

What will the accession of the EU to the ECHR bring to EU anti-discrimination law?

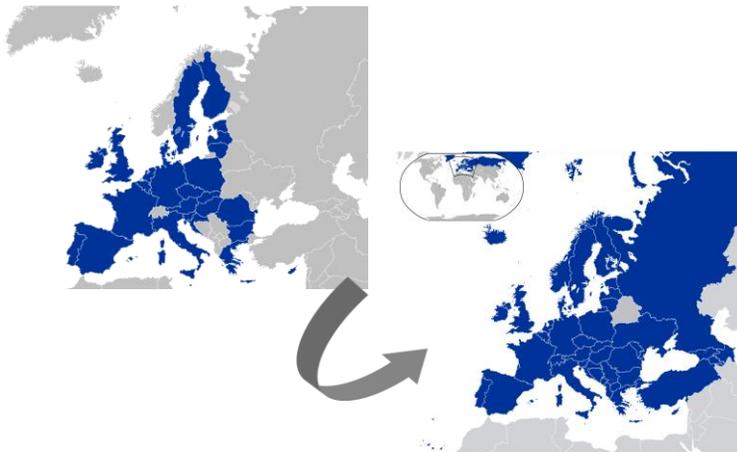
Prof. dr. J.H. (Janneke) Gerards, Radboud University of Nijmegen, the Netherlands

Current reflections on EU non-discrimination law
ERA, Trier, 11-12 November 2013

Radboud Universiteit Nijmegen



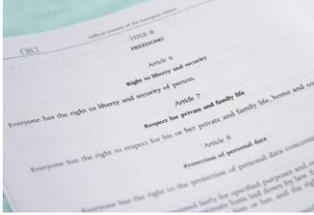
April 2013 – Accession Agreement 47+1



Radboud Universiteit Nijmegen



A long history



- **Discussed since 1979**
 - no fundamental rights catalogue
 - case-law still developing
 - criticism national courts (*Solange*-judgment German FCC)
- Accession ideal solution?
- Legal basis lacking
- Development of **EU fundamental rights protection**
 - strong case-law recognising fundamental rights as principles of EU law
 - adoption of fundamental rights catalogue → EU Charter of Fundamental Rights



No longer need for accession after Lisbon?

Lissabon-Urteil German FCC (2009)

191. ... The Federal Constitutional Court **no longer** exercises its jurisdiction to decide on the applicability of secondary Union law and other acts of the European Union cited as the legal basis for any acts of German courts or authorities within the sovereign sphere of the Federal Republic of Germany **merely as long as** the European Union guarantees an application of fundamental rights which in substance and effectiveness is essentially similar to the protection of fundamental rights required unconditionally by the Basic Law.



Legal protection gap

- Complaints **against the EU**:
 - **inadmissible** before ECtHR (EU not a party to the ECHR)
 - CJEU in *Inuit* – **limited locus standi CJEU** for individuals
 - **national legal protection** dependent on willingness to refer preliminary questions
- Complaints **against EU MS implementing EU law, but without discretion**:
 - **admissible**, but *Bosphorus doctrine*
 - presumption of equivalent protection
 - manifestly deficient test



Situation after accession



- **Protection gap filled**: access to ECtHR with respect to all national and EU acts and omissions (but: future Bosphorus doctrine uncertain)
- **Formal hierarchy** between ECtHR and CJEU established → less risk for co-equal, diverging interpretations
- **Questions / problems**:
 - how to respect EU autonomy?
 - how to involve CJEU?



Solutions Accession agreement (April 2013)

Co-respondent mechanism

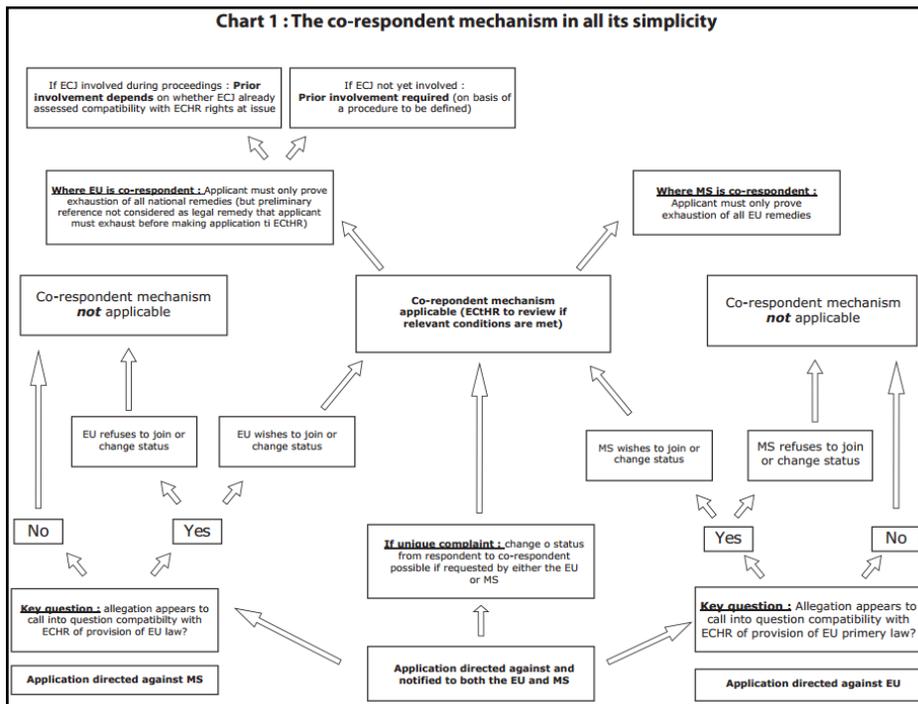
- Application against EU member state: **EU is co-respondent (party)** to the case if avoiding alleged violation would lead to disregarding an obligation under EU law:
- Application against EU institution: **member states are co-respondents (parties)** to the case if validity of primary EU law is at stake

Prior involvement procedure

'In proceedings to which the European Union is co-respondent, if the CJEU has not yet assessed the compatibility with the Convention rights at issue of the provision of EU law, then sufficient time shall be afforded for the CJEU to make such an assessment and thereafter for the parties to make observations to the Court.'



Chart 1 : The co-respondent mechanism in all its simplicity



Speedy accession?

- CJEU asked for advice
- Need for unanimous approval by Council EU
- Internal rules within EU needed to accommodate new procedures
- Ratification by all 47 states parties to the Council of Europe required



Consequences for EU non-discrimination law?

- EU non-discrimination law further developed than ECtHR case-law
 - substantive discrimination
 - indirect discrimination
- ECtHR will follow rather than take the lead?
- Comity and 'hedgehog behaviour'



Differences between EU and ECHR non-discrimination law

EU Directives and primary law

- **high level of detail**
- **closed system**
 - limited number of grounds
 - limited material scope
 - limited possibilities for exceptions / justification

ECHR Article 14

'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'

- **very open system**
 - all personal characteristics
 - wide material scope
 - open possibility for justification
- **limitation: accessory character**



Article 14 in ECtHR case-law

- **EU**: high level of detail ↔ **ECtHR**: more general, abstract protection
- **How does the ECtHR deal with non-discrimination cases?**
 - example: religious discrimination in employment cases (*Obst v. Germany* (2010), *Schuth v. Germany* (2010), *Siebenhaar v. Germany* (2011), *Eweida v. United Kingdom* (2013))
 - criterion: fair balance?
 - assessment (weight of) interests individual (non-discrimination, religious, privacy)
 - assessment of (weight of) interests employer
 - margin of appreciation
 - if national authorities struck wrong balance: violation Article 14
- **Framework Directive** → similar outcome?
- Risk of **divergent interpretation**?



Consequences for EU after accession

- **Example**
 - religious organisation refuses homosexual applicant for religious reasons
 - national courts apply Framework Directive; no possibility for justification found
 - organisation applies to ECtHR, alleging that Framework Directive does not sufficiently allow for proper balance to be struck in conformity with the Convention requirements
- Is the Framework Directive **compatible with ECHR** (Article 9 and 14)?
- **If no**: binding judgment → need to adapt EU legislation
- Must open balancing be preferred over closed system of non-discrimination law?



Negative and positive obligations

- **Negative obligations** – state is obliged **not to interfere with** fundamental rights
 - Obligation to abstain from limiting rights – non-interference
 - Obligation of result
 - Cf. obligation to respect
- **Positive obligations** – state is obliged to **secure** fundamental rights in a practical and effective manner
 - Obligation to act in a proactive manner
 - Obligation of effort, not of result
 - Cf. obligation to protect, to fulfil



Positive obligations in ECtHR non-discrimination law

Redfearn v. the United Kingdom (2012, para. 56)

... the Court considers that it was **incumbent on the respondent State to take reasonable and appropriate measures to protect employees**, including those with less than one year's service, from dismissal on grounds of political opinion or affiliation, either through the creation of a further exception to the one-year qualifying period or through a free-standing claim for unlawful discrimination on grounds of political opinion or affiliation. As the United Kingdom **legislation is deficient** in this respect, the Court concludes that the facts of the present case give rise to a **violation** of Article 11 of the Convention.

Other examples

- obligation to introduce more severe sentences for racist violence (*Angelova and Iliev v. Bulgaria* (2007), para. 104)
- obligation to accommodate special needs of Roma (e.g. *Winterstein v. France* (2013))



Consequences for EU after accession

- **Positive obligations can be imposed on EU directly**
- **Examples**
 - solving problems of intersectional discrimination by adapting non-discrimination legislation
 - adopting non-discrimination legislation in the field of provision of services or social security
 - step up policy efforts in relation to Roma rights
- **Problem:** limited competences EU



Internal organisation irrelevant to ECtHR

Swedish Engine Drivers' Union v. Sweden (1976, para. 50)

'... neither Article 13 nor the Convention in general lays down for the Contracting States **any given manner for ensuring within their internal law** the effective implementation of any of the provisions of the Convention ...'

Assanidze v. Georgia (2004, para. 146)

'... for the purposes of the Convention, **the sole issue of relevance is the State's international responsibility**, irrespective of the national authority to which the breach of the Convention in the domestic system is imputable'.



Conclusion: predicting the future?

- Great impact conceivable, especially because of positive obligations
- However:
 - margin of appreciation doctrine
 - need for comity and 'hedgehog behaviour' undiminished
 - 'prior involvement' CJEU may influence ECtHR
- Predicting the future very difficult, but important to be aware of possibilities

