Is there any “perspective” for an European Union accession to the European Social Charter?

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Abstract: The paper argues that the EU-accession to the European Social Charter could be realized even without a formal revision of the EU-treaties. Various external competences, including art. 37 TEU in Common Foreign and Security Policy matters could be exercised. Accession could be considered necessary in order to achieve, within the framework of the Union policies, the objective of a “social market”. For a real perspective of accession further impact studies are needed.

Résumé : Le document de travail argumente que l’adhésion de l’UE à la Charte Sociale Européenne ne requiert pas une révision des traités de l’Union. Plusieurs compétences externes, même l’art. 37 TUE en matière de Politique étrangère et de sécurité commune (PESC) pourraient être exercées. L’adhésion pourrait être nécessaire pour réaliser le but d’un marché sociale. Pour une perspective réelle de l’adhésion autres analyses d’impact sont nécessaires.

1. Preliminary observations. The Turin conference is facing the question whether the accession of European Union (EU) to the (Revised) European Social Charter (ESC) might be a « perspective ». The question has been studied first by a EUI working paper by Olivier de Schutter in 2004¹, updated in July 2014, and only partially discussed by other authors.² The paper faces both political and legal issues. De Schutter holds that the accession “will contribute to reduce the risk of conflicts between the duties that are imposed under the (Revised) ESC and EU law; and it will ensure the uniformity of application of EU law throughout all the EU Member States”. He claims that accession of the EU to the revised ESC would be entirely compatible with the limited competence of EU and its constitutional law and with its limited competence, notwithstanding the fact that Art. 6 TEU provides only the accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Art. 151 TFEU has in mind only the European Social Charter of 1961. Finally he outlines a scenario of modalities and consequences of the accession.

Actually, until the European Court of Justice has not delivered its advisory opinion on the accession treaty draft³, the discussion of this report, especially of the modalities according to which the European Union could accede to the (Revised) European Social Charter, can offer just a fantastic “perspective on perspectives” and not yet workable elements for final drafting.

Nevertheless the issue needs to be addressed as a concrete political option in a European context of social, economical and political crisis. There is not only an institutional interest of the Council of Europe to be needed as a supervisor. There is even a hope of the European left to overrule Viking and Laval and to correct the austerity policies strengthened by the so-called Fiscal Compact, transforming

social rights in polemical “counter-rights” even with an own European Social Rights Court and a further accession to other UN- and ILO-conventions on Human Rights, as Andrea Fischer-Lescano prospected in Germany to the socialdemocratic Friedrich-Ebert foundation.\(^4\)

On the other hand, the Angela Merkel denies any perspective of a “Social Union” and there are still European countries like Switzerland contrary even to ratify the ESC.\(^5\) But there might be even a conservative interest in preventing nation judges and Constitutional courts from using the ESC against EU-law, establishing a new “Solange” threat based on the constitutional law of the poor member States: “as long as the EU does not practice a protection of social rights at the minimum level of the European Social Charter, national judges or constitutional courts have to control the constitutionality of acts of the EU and their member states in performing EU-law affecting the same rights protected through national constitutional guarantees”. The purpose of this paper is to focus first of all the legal question of competence (2.). The discourse regards mainly EU-law, but even the legal order of the Council of Europe and national constitutional law.

2. **The puzzle of the competences.** The European Union treaty making power has been developed by the ECJ case-law of the former European Community.\(^6\) The new Art. 216 TFUE specifies four general cases of treaty making competence: “I. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide (1) or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties (2), or is provided for in a legally binding Union act (3) or is likely to affect common rules or alter their scope (4)”.

The system is still based on a principle of parallelism between internal (legislative acts) and external (agreements) competences\(^7\), but this principle of parallelism is supplemented and derogated by further specific competence clauses, including art. 6 (2) TEU for mandatory accession to the ECHR, art. 8 (2) for neighbourhood policies, art. 37 TEU for agreements with international organisations for “areas covered by the Common Foreign and Security Policy” (CFSP), art. 79 (3) TFEU for immigration policies, art. 186 TFEU for technological and scientific cooperation (e.g. in health matters), art. 191 (4) TFEU for environment protection, art. 207 (3) TFEU for development cooperation, art. 214 (4) for humanitarian aid, art. 217 TFEU for a possible accession to the Council of Europe etc. External

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\(^6\) See ECJ judgment in case n. 22/70 (AETR = European Agreement concerning the work of crews of vehicles engaged in international road transport), and the opinions n. 1/76 (Draft Agreement establishing a European laying-up fund for inland waterway vessels), 1/91 (Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area), 2/91 (Convention Nº 170 of the International Labour Organization concerning safety in the use of chemicals at work), 1/92 (Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area), 2/92 (Competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment), 1/94 (Competence of the Community to conclude international agreements concerning services and the protection of intellectual property), 2/94 (Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedom), 01/03 (Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), 01/09 Draft agreement on creation of a unified patent litigation system (“European and Community Patents Court”) incompatible.

\(^7\) R. Adamo/ A. Tizzano, Manuale di diritto dell’Unione europea, Padova 2014, 799.
competences for an agreement are exclusive if they fall under the areas enumerated in Art. 3 (1) TFEU or “when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.” (Art. 3 (2) TFEU) This provision applies to all areas of internal competences under art. 4 TFEU, including sect. (1) (b) “social policy for the aspects defined in this Treaty, (c) economic, social and territorial cohesion”, and the complementary competences for “coordination of the employment policies of the Member States” (art 5 (2) TFEU) and “actions to support, coordinate or supplement the actions of the Member States” in other areas (6 TFEU). Finally if one combines the necessity clauses in art. 3 (2) TEU and 216 (1) TFEU for the external competence with the flexibility clause (art. 352 TFEU) for the internal one, the entire system of competences could have been widened.\(^8\)

Olivier De Schutter holds that the obligations deriving from the ESC would “affect common rules” and, “à titre subsidiare”, the accession would be “necessary in order to achieve, within the framework of the Union policies, one of the objectives referred to in the treaties”, avoiding conflicts between the EU rules and the ESC itself.\(^9\) This opinion is mainly based on the ECJ case law and on the precedent case of the “Council decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities” (2010/48/EC), issued just five days before the entry into force of the Lisbon treaty.\(^10\) The central argument, that affection of common rules could not be excluded, is based on prima facie conflicts between the social and economic rights, specially in the light of the jurisprudence of the ECSC on the consequences of the Laval judgment of the ECJ. One could object that the rules already or potentially affected need to be listed and that partial or indirect forms of “affection” would not be sufficient.\(^11\) The doubt could arise that the accession would probably rather promote than prevent similar conflicts. In any case, if one looks at the new system of treaty making competences after Lisbon, the question of competence seems to be more complex and a concurring opinion appears possible.

3. External CSFP competence for human rights treaties. A first observation is that EU accession to ESC/RESC could be part of the CFSP falling under art. 37 TEU. A similar provision was not yet in force at the time of the ECJ opinion 2/1994. When it was introduced by art. 24 of the Nizza Treaty (2001), the areas covered at that time included already the development and consolidation of the

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8 See also M. Cremona, External relations and external competences of the EU, in : P. Craig / G. De Burca, The evolution of EU Law Oxford, 2ed. 2011, 217ff: “the Treaty of Lisbon has thus extended the possibility for the use of both implied powers and the flexibility clause by loosening the link between internal obligation and external action”.

9 Op. cit., 25 : “limiter le risque de conflit entre les deux ensembles de règles, ce qui favorise l'application uniforme du droit de l'Union européenne”.

10 See Article 44 Regional integration organisations. “1. ‘Regional integration organisation' shall mean an organisation constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention. Such organisations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by the present Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence.

2. References to 'States Parties' in the present Convention shall apply to such organisations within the limits of their competence.

3. For the purposes of Article 45, paragraph 1, and Article 47, paragraphs 2 and 3, of the present Convention, any instrument deposited by a regional integration organisation shall not be counted.

4. Regional integration organisations, in matters within their competence, may exercise their right to vote in the Conference of States Parties, with a number of votes equal to the number of their member States that are Parties to the present Convention. Such an organisation shall not exercise its right to vote if any of its member States exercises its right, and vice versa.”

11 ECJ opinion 2/91 and 2/92.
respect for human rights and freedoms all over the world, a traditional objective of CFSP since Article J.1 of Title V of the Maastricht Treaty. This objective has been maintained as a specific objective of the Union’s action on the international scene (art. 21 (2) (b): “consolidate and support (...) human rights”) and as a general objective of the Union under art. 3 (5) TEU: “In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.” In order to realize those objectives, Art. 37 TEU provides now not just for a principle, but for a broad competence that covers “all areas of foreign policy” (art. 24 TEU), not just the areas specified by art. 3 TFEU and the fifth part of TFEU. The clause refers explicitly to all actions “covered” by the CFSP chapter of the TEU that is opened by another general clause: “The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.” (art. 23 TEU) The EU-accession to ESC doesn’t fall necessarily under security and defence matters, but serves as a consolidation and support to “human rights”. Unless they are not completely transformed into fundamental rights binding for internal law, “human rights” are still mainly foreign legal affairs. Through EU-accession to ESC it “seeks to advance in the wider world the universality and indivisibility of human rights. The Council of Europe (CoE) and its 47 member states are obviously a minor part of the “wider world”, but it aims to “the preservation of human society and civilisation” as a global objective. The EU member states are a majority within CoE, but they have no legal hegemony over this organisation and accepted international monitoring procedures. Social rights are only a part of human rights and the ESC/RESC protects them mainly as citizens rights, but the selective accession of the EU to the ECHR with no subsequent accession to the ESC/RESC could reverse the principle of universality and indivisibility of human rights. It is therefore reasonable to hold that the development of a system of regional protection of social rights binding even for an inter- and supranational organisation offers a new model and legal experience that can contribute to develop gradually international solidarity and the respect for all human rights all over the globe. EU-accession to (R)ESC could be of strategic interest for the consolidation and development of the monitoring mechanisms under the International Covenant of Economic, Social and Cultural Rights (ICESCR). The “EU Strategic Framework and Action Plan on Human Rights and Democracy” of June 2012 underlines indeed that the EU “remains committed to a strong multilateral human rights system” and aims at an interregional partnership with a “view to encouraging the consolidation of regional human rights mechanisms”. The accession to the revitalized (R)ESC could realize a consolidation of such regional human rights mechanisms. Finally, human rights affairs have always aspects of external administration and the participation of the EU to the monitoring and collective complaint mechanisms,

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being not just a pure “submission” to a higher authority, could also be qualified as a “cooperation” with an international organisation under art. 220 TFEU.\textsuperscript{13} In the light of art. 3 (3 and 5) and art. 23, 24 TEU, art. 37 TEU gives thus a large but sufficiently clear determined autonomous treaty making power for human social rights instruments consistent with the CFSP principles.\textsuperscript{14} This specific treaty making power is just recalled by the first clause of art. 216 (1) TFEU, but does not fall under the areas of exclusive competence listed by art. 3 (1) TFEU. In human rights treaty matters, the competence of art. 37 TEU remains shared and mixed, with powers both of the national States and of the EU.

Under Article 40 TEU, “the implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.” In the light of the SALW judgment,\textsuperscript{15} the “ratio” of this provision seems to separate the CFSP powers from the powers in the specific areas of external competences governed by the fifth part of the TFEU, but also to separate external from internal competences. The question is what happens if the accession to ESC matters not only for CFSP but even for the internal shared competences under art. 4 TFEU, specially sect. (1) (b) “social policy for the aspects defined in this Treaty, (c) economic, social and territorial cohesion” and for the internal complementary competences on “coordination of the employment policies of the Member States” (art 5 (2) TFEU) and “actions to support, coordinate or supplement the actions of the Member States” in other areas (6 TFEU).

4. Internal competences are affected. Instruments ensuring human rights respect involve not only the relations to third states and to the Council of Europe (CoE), but affect the maintenance of the values and the realisation of the objectives of the Union (art. 2 and 3 TEU) also in its internal competences. The question is thus whether EU-accession to ESC might be “necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties (2), or “likely to affect common rules or alter their scope” (art. 216 (1) TFEU).

In the case of the “United Nations Convention on the Rights of Persons with Disabilities” the internal competences have been explained and specified through the “Declaration concerning the competence of the European Community with regard to matters governed by the United Nations convention on the rights of persons with disabilities”: “In some matters the European Community has exclusive competence and in other matters competence is shared between the European Community and the Member States. The Member States remain competent for all matters in respect of which no competence has been transferred to the European Community.” The declaration makes reference to internal exclusive competences “as regards the compatibility of State aid with the common market and the Common Custom Tariff” and regarding “the recruitment, conditions of service, remuneration, training etc. of non-elected officials” of its own administration (..). The declaration lists furthermore in the shared competences affected: “The European Community has exclusive competence to enter into this Convention in respect of those matters only to the extent that provisions of the Convention or legal


\textsuperscript{14} P. Eeckhout, EU external relations law, Oxford, 2011, 189: “There appear to be virtually no significant areas of international law-making in which EU can not participate.”

\textsuperscript{15} ECJ C-91/05 Commission v. Council (SALW) (2008) ECR I-3651.
instruments adopted in implementation thereof affect common rules previously established by the European Community. When Community rules exist but are not affected, in particular in cases of Community provisions establishing only minimum standards, the Member States have competence, without prejudice to the competence of the European Community to act in this field.” Finally, the declaration lists relevant policies covered by further competences and the Open Method of Coordination (OMC): “Member States and the Community shall work towards developing a coordinated strategy for employment. (...)

In the case of EU accession to the ESC the same (art. 15 RESC) and still other internal competences are affected. The ESC-obligations fall under the above mentioned areas of shared competences for “b) social policy for the aspects defined in this Treaty, (c) economic, social and territorial cohesion, (...) k) common safety concerns in public health matters, for the aspects defined in this Treaty” (art. 4 (2) TFEU). Other areas of competences are the “coordination of the employment policies of the Member States, in particular by defining guidelines for these policies” (art. 5 (2), 145 TFEU), the “actions to support, coordinate or supplement the actions of the Member States” regarding “(a) protection and improvement of human health; education, vocational training, youth and sport” (art. 6, 165 TFEU, 168 TFEU). All remaining areas of policies and activities are insofar affected as the Union:
- “shall aim to eliminate inequalities” (art. 8 TFEU) deriving from violations of social rights;
- “shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health” (art. 9 TFEU);
- “given the place occupied by services of general economic interest in the shared values (...) shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions” (art. 14 TFEU);
- has to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief; disability, age or sexual orientation” (art. 19 TFEU).

All ESC obligations deriving from the complete catalogue of social rights are mostly covered by this wide framework of competences an objectives. Even rights such as the right of families, children and elder persons to appropriate social, legal and economic protection (art. 16, 17, 23 RESC), the right to protection against poverty and social exclusion and the right to housing (art. 30, 31) could be considered part of the policy measures listed under art. 153 (1) TFEU: “(j) the combating of social exclusion; (k) the modernisation of social protection systems”. The targets of the revised Lisbon Strategy “Europe 2020”\textsuperscript{16} can be considered inspired not only by art. 3 (2) TEU, but even by the ESC/RESC. In the perspective of “Europe 2020”, the accession to ESC/RESC could be an “other tool for growth and jobs”.

5. Accession necessary in order to achieve, within the framework of the Union policies, the objective of a “social market”. Objection could be made that the EU accession to RESC would not be neither necessary in order to achieve one of the objectives referred to in the treaties (art. 216 (1) TFEU) nor “necessary to enable the Union to exercise its internal competence” (art. 3 (2) TFEU). This question has to be handled with particular care. The “necessity” criterion can be interpreted in a weaker fashion as an “effet util” requirement or in stronger fashion as an impossibility to reach the objectives of the agreement through the exercise of the internal competences. In this regard, necessity can be subject to a

\textsuperscript{16} “1. Employment : 75% of the 20-64 year-olds to be employed. 2. R(esearch)&D(velopment) : 3% of the EU’s GDP to be invested in R&D. 3. Climate change and energy sustainability : greenhouse gas emissions 20% (or even 30%, if the conditions are right) lower than 1990, 20% of energy from renewables, 20% increase in energy efficiency. 4. Education: Reducing the rates of early school leaving below 10% at least 40% of 30-34-year-olds completing third level education. 5. Fighting poverty and social exclusion: at least 20 million fewer people in or at risk of poverty and social exclusion.”
margin of appreciation or to full control of the ECJ. EU-accession to the (R)ESC would of course not be a “sufficient condition” for exercising internal competences nor for reaching the above specified objectives. Nevertheless it could be reasonable consider the accession as a “conditio sine qua non” in order to achieve the objective of a “social market” by consolidating minimum positions with in minimum of effective protection even in hard times of financial and economical crisis. Being not covered by an exclusive competence of CFSP, to necessity of EU-accession could apply not only a proportionality test, but even a subsidiarity control mechanism. In the context of the new Europe 2020 strategy and the procedures of the European semester in the economic and monetary union (EMU), the EU governance control over economies can no more be disjoined from effective monitoring on social implications. The monitoring and complaint procedures at the national level can not realize that need of synchronization of attentions inside the EU governance mechanisms.

Furthermore, the selective accession of the EU to the ECHR with no subsequent EU-accession to (R)ESC would both strengthening economic freedoms and weakening social responsibilities, open the eyes of external observers and judges on the respect of civil rights and left closed both eyes on the respect of social rights. The political choice whether to accede to ESC or not is of course free, but no one can seriously argue that necessity hasn’t grown.

In order to preserve the qualification “social market”, social rights can define the minimum conditions and offer indicators for the measuring of quality in monitoring. Without any effective external monitoring on social rights even at the global level it could no more be possible to reach the general objective of a “highly competitive social market economy” with specific purposes of “full employment and social progress”, of “combat against social exclusion and discrimination”, of promotion of “social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child” (art. 3 (3) TEU). The Lisbon treaty and the Lisbon strategy have both acknowledged that the single market has not yet reached those objectives and that only the realisation of these objectives allows to qualify it as a “social market economy”. It would not be an exaggeration to say that without an enlargement of the legally binding core of social human rights and without specific external monitoring and complaint procedures it is nowadays impossible to reach these objectives. The Union is free to cancel that objective, but the national constitutions could then no more legitimate the participation to a simply neoliberal Union.

If it becomes impossible to achieve the objectives, the exercise of the relevant competences needs to be “enabled”. A single market without minimum obligations deriving from social rights and binding even for EU and without any effective procedures of external monitoring on the respect of such rights could no longer be named a “social” market economy. And a “social justice” without a minimum of social rights guarantees might be a good spirit, but not a “justice” in a legal sense. “Social progress” can not be measured without procedures that lead to a legally binding definition of a starting point in indicators and standards. “Solidarity” duties without any effective control mechanism are just a hope and

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20 See also M. Mikkola, Key Principles of European Social Human Rights (2013), http://www.sosyalhaklar.net/2013/bildiriler/mikkola.pdf: (R)ESC “could be understood as a collection of the common minimum standards for an integrated Europe”.

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potentially misleading. They should have no longer place neither in constitutions nor in international treaties. Art. 3 (3) TEU can no more be construed just as a moral or ethic self-illusion of a legal person named European Union.

One could object that the Nizza Charter (CFREU) has already transformed the bulk of the ESC/RESC rights in fundamental rights with specific judicial guarantees and that the EU could make a minimal choice of rights and obligations. Nevertheless there might be now a need to extend protection, always within the framework of the EU-competences, even to “fair remuneration sufficient for a decent standard of living” (art. 4), to vocational training (art. 10), to special “social welfare services” (art. 14), to protection and assistance of migrants (art. 19) and to protection of worker’s representatives (art. 28 ESC). Within the institutional framework of the EU, the fundamental rights reporting is still separated from the human rights reporting and only the accession both to ECHR and to (R)ESC could push to simplify and integrate better the reporting procedures. The existing monitoring system of the (R)ESC is controlled by the member states even as far as their participation to framing and implementation of EU-law is regarded, but that could be considered insufficient. An external monitoring and collective complaint mechanism participated by the European Union could be necessary in order to strengthen the responsibility of the EU for respect and for protection of such rights. The recognition of such a need is finally coherent to the general principle that the declaration of rights aim “through progressive measures, national and international, to secure their universal and effective recognition and observance” (UDHR preamble). In the light of the international law principle of a “progressive realization” of social rights, within the legal framework of competences and objectives of the EU, they have to be taken seriously and legally binding not only by the member states, but even by the EU. The EU-treaties are based on the will to develop a “constitutionalisation” of supranational powers and international institutions, even without a single constitution. Of course the political class of the Union is free to not want to do what is “necessary” for that purpose and there are only weak political instruments for citizens to sanction them if they are “unwilling”, but that allows not to the legal adviser to hold the EU-accession to RESC “unnecessary”. A similar conclusion would be a partisan “neoliberal” interpretation and choice. The opposite conclusion is not a “socialist” viewpoint, being socialism notoriously a policy that goes beyond minimum rights and state purposes in social welfare.

6. No implied prohibitions of accession exist in the Union law. Further objections could prospect a norm of prohibition of EU-accession to (R)ESC based on.

(1) the provisions of accession to ECHR (art. 6 (2) TEU, art. 218 (6) TFEU, protocol n. XIV),
(2) the qualification of the ESC in the preamble of TEU and in art. 151 TFEU,
(3) the decision of the Charter of fundamental rights of the European Union (CFREU) to not incorporate all (R)ESC-rights and to make no reference to RESC (art. 52 (3) CFREU)),
(4) the right to an effective remedy (art. 47 CFREU),
(5) the entire framework of the fundamental rights protection within the TEU/TFEU treaties.

Ad (1) From a formal point of view the expression “shall” in art. 6 (2) TEU is a command, not just a permission. If the accession to ECHR with its external jurisdiction is commanded as the first step of the CFSP towards a consolidation of COE and a worldwide system of human rights protection, that provision needs not to imply a prohibition of further steps in favour of the so called second generation rights. Art. 53 CFREU, referring to “international agreements to which the Union or all the Member States are party”, already contemplates the case of accession to human rights instruments different from ECHR. The “EU non-accession to the ESC” was just a “not yet decision”, not a political choice binding for the future. The accession to ECHR being a precedent, the accession to RESC could always be

managed even through a specific amendment to art. 6 TEU, but in the new system of treaty making competences no further specific competence would be needed.

(2) Insofar as the ESC is already quoted in the EU-treaties, the relevant provisions are firstly a narration of history, but that could have even normative implications for the interpretation of the treaties. The inspiration to ESC as a general principle of social rights protection common to all member states was a justification of the conferral of the competence in social policy, but as a spirit evolves over time, the call on that spirit in an international instrument cannot not be read as a command of “petrification” or as a prohibition for accession to (R)ESC. Another question of formal drafting and clearness would be, whether after the accession, art. 151 TFEU could be amended by a simplified revision procedure.

Ad (3): The CFREU reaffirms in its preamble “with due regard for the powers and tasks of the Union and for the principle of subsidiarity” the rights as they result from the Social Charters adopted by the EU and CoE. Combining dignity and solidarity with liberty and equality, the CFREU has mixed freedoms and social rights in order to promote the “indivisibility” of human rights. Art. 53 CFREU precludes to qualify the obligations deriving from (R)ESC rights not included in CFREU being beyond the powers and tasks of the Union and to hold the accession to (R)ESC contrary to the principle of subsidiarity. On the contrary, the human rights as a whole are no more sufficiently protected if the external protection in the wider Europe is restricted to freedoms and if social rights are left without a specific external monitoring. The generations of guarantees and the procedures of protection might remain different, but human rights shall no more be “divided” into first and second class rights.

Ad (4): Art. 47 CFREU recognizes the right to an effective remedy only to “everyone whose rights and freedoms guaranteed by the law of the Union are violated”. The appendix to Part III of the (R)ESC states that “the Charter contains legal obligations of international character, the application of which is submitted solely to the supervision provided in Part IV”, that is the monitoring and – if accepted – the complaints procedures. The (R)ESC provisions will not find direct application in the legal order of EU as long as no specific legislative act orders to make direct application for the purpose of respect, protection or fulfilment of the obligations deriving from social rights.22 The social rights declared could not be defended by individuals through the Union’s judiciary power unless they are not transformed in CFREU rights or within the existing legal framework of competences by adopted or future legal acts. As long as the (R)ESC remains law of the CoE, the right to an effective remedy can thus be restricted to trade unions and nongovernmental organisations and Art. 47 CFREU is not violated by that restriction. Insofar as the (R)ESC rights have been already transformed in fundamental rights of the CFREU or in other sources of EU-law they already have effective remedies. In the long run, the remaining parts could get further internal remedies decided by new legislative acts.

Ad (5): It is finally necessary to remember that the ECJ qualified the accession to ECHR as a “substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235 (today 352 TFEU, j.l). It could be brought about only by way of Treaty amendment.”23

There is no doubt that the EU-accession to (R)ESC means the entry of the EU into “another institutional system”, but this system of monitoring and collective complaint procedures is much weaker than the jurisdiction of the ECHR. The fundamental rights system outlined in art. 53 CFREU

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22 O. De Schutter, op. cit., 28 ff.
can be integrated by both ECHR and (R)ESC without any formal amendment. The accession to RESC implies no “fundamental institutional implications” for the judiciary or to the other institutional framework of the EU nor a “constitutional significance” that could require an amendment to treaties that already renounced to any constitutional terminology. The Fundamental Rights Agency could get new missions and existing reporting procedures could be changed, but these institutional implications are not fundamental for the form of government of the Union and the policies of “constitutionalisation” after the Lisbon treaty are no more reserved to treaty amendments. The general objectives of the Union would not be changed but applied without any substantial extension of competences. In the case of accession, the obligations stated in (R)ESC become binding for the EU institutions only within the limits of their competences and for the member states only when executing EU-law. In order to avoid any further hypothetical abuse, the accession treaty could stipulate a specific saving clause similar to the one contained in art. 6 (2) TEU (“Such accession shall not affect the Union’s competences as defined in the Treaties.”) and could use the same mechanism created by the aforesaid UN Convention.

7. A dual legal basis with one procedure. The external competence under art. 37 TEU and the external competence under art. 216 (1), alternatives 2 or 4, TFEU form a dual legal basis of competence. The EU-accession to RESC therefore does not relate exclusively to the common foreign and security policy. The question is thus whether the European Parliament has a power of consent because the accession agreement will establish “a specific institutional framework by organising cooperation procedures” (art. 218 (6) a) iii) TFEU) or whether it could only be just consulted and express an opinion within a time-limit (let. b). Art. 220 (1) TFEU allows to “establish all appropriate forms of cooperation with the organs of (…) the Council of Europe”. Such forms of cooperation could include procedures of reporting and monitoring and might apply thus to the participation of the EU to the monitoring and collective complaint procedures and to the proposal of candidates for the members of the European Committee of Social Rights (art. 25 (1) ESC) or to the Governmental Committee of the European Social Charter and the European Code of Social Security (sub-committee of the Governmental Social Committee, art. 27 (2) ESC). Insofar as the EU-accession to RESC will establish a specific external institutional framework different from the already existing forms of cooperation, the consent of the European Parliament could be required.

8. The need for further impact studies. If the EU-law offers a competence and a procedure and makes no prohibition, that doesn’t mean that there is already a real “perspective” for the EU-accession to the RESC. The academic duty of political neutrality makes not a prohibition for the sciences of

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24 For a more substantialist view see O. De Schutter, La Charte sociale européenne: Une constitution sociale pour l'Europe, Bruxelles 2010.
25 Contrary Eecdhout, op. cit., p. 185: “difficult to contend that the TFEU procedures should take precedence over those of the CFSP”.
26 See already Art. 22 of the Rules of the Governmental Committee: “Participation of International governmental organisations”: (…) 2 The European Commission is invited to appoint a representative to attend the meetings of the Committee dealing with the Code as an observer (without voting rights or defrayal of expenses).
27 See also 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”, 18. 6. 2008: “8. The Agency shall take due account of the judgments and decisions of the European Court of Human Rights concerning the areas of activity of the Agency and, where relevant, of findings, reports and activities in the human rights field of the Council of Europe's human rights monitoring and intergovernmental committees, as well as those of the Council of Europe's Commissioner for Human Rights.”
public and private law to study the political and legal impact of the prospected reform, as long as the conclusions are not fallacious and misleading prophecies.

We excluded that the EU-accession to RESC would have “fundamental” institutional implications and a “constitutional significance”, but that does not mean the accession would have no “constitutional relevance” and could not be a policy of indirect “constitutionalisation” of the supranational power. For this purpose further impact studies on the costs and benefits of the possible EU-accession to RESC are needed. The legal conditions of the implementation of the EU-treaties could change if the EU-institutions have to take into account the RESC obligations. But exactly on that point, a further study should be carried out to what extent the existing EU-law would collide with RESC-rights, which common rules would really be affected by accession and which rights and obligations should be chosen à la Carte. Could the accession to RESC really become a constraint for “re-judging” social rights? Could for example the right to fair remuneration become a principle guiding the ECB fight against inflation? Would the powers of the EU-legislators notwithstanding unchanging competences reduced by further limits and veto-players, or would it be increased by further substantial legitimacy or support from contestation? And what about the impact on the existing supervisory functions of Commission and Parliament? Would the existing administration of internal monitoring be finally simplified or even more complicated, creating perhaps one more “Social human rights report” and jobs for law scholars?

Another open question is whether the power of ECJ- and/or national judges will be increased, especially in a context where an increasing number of national courts make direct application of the Charter and the ECSR decisions. Would it make a sense to decide the EU-accession to RESC and exclude any enforceability of these social rights in EU-law?

The Council of Europe supports of course the accession idea because it could gain further legitimacy and offer new perspectives even for the European neighbourhood. There is no doubt that the “poor” sister CoE risks always to suffer the hegemony of the “rich” brother EU, but the EU-accession both to the ECHR and to the RESC is based on the principle of equal dignity of states in the wider international community and could help to reduce such hegemony. But what will be the practical impact of the accesson on the strengths and weaknesses of the European Social Charter Supervisory system. Will the EU become supervised or supervise its supervisors?

The interlocutory conclusion is that the EU-accession to ESC will not be a revolution, but perhaps a reassessment of the fundamental rights architecture in Europe that could strengthen the effectiveness of the values and principles of the Union. The exercise of powers within the institutional framework of the EU and between the various international “levels” of human rights protection and their autonomies will be partially restrained, partially enabled. The primacy or rule of international law could be strengthened and that could even strengthen the authority of the EU-law. On the other hand, if the EU-COE and other international organisations could gain authority and strengthen monitoring powers even by backing the NGO’s, the member states could fear to be less free to ignore the ESRC jurisprudence and to be weakened within these organisations. The paradox of the adviser is, the more impact studies are done, the more risks the players could perceive and in the end all

29 On the practical impact of rights through contestation see K. Young, Constituting Economical and Social Rights, Oxford 2012, 256 ff.
would prefer to not change the status quo. But that would be detrimental to the Grundnorm of social human rights discourse: “Everyone is entitled to a social and international order” in which even the social human rights (art. 28 Universal Declaration of Human Rights) shall be gradually, but at the long run even “fully realized”. The citizens do not need promises of the impossible and not even social rights that strengthen just social and international powers. The “rights of the poor” can not remain for ever “poor rights”. A real “perspective” should include a reasonable time lapse and strategy for empowering citizens to defend their social rights not only through political votes and collective actions.