (RESC).

All EU Member States are party to the ESC in one form or another. Five Member States are party to the 1961 Charter only; five are party to the

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4 Additional Protocol to the European Social Charter, 5 May 1988, ETS No 128. There is a further Protocol Amending the European Social Charter, 21 October 1991, ETS No 142, (known as the Turin Protocol), which seeks to improve the Charter’s enforcement machinery. It has never entered into force, but with one exception, all the changes made by it have been implemented in practice. On this, see n 12 below.

5 European Social Charter (Revised), 3 May 1996, ETS No 163. The 1961 ESC and Revised Charter are independent of one another, with the latter designed to eventually replace the former. Reference to the European Social Charter (ESC) will be used to include both the 1961 Charter and 1996 Revised Social Charter. Distinctions will only be drawn where reference is being made to one treaty but not the other. For an overview of the history of the Charter see O de Schutter, ‘The Two Lives of the European Social Charter’ in de Schutter (n 2) 11.

6 Germany, Latvia, Luxembourg, Poland and United Kingdom.
1961 Charter and the 1988 Additional Protocol;⁷ and the remaining 18 are party to the 1996 RESC. The Charter provides two forms of machinery for seeking to ensure that its parties comply with their obligations under it. The first is a system of reporting, which has been in existence since the adoption of the Charter in 1961 and is obligatory for all parties to both versions of the Charter.⁸ The second compliance mechanism is an optional system of collective complaints that was introduced in 1995.⁹ Of the 15 Council of Europe States Party to the Collective Complaints Protocol (CCP), 14 are EU Member States.¹⁰ The CCP has, for both our purposes and more generally, changed the dynamic of the Charter system substantially.¹¹

The Charter is interpreted by the European Committee of Social Rights (ECSR), a body of 15 independent experts in social policy and law.¹² At the time of writing, 13 of these independent experts come from EU Member States—nine are from the older Member States and four are from the Member States which joined the EU in 2004. The two remaining members of the Committee are of Russian and Turkish nationality respectively. The ECSR plays a key role in both the reporting and CCP procedures of the Charter, although in both procedures it is technically subordinate to the Committee of Ministers of the Council of Europe, a political organ, which is the only body that may address recommendations to Contracting Parties. This highlights one of the legacies of the original setup of the Council of Europe, where under both the Charter and Convention systems, the Committee of Ministers played a major role.¹³ Nevertheless, it is now recognised, at least in theory if not always in practice, that the ECSR is the only body that is competent

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⁷ Czech Republic, Croatia, Denmark, Greece and Spain.
¹⁰ They are: Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Greece, Ireland, Italy, Netherlands, Portugal, Slovenia and Sweden. Bulgaria and Slovenia have become party to the CCP by a declaration made in application of art D(2) of pt IV of the RESC.
¹² The 1961 ESC as amended by the Turin Protocol refers to ‘at least nine members’ who are to be elected by the Parliamentary Assembly. This change has never been implemented and they are still elected by the Committee of Ministers. The number of members was changed from nine to 15 by a decision of the Committee of Ministers at the 751st meeting of the Ministers’ Deputies, 2–7 May 2001.
¹³ Protocol 11 to the European Convention removed the role of the Committee of Ministers in this regard.
to give an authoritative interpretation of the Charter. Unlike UN human rights treaty bodies, the ECSR does not produce ‘General Comments’ that set out its views of the specific provisions or aspects of the treaty in question. In the case of the original Charter and to some extent the Revised Charter, the jurisprudence of the ECSR has to be gleaned from its conclusions on individual national reports and its findings on collective complaints. The ECSR, however, is now making a conscious effort to set out its ‘established’ views on certain issues in both the reporting system and, in particular, when considering the merits of complaints under the CCP.

In terms of substantive rights, both the original 1961 Charter and the Revised Charter make a distinction between ‘core’ and ‘non-core’ rights. In the original Charter there are seven ‘core’ rights: the right to work; the right to form trade unions and employers’ associations; the right to bargain collectively; the right to social security; the right to social and medical assistance; the right to social, legal and economic protection for the family; and the right to protection for migrant workers. The Revised Charter adds two further core rights: the right of children to protection; and the right to equal opportunities and treatment in employment. The second category of rights comprises the ‘non-core’ rights. In the original Charter these are the rights to: just conditions of work; safe and healthy working conditions; fair remuneration; vocational guidance and training; special protection for children, women, the handicapped and migrants; health; social welfare services; and special protection for mothers and children, families, the handicapped and the elderly. The 1988 Additional Protocol to the Charter adds a further four rights: the right to equal opportunities and equal treatment in employment; the right of workers to be informed and consulted in the workplace; the right of workers to take part in the determination and improvement of their working conditions and environment; and the right of the elderly to social protection. The Revised Charter adds eight more non-core rights: the right to protection in cases of termination of employment; the right to protection of workers’ claims in the event of their employer’s insolvency; the right to dignity at work; the right to equal opportunities and treatment for workers with family responsibilities; the right to protection of workers’ representatives in the workplace; the right to information and


15 The ECSR does this routinely when dealing with the merits of a collective complaint. See, for examples, the discussion below.
consultation in collective redundancy procedures; the right to protection against poverty and social exclusion; and the right to housing. As is obvious, there is a substantial overlap between many but certainly not all of these Charter rights and the EU’s competence, but less so in the case of the Charter of Fundamental Rights of the European Union (CFREU).16

The ESC is unique among human rights treaties in permitting its parties not to accept all the rights it contains.17 However, unlike the International Covenant on Economic, Social and Cultural Rights (ICESCR), Charter rights are, in general, of immediate effect and are not considered to be ‘progressive’ in the sense of allowing a State Party time to give effect to them as their resources and level of development permit. A number of Charter rights are, as is common in treaties concerned with protecting economic and social rights, framed in rather vague and imprecise language. It should be stressed, though, that many provisions, particularly those concerned with employment rights, are drafted in sufficiently precise terms to be judicially enforceable and, further, the ECSR has over time articulated the content and scope of the obligations that certain other provisions entail. While the pernicious legacy of the argument that economic and social rights are not justiciable still rears its head once in a while in the statements of representatives of certain States Parties to the ICESCR, that debate is now at most of marginal practical relevance in the Charter context.18 The rights contained in the Charter apply only to the nationals of the State concerned and to the nationals of other States Parties lawfully resident or working regularly in that State.19 The rights do not extend to all within the jurisdiction of the State concerned, as is the case with the ECHR. Clearly, the rights will apply to EU nationals exercising most market freedoms.20

III. THE ESC IN THE RIGHTS FRAMEWORK OF THE EU21

Broadly speaking, it is possible to identify four avenues through which the ESC can play a role in the EU legal order, even if it is not formally a part of it. This section discusses each of these avenues.

16 See in particular the breadth of art 153 of the Treaty on the Functioning of the European Union (TFEU) and the scope of the directives where it has been used as a legal base.
17 The Charter system is set up so that State Parties only need accept a minimum number of obligations. Parties to the original Charter must accept at least five out of the seven core rights, and in total either 10 of the 19 articles or 45 out of 72 numbered paragraphs, while parties to the Revised Charter must accept at least six of the nine core rights, as well as at least 16 of the 31 articles or 63 out of 98 numbered paragraphs.
18 For an accessible exposition, see M Langford, ‘The Justiciability of Social Rights: From Practice to Theory’ in M Langford (ed), Social Rights Jurisprudence: Emerging Trends in International and Comparative Law (Cambridge, Cambridge University Press, 2008) 3. For examples of statements made by Member State representatives, see n 63 below.
19 See the Appendix to both Charters with regard to those it extends to. On the scope of obligations under the ECHR, see art 1.
20 The freedom to provide services is a possible exception.
21 For more general discussion, see a number of the essays in de Búrca and de Witte (n 2).
The first avenue is reference to the Charter in the treaties. At different stages of the EU’s evolution, the treaties have made various references to the ESC. The first was in the changes made to the preamble to the then EEC Treaty by the Single European Act 1986, where it was noted that the Member States ‘were determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter’. A preamble to a treaty is, of course, of very limited legal significance.22 The amendments made at Maastricht in 1992 led to the loss of this solitary reference to the ESC, but further to the changes made by the Amsterdam Treaty in 1997, the preamble to the Treaty on European Union (TEU) provided that the Member States confirmed ‘their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers’.23 The EC Treaty as amended by the Amsterdam Treaty in Article 136 made express reference for the first time to the Charter in the Treaty itself. Post-Lisbon, Article 151 TFEU, which is part of Title X on Social Policy, states that the:

Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

Therein lies part of the nub of the issue—the Community, as it then was, has in the past drafted a directly competing, albeit significantly narrower, document setting out social rights for workers only. This Community Charter was never intended to be legally binding; it is neither a treaty nor a legally binding act of the EU.24 This can be seen as evidence of a lack of commitment among at least some of the Member States to the protection of such rights at the EU level.

In the current EU treaties, what is more telling with regard to the ESC is that which is omitted as opposed to that which is expressly noted. Article 6 TEU, the cornerstone of EU rights protection, refers to fundamental rights and freedoms as protected by the CFREU; that the EU shall accede to the

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24 The Community Charter is a solemn declaration adopted by the Heads of State or Government of all Member States except the United Kingdom at a meeting of the European Council in Madrid in 1989.
ECHR; and that fundamental rights, as guaranteed by the ECHR and, as they result from the constitutional traditions common to the Member States, shall constitute general principles of EU law. There is no specific mention in the provision to the protection of economic and social rights. At very best, it is possible to read ‘fundamental rights as they result from the constitutional traditions common to the Member States’ to encompass economic and social rights, something that the Court of Justice of the European Union (CJEU) has not done to date with reference to the rights protected by the ESC.25

The second avenue through which the ESC plays a role in the EU legal order is through references made by the EU courts when they are examining matters related to the protection of social and economic rights. However, an examination of the jurisprudence of the CJEU highlights that the Court almost always refers to the Social Charter in passing, never in any substance and often in the same breath as reference to the 1989 Community Charter of the Fundamental Social Rights of Workers (as referred to above).26 Furthermore, such references are relatively few and far between—much like those to the International Covenant on Civil and Political Rights 1966 or the UN Children’s Convention 1989.27 The ESC has not, in any case, material influenced the reasoning of the CJEU.28 Although Advocates General refer to the ESC more frequently than the Court, the Charter has not been central to the reasoning in their Opinions and one Advocate General has


26 See, eg, Case C-438/05 International Transport Workers’ Federation (ITF) and Finnish Seamen’s Union (FSU) v Viking Line [2007] ECR I-10779 [43]; and Case C-341/05 Laval un Partneri v Svenska Byggnadsarbetareförbundet [2007] ECR I-11767 [66]. For recent and rare examples of where the Court has referred to the ESC but not the 1989 Community Charter, see Case C-271/08 Commission v Germany [2010] ECR I-7091 [37]; and Case C-268/06 Impact v Minister for Agriculture and Food and Others [2008] ECR I-2483 [113].

27 International Covenant on Civil and Political Rights, 1966, 999 UNTS 171; Convention on the Rights of the Child, 1989, 1577 UNTS 3. The Court has, however, stated that the ICCPR and the Convention on the Rights of the Child are ‘international instruments for the protection of human rights of which it [the Court] takes account in applying the general principles of Community law’. See, eg, Case C-540/03 European Parliament v European Council [2006] ECR I-5769 [37] with regard to both treaties. It has not made a similar statement with regard to the ESC.

28 In Case 149/77 Defrenne [1978] ECR 1365 [27]–[28], the Court did consider the prohibition on sexual discrimination to be a fundamental right and in coming to that conclusion specifically referred to the ESC and ILO Convention No 111, Concerning Discrimination in Respect of Employment and Occupation, but the basis of its decision was not the existence of the obligations under the ESC. In C-540/03 European Parliament v European Council [2006] ECR I-05769, the Court did carefully consider the ESC, but the decision to dismiss the European Parliament’s application for annulment did not turn on the obligations entailed in the Charter. See also Case 24/86 Blaizot [1988] ECR 379 [17].
gone so far as to state, quite incorrectly, that the ESC does not contain rights, but rather ‘policy goals’.29

Closely related to the above, the third avenue through which the ESC may play a role in the EU legal order is through the EU Charter on Fundamental Rights.30 This may be through the judgments of the EU Courts or as a reference point for the institutions in their actions, legislative or otherwise.31 The CFREU makes specific reference to both the European Convention and the European Social Charter. A significant number of rights, freedoms or principles set out in the CFREU are drawn from, or overlap with, provisions in the Council of Europe’s Social Charters.32 To take just a few examples: Article 15 CFREU covers the freedom to choose an occupation and right to engage in work; Article 25 CFREU covers the rights of the elderly; Article 26 CFREU covers the integration of persons with disabilities; Article 27 CFREU covers workers’ rights to information; Article 28 CFREU covers the right to collective bargaining; and Article 31 CFREU covers fair and just working conditions. All of these provisions are recognised as drawing upon, or being closely related to, the rights to which Member States have undertaken to give effect as parties to the ESC.33

However, once again in respect of the CFREU and the TEU, what is critical are the omissions. The relevant part of Article 6 TEU notes in this regard that:

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

Thus, although there must be ‘due regard’—but no more—to the sources of the provisions of the CFREU, including the ESC, central for our purposes

29 In Case 67/96 Albany [1999] ECR I-5751 [146], AG Jacobs noted that ‘the structure of the Charter is such that the rights set out represent policy goals rather than enforceable rights’.
30 For discussion of the protection of economic and social rights under the EU Charter more generally, see T Hervey and J Kenner (eds), Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective (Oxford, Hart Publishing, 2003). It is unclear what the exact status of the 1989 Community Charter is in light of the CFREU now having the same status as the EU treaties. While it would seem obvious that the CFREU has replaced the 1989 Community Charter, the TFEU still makes reference to it, so presumably the Community Charter continues to have some status.
32 For a full table to this effect, see Churchill (n 2).
is Title VII of the CFREU and in particular Articles 52(3) and 53 of it. The former notes that in ‘so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention’. The CFREU here draws a clear distinction between the ECHR and the ESC. If there is to be compatibility with one regional general human rights treaty to which all the Member States are party and which is referred to in the explanations to the provisions of the EU Charter (the ECHR), why not the other? Article 53 CFREU, which relates to the level of protection, reinforces the inferiority of the ESC and other treaties as compared to the ECHR. It states that:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.

Special protection is afforded to the Convention but not to the ESC. The reason for this distinction in the CFREU is, of course, because the EU Charter draws a distinction between rights and principles, with social rights downgraded to the latter. However, from an international human rights law perspective, it is difficult to find a convincing reason to justify their disparate treatment. Article 53 CFREU seeks to ensure that EU law will, due to its supreme nature, trump all other human rights norms to which the Member States and/or the EU are party. Article 351 TFEU is of course relevant but does not apply to the Social Charters in the same way that it does with regard to, for example, the ECHR or membership of the United Nations (UN). The 1961 Charter and Revised Charter are separate treaties; thus, EU Member States can only invoke Article 351 TFEU where they ratified either the 1961 Charter or the RESC before acceding to the EU. Seventeen EU Member States have ratified the RESC after having joined the EU and thus are barred from invoking Article 351 TFEU. The

34 See art 51 CFRFEU.
35 See further Case C-399/11 Melloni (ECJ, 26 February 2013) [55]–[64].
36 It would also be the case that where an EU Member State ratifies either the 1961 ESC or the RESC prior to acceding to the EU but then subsequently accepts a provision of the Charter which it had not accepted on ratification after it has joined the EU, it cannot rely upon Article 351 TFEU with regard to those Social Charter provisions subsequently accepted.
37 The Explanatory Report to the European Social Charter (Revised), paras 8–10. Available at: http://conventions.coe.int/Treaty/en/Reports/Html/163.htm. The Report notes that ‘it [the RESC] does not conflict with the Charter but is intended to eventually replace it ... [I]f a Contracting State accepts the provisions of the Revised Charter, the corresponding provisions of the initial Charter and its Protocol cease to apply to that State’.
United Kingdom and Poland, which are party to the 1961 Charter only, can invoke Article 351 TFEU with regard to that treaty only. Spain and Denmark can invoke Article 351 TFEU with regard to the 1961 Charter but not the Additional Protocol of 1988, which they ratified after joining the EU. However, six Member States—Bulgaria, Cyprus, Estonia, Lithuania, Romania and Slovenia—that all ratified the RESC prior to acceding to the EU can rely upon Article 351 TFEU in case of a conflict between, on the one hand, the RESC and, on the other, EU law obligations. This is where the real potential for invoking Article 351 TFEU exists vis-a-vis the Charter, but to date none of these six Member States has invoked it.

The final avenue, closely related to the above, is merely potential. The CFREU makes clear the need for consistent interpretation by the EU courts of European Convention rights and obligations. Thus, through the jurisprudence of the European Court of Human Rights (ECtHR), one can see the influence of the ESC on EU standards. It is well established in both UN and ECtHR human rights jurisprudence that civil and political rights can be interpreted so as to have an economic and social rights dimension. This is certainly so where there is discriminatory treatment involved and labour rights are at issue under the Convention. It is also so in cases such as Demir and Bakyara v Turkey, where the ECtHR ruled that Article 11 (freedom of association) covered collective action and collective bargaining rights, both of which are expressly protected in the ESC at the regional level. In certain circumstances, EU law may well provide an equally satisfactory, if not more effective, remedy to the Convention system.

38 Poland has ratified the Amending Protocol of 1991, which the UK has not. The Protocol, which does not contain substantive rights, is to all extents and purposes in force. See n 4 above.


40 Croatia has signed and ratified all Social Charter treaties but not the RESC, which it has only signed. On the application of what is now art 351 TFEU in the context of social rights, in these cases to an ILO Convention, see Case C-345/89 Stoeckel [1991] ECR I-4047; and Case C-158/91 Levy [1993] ECR I-4287.


42 In, eg, Smith and Grady v UK App Nos 33985/96 and 33986/96 (ECtHR, 27 September 1999), dismissal from the British armed forces solely on the grounds of sexual orientation was considered a breach of private life under art 8.

43 Demir and Bakyara v Turkey App No 34503/07 (ECtHR, 12 November 2008) [140]–[154]. See arts 5 (right to organise) and 6 (collective bargaining) of the ESC and of the RESC. See also arts 12(1) (freedom of assembly) and 28 (right of collective action and bargaining) CFREU.
The key distinction will be that the ECtHR will examine cases through a human rights prism, whereas the CJEU may use more of a market-oriented prism and thus the approaches and outcomes may be different. This issue is returned to below.

It is fair to conclude that the ESC has not been central to the discussion of economic and social rights in the EU context; indeed, far from it. The EU institutions are at best indifferent to the ESC and the work of the ECSR which interprets it. This can be seen not only with regard to the limited role that the ESC has played as a part of EU law but also what can only be described as the EU’s repeated snubbing of the ESC. To take an example, in Opinion 2/94 the Court was asked whether the (then) Community had competence to accede to the ECHR.\(^44\) Notwithstanding the request to the Court for the Opinion, accession was not a realistic prospect for the Community at that time. Yet, if there was not a deliberate policy to marginalise or ignore the Social Charter, it is difficult to explain why the Opinion sought from the Court did not extend to asking whether the Community was also competent to accede to the 1961 Social Charter. Admittedly the ‘revitalisation’ of the Social Charter was not complete at the time of the request for an Opinion, but the process was at a very advanced stage.\(^45\) The then Community had competence in fields that overlapped with the rights protected by the 1961 Social Charter and the 1988 Additional Protocol to a significantly greater extent than it did with the ECHR, and that competence had been widely exercised. Equally, if not more importantly, however, the EU continues to snub economic and social rights in its own legal order. The status of economic and social rights as principles in the CFREU is indicative of their marginalisation by the EU. It is worth bearing in mind, however, that the Council of Europe itself treats the economic and social rights protected by the ESC as inferior to the ECHR: it does not require potential new members of the Council to become parties to the ESC, whereas they must become parties to the ECHR. Moreover, the Council also refuses to tackle the anomalous role of the Committee of Ministers in relation to the ESC, whereas it has done so in relation to the ECHR.\(^46\)

Despite some apparent obstacles, however, accession to the ESC is in some senses an obvious choice for the EU if it wishes to manifest a genuine commitment to economic and social rights. While it is currently only open

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\(^{45}\) The Opinion was requested by the Council in April 1995 and the Court delivered the Opinion in March 1996. In October 1994, the Charte-Rel Committee adopted a ‘draft Revised European Social Charter’ and submitted it to the Committee of Ministers for adoption. The Committee of Ministers adopted the text on 3 April 1996 and opened it for signature on 3 May 1996.

\(^{46}\) Switzerland and Liechtenstein are members of the Council of Europe and are not party to the ESC.
to States to accede to the ESC, an amending protocol to the effect to allow the EU to accede, in the sense that has been negotiated for the ECHR, would by comparison to the Convention be straightforward. There are, of course, some obvious difficulties. For example, which rights in the ESC would the EU accept; how would the EU be represented on the Committee of Ministers; how would the reporting system apply to the EU; and would the EU be obliged to accept the CCP? Some of the institutional groundwork has already been done, precedents have been set and some such problems tackled during the EU’s accession negotiations vis-à-vis the ECHR. There are no insurmountable obstacles if the desire exists. It is now routinely forgotten that when the Social Charter was undergoing its ‘revitalisation process’ in the 1990s, the draft version of what became the Revised Charter contained a provision to the express effect of allowing the Community to accede. There is a stark contrast in the dynamic; the EU has provided most of the momentum to drive forward the difficult process for it to accede to the European Convention, whereas those associated with the Social Charter strongly desire the EU to accede to it as well, but the EU has shown little or no interest in doing so. If the EU wishes to accede to an economic and social rights treaty, then the ESC is the only realistic option: the chances of the EU Member States successfully negotiating a new Protocol to the ICESCR to allow ‘regional integration organizations’, to use the words of the UN Convention on the Rights of Persons with Disabilities, to become parties as well as states, to which it is currently exclusively open, are remote.

EU accession to the ECHR is important for various reasons—legitimacy, establishing minimum standards of conduct and having an external adjudicating body to ensure compliance with Convention standards. There are, however, relatively few circumstances where the EU institutions or the Member States in implementing EU law are likely to breach fundamental civil and political rights as protected by the ECHR. This raises the following question: if, as it routinely tells us, the EU is serious about protecting

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47 For an outline of the process and stages in the EU’s accession to the ECHR, see Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final Report to the CDDH (5 April 2013) Doc 47+1 (2013)008, 17 et seq.


49 On the desire of those associated with the ESC wishing for EU accession, see the discussion below.

50 See n 1 above.
fundamental rights, in this case economic and social rights, why not accede to the ESC?\textsuperscript{51} As noted above, EU accession to the Social Charter is not currently a serious topic for discussion within the EU, despite continued regular calls for it from some.\textsuperscript{52} There are essentially three reasons why the EU is not likely to accede to the ESC. First, it would expose to external scrutiny and assessment the EU’s protection of rights in a sphere where its standards and approach, from a human rights perspective, at times leave something to be desired. Second, the judgments of the CJEU would effectively be subservient to the views of the ESCR and this may also call into question the supremacy of EU law.\textsuperscript{53} Third, certain Member States, in particular, Poland, Germany and the United Kingdom, have always displayed a strong suspicion of economic and social rights and are almost certain to strongly oppose any such initiatives which would need their consent.

With regard to the first reason, it is a well-known and widely held view that the balance that the CJEU strikes between fundamental rights and market freedoms may not be ideal from the perspective of rights protection—even if it works from the perspective of the functioning of the internal market.\textsuperscript{54} In terms of economic and social rights, \textit{Laval}, \textit{Viking}, \textit{Luxembourg} and \textit{Rüffert} are good examples of the unsatisfactory balances struck by the CJEU between social rights and market freedoms.\textsuperscript{55} These

\textsuperscript{51} The status of economic and social rights in the CFREU does suggest that the EU is not as serious about protecting such rights as its rhetoric would have us believe.

\textsuperscript{52} See, eg, ETUC, ‘Position on the Social Dimension of the European Union’, adopted 23 April 2013, where it is noted that: ‘We insist that the EU and its member states should observe scrupulously European and international instruments such as … the revised European Social Charter, to which the European Union should accede as well as to its Protocol providing for a system of collective complaints.’ Available at: www.etuc.org/a/11136. See also n 2 above.

\textsuperscript{53} In the context of the EU’s accession to the ECHR, Article 1 of Protocol (No 8) Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms [2010] OJ C83/273 sets out that the accession ‘shall make provision for preserving the specific characteristics of the Union and Union law’. Although supremacy is not mentioned, it is clearly one of the characteristics being referred to.


decisions have been subject to extensive criticism not only in the literature but also by the Freedom of Association Committee of the International Labour Organization (ILO).\textsuperscript{56} The discussion will return to some of these cases in the next section.

The second reason is more difficult to substantiate but is certainly not without substance. There is a degree of comity and respect between international and regional courts/tribunals—and there is also, informally at least, a hierarchy. For EU Member States, whether it has been the CJEU or the ECtHR at the top of that order in recent years is open to discussion. It is a perfectly plausible reading of \textit{Opinion 2/94} that the then judges at the European Court of Justice did not wish to be effectively subservient to the ECtHR.\textsuperscript{57} Post-EU accession to the Convention, the ECtHR will be the final arbiter for those matters referred to it, but here the matter has been taken out of the hands of the CJEU.\textsuperscript{58} The Court’s judgment in \textit{Kadi} reinforces the view that the CJEU sees itself and EU law, and the norms it protects, including some rights, as superior to the other legal obligations that the Member States are under, even if they do stem from the UN Security Council.\textsuperscript{59} In terms of European institutions, the ECSR and its work in interpreting the Social Charter is certainly not considered by some (probably most) of the Member States of the EU to be on par with the judgments of the CJEU and the Court has clearly never considered the Charter to be a series of obligations to which it must pay close attention. Commentators have long recognised that where Member State obligations conflict under, on the one hand, EU law and, on the other, the ESC, it is the former that Member States will heed.\textsuperscript{60} The treaty obligations undertaken by Contracting Parties to the European Social Charter are no less legally binding than those obligations entailed by membership of the EU; if anything, the argument is that human rights obligations are normatively superior under international law.\textsuperscript{61}

\textsuperscript{56} See Observation (CEACR)—adopted 2010, published 100th ILC session (2011) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87)—United Kingdom, where it was noted that: ‘The Committee wishes once again to recall the serious concern it raised as to the circumstances surrounding the BALPA proposed industrial action, for which the courts granted an injunction on the basis of the \textit{Viking} and \textit{Laval} case law.’


\textsuperscript{58} Above n 47. On the CJEU’s position vis-a-vis the ECHR, see its pointed observation in Case C-617/10 Åklagaren v Hans Åkerberg Fransson (ECJ, 26 February 2013) [44].

\textsuperscript{59} Joined Cases C-402/05P and C-415/05P \textit{Kadi and Al Barakat v Council and Commission [2008]} ECR I-6351.

\textsuperscript{60} See, eg, S Evju, ‘The European Social Charter’ in Blanpain (n 2) 19, 32; and Churchill and Khaliq, ‘The Collective Complaints System’ (n 9) 456.

The reality, however, is that EU law is capable of direct effect, is supreme and is enforceable in domestic courts and before the CJEU in a way that most if not all other treaty obligations are not. And that, of course, has both legal and political repercussions for Member States and the choices they make.

The third reason why the EU is not likely to accede to the ESC is the view of some of the Member States. Although it is beyond the scope of this article to analyse the approaches of the EU’s Member States to economic and social rights under various human rights treaties, it is clear that some Member States still have a deeply entrenched suspicion of or uncertainty about such rights. In particular, Poland and the United Kingdom continue to stress the ‘different’ nature of economic and social rights as compared to civil and political rights. Related to this is the question of which Charter the EU would accede to. As noted above, five EU Member States are party to the 1961 Charter only and these include major players such as Germany, Poland and the United Kingdom. The 1961 Charter is in parts dated; the RESC is designed to gradually replace the 1961 Charter and is the only realistic option, but accession to it is simply not agreeable to some EU Member States. As things currently stand, they are certainly not likely to agree to EU accession talks.

The ECSR has reacted to the EU’s marginalisation of the ESC and this has manifested itself in the Committee’s current approach to those issues of EU law that come before it. EU law and standards have unavoidably been a significant consideration in the work of the ECSR with regard to some rights and the setting of standards under the ESC system. Observing the approach of the ECSR over several years, it is clear that the ECSR’s approach to EU standards and how they map onto the provisions of the ESC has evolved. This evolution is discussed in the next section, which examines the normative role that EU law has played in the Social Charter.

IV. EU LAW AND THE WORK OF THE ECSR

The Preamble to the CCP states clearly that its objective is to improve the effective enforcement of the social rights guaranteed by the Charter. One of the consequences of the Protocol coming into force, as noted above, is that

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62 See further Churchill (n 2) 79–81. In Commission Memorandum, Accession of the Communities to the European Convention on Human Rights, EC Bull, Supplement 2/79, which first set out the case for Community accession, it is noted (at 5) that there is no agreement between the ‘Member States on the definition of economic and social rights’.

63 See, eg, Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, UN Doc E/C.12/GBR/5, 31 January 2008, paras 71–75; Fifth Periodic Report of Poland, UN Doc E/C.12/POL/5 and in particular, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Poland, E/C.12/POL/CO/5, 2 December 2009, para 8, where it is noted by the CESCR Committee that it is ‘deeply concerned that the State party still views the Covenant as programmatic, aspirational and not justiciable’.
it has brought into sharper focus the issue of consistency of standards and obligations imposed upon states by different treaties in relation to certain economic and social rights and, furthermore, the mechanisms available for their enforcement. A very significant issue is the relationship between the ESC and EU law, both in terms of possible conflicts of obligations and the availability of remedies. To take an example, Article 153 TFEU provides a specific legal base for the EU to enact measures to improve: the working environment; the protection of workers’ health and safety; working conditions; and the provision of information to and consultation of workers. Although Article 157 TFEU, as noted above, makes specific reference to the ESC, there is the clear possibility of EU measures in this field conflicting with Member States’ obligations under the Charter. This is particularly the case when such measures exhaustively regulate the field and set a standard lower than that acceptable to the ECSR, especially where the approach taken by the EU displays a market-driven mentality. It is almost certainly the case, however, that the ECSR occasionally utilises the standards established by EU directives in the knowledge that if it were to set higher standards, they would in all likelihood be ignored by those States Party to the ESC which are also members of the EU. Due to the nature and effect of EU law, as well as the ability of individuals to utilise national courts to enforce it, recourse is often made to them as opposed to the mechanisms under the Charter, particularly as individuals do not have standing under the CCP.

As membership of the EU has expanded and as the CFREU has been granted the same legal status as the EU treaties, the possibility of EU procedures and standards replacing Social Charter procedures and standards for the effective protection of certain social rights has become a very stark one. This is what has led to a more robust approach towards EU standards by the ECSR. Notwithstanding this, it is clear that EU standards play a major role and that the ECSR utilises them in various ways; the relationship between the EU and the Social Charter exists on many different levels and it is possible to identify a significant number of ways in which EU standards have interacted with the Social Charter and the work of the ECSR.

First, the motivation for the ‘revitalisation’ of the Charter system in the late 1980s and 1990s was in part driven by the European Community’s actions. The ending of the Cold War and the consequent political upheaval in Central and Eastern European States led to the liberalisation of their

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64 Article 151(2) TFEU is clear that the EU and its Member States shall ‘implement measures which take account of the diverse forms of national practice ... and the need to maintain the competitiveness of the Union’s economy’ (emphasis added). D Ashiagbor, ‘Unravelling the Embedded Liberal Bargain: Labour and Social Welfare Law in the Context of EU Market Integration’ (2013) 19 European Law Journal 303, 308 argues clearly that the EU’s Lisbon strategy moves away from protecting workers from the market to strengthening their employability within the market. Such an approach is difficult to reconcile with that adopted by the Social Charters and in turn the ECSR.
economies. Most of these States immediately looked to the West and organisations such as the Council of Europe, the EU and subsequently NATO. The Community’s 1989 Charter of the Fundamental Social Rights of Workers came only a year after the 1988 Additional Protocol to the Social Charter. The Community was already an active legislator in the field and through the 1989 Community Charter became an actor more generally; the Council of Europe sought to re-establish its pre-eminence in the field and this was clearly a major incentive to push harder for what became the RESC and improved mechanisms for supervision. So, in this respect at least, the standards set out in the RESC are in part a direct consequence of the Community’s actions. Furthermore, in drafting the provisions of the RESC, the Community’s directives were a natural reference point. It is common knowledge that when the 1961 Charter was being drafted, the provisions were based upon ILO standards and for the 1996 Revised Charter, the reference points were ILO standards and Community directives. For example, Article 2 RESC protects the right to ‘just conditions of work’. The Explanatory Report to the RESC makes clear that the ‘essential aspects’ of the contract or employment relationship of which workers shall be informed under Article 2(6) have not been specified in the provision. However, the report further notes that reference as to the minimum requirements in this respect may be found in Community Directive 91/533/EEC on an employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship.\(^65\) Article 25 RESC, by contrast, is an example of the influence of EU standards on the inclusion of new rights in the Charter and not just their interpretation. Article 25 deals with the rights of workers to the protection of their claims in the event of the insolvency of their employer. The inclusion of this provision is acknowledged to be a direct result of ILO Convention No 173\(^66\) and of a significantly earlier (and more detailed) EC directive which related to the protection of employees in the event of the insolvency of their employer.\(^67\) Reference to EU standards in the work of the ECSR consequently becomes unavoidable.

Second, EU law is an obvious reference point for the ECSR in defining or setting its own standards under the Charter (and the Revised Charter in particular) because a significant majority of the Contracting Parties to the Charter are obliged to and have implemented EU standards into their domestic legal systems. This has manifested itself in various ways. For example, the ECSR has used EU directives to gauge the acceptable


minimum standards with which Contracting Parties must comply with regard, for example, to the employment of young persons and their exposure to certain chemicals.\(^68\) There are also examples of the ESCR using developments in EU law to gauge the situation in non-EU Member States as far as Charter rights are concerned. For example, when considering whether Iceland was in conformity with its obligations under Article 1(2) ESC, which prohibits discrimination on various grounds in the context of employment, the ECSR asked whether the arrangements in Iceland were to be amended in light of the ‘changes in Community law and the adoption of Council Directive 2000/78/EC’, which establishes a general framework for equal treatment in employment and occupation.\(^69\) Similarly, when considering whether the situation in Turkey was in conformity with Article 3(2) ESC concerning health and safety at work, in particular protecting workers from asbestos, the Committee used a series of EU directives as the yardstick against which conformity was measured.\(^70\)

In some instances, however, there is a disparity between EU and ESC standards, not because the EU is seeking to water down rights but because EU legislation reflects a more contemporary approach to an issue and the Charter provision reflects the approach which was prevalent at the time that it was drafted. Article 2(4) of the 1961 Charter is a case in point. This provision requires that Contracting Parties ‘provide for additional paid holidays or reduced working hours for workers engaged in dangerous or unhealthy occupations’. EU legislation adopted a different approach that was either prevalent amongst its Member States or became so after the adoption of this legislation and which sought to reduce the amount of risk as opposed to rewarding workers by providing for additional paid holidays or reduced working hours. The situation in a number of EU Member States was thus considered not to be in conformity with the Charter.\(^71\) In the RESC, the approach has evolved and Contracting Parties must now seek to eliminate risks in inherently dangerous or unhealthy occupations and, where it has not yet been possible to do so, to provide for either a reduction

\(^{68}\) This is in particular because Explanatory Report to the European Social Charter (Revised) (n 65) para 41 makes express reference to it and the ECSR referred to the directive as there was no other relevant European standard. The ECSR now refers to Council Directive 94/33/EC of 22 June 1994 on the protection of young people at work [1994] OJ L216/12. See, eg, Conclusions XVII-2 (United Kingdom) 5.


\(^{70}\) Conclusions 2009—Turkey, art 3(2).

\(^{71}\) See, eg, the Conclusions relating to Ireland, Conclusions XIV-2—vol I, 386. See also Complaint No 10/2000 Tehyry and STTK v Finland, Decision on the Merits, 17 October 2001.
of working hours or additional paid holidays for workers engaged in such occupations.\textsuperscript{72}

In other instances, EU standards will not be sufficient to ensure compliance with the Charter even if EU law protects an extensive number of rights, which are also protected in the Charter, to a high standard. Some complaints under the CCP have highlighted the paucity of protection afforded by EU law in some regards. In a complaint against France, for example, which related to the collective expulsions of Roma to Bulgaria and Romania, the EU Citizenship Directive 2004/38 was considered by the ECSR to be sorely lacking.\textsuperscript{73} The Citizenship Directive, among a number of other EU measures, was extensively analysed and it was argued by France that the European Commission had paid close attention to the situation and that action was not taken by the Commission because there was no breach of EU rules.\textsuperscript{74} The ECSR, however, found France to be in flagrant violation of its obligations under the Charter and made specific mention of the fact that while it was not in violation of EU obligations, it was in breach of its Charter obligations.\textsuperscript{75}

The fact that the obligations imposed by or standards set by EU law are not enough to ensure full compliance with Charter obligations is not unusual.\textsuperscript{76} On many occasions, EU law obligations will, however, significantly improve the extent to which a Contracting Party complies with the Charter. An interesting example involves the experience of the United Kingdom, which is party only to the 1961 Social Charter. The Committee of Independent Experts (as the ECSR was then known) consistently considered the United Kingdom to be in breach of its obligations under Article 8(2) of the Charter for not providing adequate maternity leave. The United Kingdom

\textsuperscript{72} Explanatory Report to the European Social Charter (Revised) (n 65) para 23: ‘This provision ... has been amended so as to reflect present-day policies which aim to eliminate the risks to which workers are exposed.’

\textsuperscript{73} Complaint No 63/2010 Centre on Housing Rights and Evictions (COHRE) v France, Decision on the Merits, 28 June 2011 passim; and Directive 2004/39/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77. See also Complaint No 58/2009 Centre on Housing Rights and Evictions (COHRE) v Italy, Decision on the Merits, 25 June 2010, which dealt with very similar issues.

\textsuperscript{74} Complaint No 63/2010 COHRE v France, Decision on the Merits, paras 33 and 34.

\textsuperscript{75} Ibid paras 69–79.

\textsuperscript{76} Time and again, Contracting Parties to the Charter are in compliance with their Charter obligations vis-à-vis EU nationals only, due to EU law, but not with regard to other lawful migrants. For example, art 18 of the 1961 Charter protects the right to engage in gainful occupation in the territory of other Contracting Parties. In Conclusions XIII-I, 194, the ECSR noted ‘that Contracting Parties, Member States of the European Community, have completely realised the aim of this provision of the Charter vis-à-vis European Community nationals’. Similarly, see art 12(4) ESC, which concerns equal treatment with respect to social security where the situation in EU Member States is seen as being satisfactory with regard to EU nationals only. See, eg, Conclusions XIV-I, 82 and 371 with regard to Austria and Greece, respectively; and Conclusions XVI-I, 214 with regard to Finland.
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did not take any remedial action to address the Committee’s conclusions.77 Under EU law, it was required to implement the 1992 Pregnant Workers Directive, which it did.78 The Directive, however, only adopted a minimum standard, with Member States having discretion to provide for greater rights. In the next cycle of assessment under the Social Charter, which took place after the United Kingdom had implemented the Directive, the Committee noted that the United Kingdom had implemented the Directive but had only done so to the extent of the minimum requirements in the Directive. The Committee therefore found that the situation was still not in conformity with Social Charter standards, although the situation had improved.79 Very importantly in this instance, however, the only reason the United Kingdom had taken any legislative measures in this regard was due the nature of its EU law obligations and not its obligations under the ESC.

Third, due to the interaction between EU and ESC standards, EU Member States not unnaturally often argue before the ECSR, sometimes as part of the reporting process but much more usually during the ECSR’s consideration of the merits of a complaint under the CCP, that as a Member State of the EU, it has had to implement a directive and thus the matter has been dealt with under that body of law; effectively the ECSR does not have competence to assess a directive’s conformity with the Charter. As noted above, in more recent years, the ECSR has in some contexts displayed a robust approach and has not shied away from scenarios where the ECtHR has displayed greater restraint. As is well known, the ECtHR in Bosphorus stated that, due to the measures adopted by the EU and the jurisprudence of the CJEU, there is a rebuttable presumption that the EU’s activities comply with and protect civil and political rights to the same standard as required by the ECHR.80 The ESCR has adopted a different tactic.

EU Member States have at times argued in essence that the Committee is not competent to consider EU law—and that is certainly correct and the ECSR agrees this is so. As the ECSR has noted, ‘it [the ECSR] is neither competent to assess the conformity of national situations with a directive of the European Union nor to assess compliance of a directive with the European Social Charter’.81 The ECSR, however, has further noted that:

[W]hen member states of the European Union agree on binding measures in the form of directives which relate to matters within the remit of the European Social Charter, they should—both when preparing the text in question and when

77 See Conclusions XII-1, 101 (United Kingdom).
79 Conclusions XIII-4 88 et seq (United Kingdom).
80 Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v Ireland App No 45036/98 (ECtHR, 30 June 1995) [165].
transposing it into national law—take full account of the commitments they have taken upon ratifying the European Social Charter. It is ultimately for the Committee to assess compliance of a national situation with the Charter, including when the transposition of a European Union directive into domestic law may affect the proper implementation of the Charter.\footnote{Ibid. This approach is part of the well-established practice of the ECSR under the reporting system. For a slightly differently worded earlier version, see Conclusions XIV-1, vol 1, 28, which dates from 1998.}

Two aspects of this approach are particularly noteworthy. First, the ECSR is invoking a corollary of the EU duty of fidelity now found in Article 4(3) TEU; being a Contracting Party to the Social Charter requires Member States in their capacity as parties to other treaties or as members of international organisations to have full regard to their obligations under the Social Charter. This approach can be contrasted with the general position under international law as codified in Articles 26 and 27 of the Vienna Convention on the Law of Treaties, where States are obliged to perform treaty obligations in good faith—the principle of \textit{pacta sunt servanda}—and further cannot invoke their ‘internal law’ as a justification for failing to comply with a treaty obligation.\footnote{Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331.} Second, the Committee is here indirectly, but perfectly legitimately, effectively engaging in an assessment of whether EU directives comply with the standards set by the Social Charter. There is, of course, some room for manoeuvre as an EU Member State may have incorrectly implemented a directive or the directive may give Member States some flexibility in terms of how they implement it. However, some of the directives which are effectively under consideration in a series of complaints under the CCP have been implemented for a number of years, so, if this was the case, it is not unreasonable to have expected challenges in domestic courts or before the EU courts against incorrect implementation.

In a complaint from 2010 involving France’s implementation of an EU directive, Complaint No 55/2009 \textit{Confédération Générale Du Travail (CGT) v France} (henceforth CGT), the ECSR tackled directly the relationship between EU law and obligations under the Charter.\footnote{CGT \textit{v France} (n 81).} The French government, as it has stated on several occasions, argued that since the national situation in France was in compliance with EU law, as a result, it was also in conformity with the Charter. In light of how the ECSR has at times used EU standards, this argument is not surprising. The ECSR’s reply to this argument noted, as it has done on numerous occasions, that:

\begin{quote}
32. … the fact that the provisions at stake were based on a European Union directive does not remove them from the ambit of the Charter (\textit{CFE-CGC v. France}, Complaint No. 16/2003, decision on the merits of 12 October 2004, para. 30;
\end{quote}
see also, mutatis mutandis, *Cantoni v. France*, judgment of the European Court of Human Rights of 15 November 1996, para. 30.)

It is worth extracting what the Committee then noted at length:

34. ... the European Court of Human Rights has already found that in certain circumstances there may be a presumption of conformity of European Union Law with the European Convention on Human Rights (‘the Convention’) by reason of a certain number of indicators resulting from the place given in European Union law to civil and political rights guaranteed by the Convention.

35. The Committee considers that neither the situation of social rights in the European Union legal order nor the process of elaboration of secondary legislation would justify a similar presumption—even rebuttable—of conformity of legal texts of the European Union with the European Social Charter.

36. Furthermore, the lack of political will of the European Union and its member states to consider at this stage acceding to the European Social Charter at the same time as to the European Convention on Human Rights reinforces the Committee’s assessment.

37. The Committee will carefully follow developments resulting from the gradual implementation of the reform of the functioning of the European Union following the entry into force of the Treaty of Lisbon, including the Charter of fundamental rights. It will review its assessment on a possible presumption of conformity as soon as it considers that factors which the Court has identified when pronouncing on such a presumption in respect of the Convention and which are currently missing insofar as the European Social Charter is concerned have materialised.

38. In the meantime, whenever it has to assess situations where states take into account or are bound by legal texts of the European Union, the Committee will examine on a case-by-case basis whether respect for the rights guaranteed by the Charter is ensured in domestic law.

A significant number of aspects of the ECSR’s approach in *CGT* are noteworthy. First, the ECSR draws a distinction between its approach and that of the ECtHR. Although the ECSR does not expressly refer to the ECtHR’s judgment in *Bosphorus*, it is clear that under the Social Charter, there is no presumption of conformity of EU law. The ECSR is careful, however, not to criticise the ECtHR as it draws a distinction between the protection of civil and political rights under the EU legal order, which it implies is satisfactory, as opposed to the protection of economic and social rights, which it makes clear are not.

Second, the decision of the ECtHR that the ECSR does expressly refer to in its reasoning is the much older *Cantoni v France*, a 1996 decision of the Grand Chamber.\(^85\) *Cantoni* is an interesting decision for the ECSR to refer to as it does not contain any statements of general principle with regard to

\(^{85}\) *Cantoni v France* App No 17862/91 (ECtHR, 15 November 1996).
the relationship between the EU legal system and the Convention. The case is, however, analogous in the sense that it did involve EU directives and their implementation in France. The ECtHR in Cantoni solely considered the compatibility of the situation in France with Convention standards and paid no substantive attention to the fact that the State in question was implementing EU legislation. In that context, the approach in Cantoni makes sense with regard to the ECSR’s strategy of holding States to account to Social Charter standards, regardless of their obligations under EU law. Central to the ECSR’s approach in CGT, however, is the fact that the EU is not considering accession to the Charter. At the time of the Bosphorus judgment, even though the EU was not in accession talks with the Council of Europe, the Constitutional Treaty—which at the time was undergoing the ratification process—made clear the obligation to accede to the Convention. No such undertaking has manifested itself with regard to the Social Charter.

Third, the ECSR makes clear that it is, when the appropriate circumstances exist, willing to adopt a presumption of compliance with the Charter vis-a-vis EU law. Certainly, in light of the ECSR’s assessment of the situation in the complaint concerning France and the expulsion of Roma, discussed above, the approach adopted in CGT is understandable. The ECSR does not make clear what the EU has to do in the interim for the ECSR to adopt such an approach, other than state that economic and social rights must be afforded the same level of protection as civil and political rights in the EU legal order. One way to achieve that end would be for the EU to seek to accede to the Charter. Another way could be for economic and social provisions of the CFREU to be elevated from principles to rights and given the same status as civil and political rights in the CFREU.

As noted above, one of the consequences of the existence and functioning of, in particular, the CCP is that it has brought into far sharper focus any difference in standards and the obligations imposed upon States by, on the one hand, EU law and, on the other, the Social Charter. A decision by potential complainants whether to use the CCP or whether to try an alternative mechanism will always be strategic in attempting to achieve a certain objective, but will also depend on their standing to bring a complaint. As an actio popularis, the CCP cannot (and is not designed to) provide individual remedies and is thus of limited utility to provide redress for individual grievances, even if an organisation with standing can be convinced to lodge a complaint. Any action taken by the defendant State seeking to rectify the situation will almost certainly not be retrospective in effect and will seek only to ensure that the Charter is not breached in future, regardless of the degree of detriment already suffered by individuals.

86 The ECtHR’s judgment in Bosphorus was made public on 30 June 2005 after the French and Dutch referenda which sounded the death knell for the Constitutional Treaty. However, the judgment was finalised on 11 May 2005, several weeks before the referenda.
By contrast, there is the possibility of an individual remedy under EU law for those rights that exist in both situations. The choice of remedy may depend on a comparison of Charter rights with any comparable rights under EU law. Thus, complainants may have to choose between a higher level of protection under the Charter, but with limited likelihood of its enforcement, and lesser protection under the EU law (or in some circumstances the ECHR), but with a greater prospect of compliance by the Member States. Where, however, there is no equivalent to Charter standards or they are clearly higher, in particular, with a view to in essence challenging EU standards or a judgment of the EU courts, the CCP is an obvious choice if it is available. This has manifested itself directly in a number of noteworthy complaints before the ECSR.

The first was a series of complaints seeking to challenge Greece’s austerity measures and specifically being targeted were the Troika agreements of 2010 setting up a financial support mechanism for Greece involving the European Commission, the European Central Bank (ECB) and the International Monetary Fund (IMF). The loan is intertwined with implementation of fiscal and structural measures to enhance the competitiveness of the Greek economy and ‘improve’ the operation of the labour market. What the exact status of these agreements is—EU law, public international law or Memorandums of Understanding—is open to some discussion, but the ECSR side-stepped the issue and effectively decided that there was nothing in these obligations that absolved Greece from its obligations under the Charter.

A further complaint is potentially far more confrontational. The Swedish trade unions have challenged the Swedish government’s implementation of the CJEU’s decisions in the Laval case. The complaint argues that Sweden’s implementation of the Laval judgment means that Swedish legislation now restricts the rights to freedom of association and collective bargaining, in violation of Articles 4 (the right to a fair remuneration), 6

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87 See Complaint No 76/2012 Federation of Employed Pensioners of Greece (IKA –ETAM) v Greece, Decision on the Merits, 7 December 2012; Complaint No 77/2012 Panhellenic Federation of Public Service Pensioners v Greece, Decision on the Merits, 7 December 2012; Complaint No 78/2012 Pensioners’ Union of the Athens-Piraeus Electric Railways (ISAP) v Greece, Decision on the Merits, 7 December 2012; Complaint No 79/2012 Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) v Greece, Decision on the Merits, 7 December 2012; and Complaint No 80/2012 Pensioner’s Union of the Agricultural Bank of Greece (ATE) v Greece, Decision on the Merits, 7 December 2012.

88 See, eg, IKA—ETAM v Greece (n 87) [50]–[52]. The five decisions on the merits are in essence very similar and in all five complaints the situation in Greece was found not to be in conformity with various provisions of the Charter.

89 Complaint No 85/2012 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden. The ECSR has not yet decided whether the complaint is admissible. Based upon its existing practice, it is most likely to find it admissible. The Swedish trade unions have also sought to challenge Laval before the Committee of Experts of the ILO.
(the right to bargain collectively) and 19(4) (equality regarding employment, right to organise and accommodation) of the RESC. It is certainly the case that restrictions on the rights of freedom of association and collective bargaining due to the need to promote market access by companies are not recognised as an acceptable justification by the ECSR in its jurisprudence. In many senses, *Laval* (and the associated judgments) reinforced the CJEU’s rather ‘different’ balancing exercise when competing economic freedoms and social rights are involved. In *Laval*, the CJEU held that national-level labour law rules are capable of constituting a distortion of competition within the internal market and, as such, can only be justified within a very narrow range and by reference to a very strict test of proportionality.90 The CJEU did not utilise a human rights prism and the ECSR’s jurisprudence certainly suggests that, assuming it finds the complaint admissible, it is likely to find the situation in Sweden not to be in compliance with its Charter obligations.

With regard to the challenge to EU law, there is, however, some room for manoeuvre if the ECSR decides to avoid a direct confrontation. Sweden’s implementation of *Laval* could be deemed to be where the shortcoming lies, as opposed to the CJEU’s decision itself.91 Sweden’s argument is, of course, that it has implemented the *Laval* judgment as it is obliged to do so. On the one hand, there is the directly effective and enforceable nature of EU law as well as the system of State liability, which is an inherent part of it. On the other hand, there are the equally legally binding but less enforceable obligations under the Social Charter. The choices for Sweden are not straightforward, although there is little doubt that some other Member States of the EU, such as the United Kingdom, would almost certainly choose to ignore the findings of the ECSR if it were to find itself with Sweden’s dilemma. Precisely how this complaint will transpire remains to be seen, but it is without doubt that other direct challenges to EU law or judgments of the CJEU will continue to come before the ECSR and other EU Member States will be confronted with a difficult conundrum.

V. CONCLUSIONS

It has been axiomatic for quite some time now that the EU’s efforts to accede to the ECHR underline yet again its marginalisation of the effective protection of economic and social rights in the EU legal order. The omissions in the CFREU, in addition to the obligation imposed by the TEU for the EU to seek to accede to only the ECHR, are part of a litany of opportunities that have been deliberately missed. The paradox, however, is that if the EU

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90 Deakin (n 55) 30.
91 Reform of Swedish law in light of *Laval* has been extremely difficult; see A Bücke, F Dorresemont and W Warneck, ‘The Search for a Balance: Analysis and Perspectives’ in Bücke and Warneck (n 55) 317 et seq.
and its Member States are indeed committed to the protection of all rights in the EU legal order and if they believe them to be interrelated, interdependent and indivisible, as we are repeatedly told, then seeking accession to the RESC is a natural initiative for the EU. It is difficult to see how a convincing argument can be made that the EU should accede to the Council of Europe’s Convention but not its Social Charter. First, all EU Member States are parties to either the 1961 or the Revised Social Charter. Second, it is a regional treaty where EU Member States form the vast majority of Contracting Parties and thus, as has been shown, standards under the Charter are often but certainly not always mapped to EU standards. Third, the EU has exercised its extensive competence in a significant number of areas regulated by the Social Charter. Fourth, the Social Charter allows parties to it to select which provisions they wish to be bound by. This would allow the EU to within limits select those provisions which most closely match its competence. As there are a number of rights protected by the RESC where the EU has no competence, it may be that the EU has to negotiate a bespoke solution as to which provisions it accepts, but it would not be unreasonable if the EU sought to do so. As is the case with the Convention, accession to the RESC would not extend the EU’s competence. This would therefore go quite some way in addressing any possible concerns that may exist for those Member States that are not party to the RESC. The implications for those Member States in areas outside of EU competence would be negligible. It is difficult to think of a principled reason as to why the EU should not seek accession to the Social Charter; difficulties stemming from either side could be overcome through negotiation. The political intransigence of certain Member States is the only, but at the same time the most substantial, obstacle to such an initiative.

In many senses, the ECtHR could afford to take a more relaxed approach to the possible responsibility of the EU under the Convention system, as it has been safe in the knowledge over the last 10 years or so that the EU will eventually accede to the Convention system and the terms of that accession would have to be worked out by those involved in the negotiations. The Court in that regard could afford to take a hands-off approach; indeed, if the Court had intervened, depending upon what it decided, it may have made accession more unpalatable or certainly difficult for the EU. One of the most fascinating issues is that the ECSR has had to take up the mantle itself. For the ECSR, EU accession to the Social Charter is currently not a foreseeable prospect, so it has adopted a strategy of trying to compel, as best it can, the EU to pay greater attention to the standards it is setting.

In the past, there was at times a tendency to align Charter standards with EU standards, for the ECSR was aware that it would simply be ignored otherwise. The ECSR now seems to have adopted a clear strategy vis-à-vis the relationship between EU and Social Charter standards. Where EU standards are equivalent or higher, as sometimes they will be, there is obviously no problem. However, in the not insignificant number of situations
where there is a disparity between them, then the function of the ECSR is to determine the scope and content of obligations that Contracting Parties (not the EU) owe under the Charter. That is perfectly legitimate and the Committee is well within its competence to do so. The fact that Member States of the EU may owe conflicting obligations under the EU or other treaties, for the ECSR is neither here nor there. EU Member States owing conflicting obligations under other treaties is nothing new; in the context of social rights, there are precedents. But for the ECSR, watering down standards to those set by the EU while legally possible for some Charter provisions, in particular those that are drafted in a rather vague and open-ended way, is not possible for others. Furthermore, the prism through which the ECSR considers matters is different from that of the EU institutions, including the CJEU; the protection of economic and social rights is first and foremost for the ECSR; it is one consideration among others (and sometimes not an important one) for the EU institutions.

The approach of the ECSR in CGT is an attempt to put EU accession to the Social Charter onto the EU’s ‘rights agenda’. If a presumption of equivalence were adopted by the ECSR, in addition to it being unjustifiable, it would mean that the Charter would simply continue to be at best marginalised and at worst ignored by the EU. By tackling potential conflicts of standards head-on, the ECSR is attempting to demand that the Member States of the EU ensure that some attention will be paid to the Charter in EU circles. The combined consequence of the CCP functioning well and the ECSR’s adopted approach is that challenges to EU obligations will continue to be brought against those EU Member States which are party to the CCP. Such Member States will have hard choices to make. The reality is that some will choose in the short term to ignore the views of the ECSR and will abide by EU standards instead. Over time, however, if the situation is replicated on numerous occasions, pressure may build up in the Committee of Ministers of the Council of Europe when it makes recommendations to Contracting Parties to take action in light of the findings of the ECSR. The EU cannot, while partaking in the work of the Council of Europe, shun its Social Charter: an essential and key component of the Council’s activities. The Social Charter is increasingly a successful treaty regime in its own right, but comparatively speaking is marginalised by some as it lives in the vast shadow cast by the ECHR. The EU seeking to accede to the RESC would give another boost in the arm to the Charter. Thus, one can see the Committee of Ministers and the Council of Europe as a whole in time seeking to press the issue more forcefully with the EU. Although some EU Member States will resist, over time the pressure on the EU to consider accession to the Social Charter will increase. In time, it is not a case of never the twain may meet—there is an imperative that they must meet.

92 Above n 40.