

# Relationship of the Charter to the ECHR and national measures

The Charter of Fundamental Rights  
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Introduction: the EU and the ECHR

Challenge of 'competing' legal orders ostensibly aiming at ensuring the protection of equivalent fundamental rights

- relationship of the Charter to national human rights provisions
- relationship of the Charter to the Convention (ECHR)
- competing legal orders?

Focus 1: the accession to the Convention

Focus 2: the Charter and domestic provisions

- The interpretation of Art. 51(1) in the case-law on general principles
- The *Fransson* and *Textdata* cases and the reaction of the German Constitutional Court



# The EU and the ECHR

- EU not a party to the ECHR, but all of its Member States are
- 47 parties to ECHR
- European Court of Human Rights in Strasbourg (ECtHR)
- Direct access to ECtHR – individual complaints



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- 28 MS of the EU
  - CJEU in Luxembourg
  - Access to CJEU mainly via preliminary reference procedure

NB: Croatia is now the 28<sup>th</sup> EU member

# The EU and the ECHR



- Before the entry into force of the Charter, CJEU relied on unwritten fundamental rights (general principles of EU law)
  - ECHR was an important ‘source of inspiration’ for CJEU when defining those principles
  - former AG Jacobs: Court scrupulously follows the case law of the ECtHR, see case *DEB* (C-279/09) on legal aid
- This is reflected in Art. 6(3) TEU, which refers to ECHR:

‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.’
- Furthermore: Art. 52 (3) CFR stipulates that ECHR is minimum standard

# Challenge of 'competing' legal orders

Fundamental rights are typically protected on (at least) three levels

- European Convention
- The EU law regime (in particular the Charter)
- National fundamental rights guarantees
  - Sub-national level (e.g. Locally protected fundamental rights)

How does the Charter relate to these?

- No direct impact on national human rights guarantees
  - Art. 6(1) and (2) TEU:

The provisions of the Charter and the future accession shall not extend in any way the competences of the Union as defined in the Treaties.

Hence no extension of Charter rights to purely national situations

- Indirect impact?
  - Hard to say, but the trend points to a convergence
  - National courts might in the future be tempted to construe equivalent national fundamental rights in line with CJEU's interpretation of Charter rights
  - Uncertain developments, for instance when citizenship rights are in the picture

- Where domestic rights provide for better protection, can they be relied upon? Dispelling the ‘minimum floor’ misunderstanding.

## **Art. 53 CFR**

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 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.**

- CJEU in *Melloni* (C-399/11, paras 55-64).

Art. 53 **does not** allow a national court to apply domestic fundamental rights against a measure of EU law as this would undermine the principle of primacy!

# The Charter and the ECHR



Interpretation of the rights in light of the ECHR, Art. 52(3)

- Art 52(3) mentions the ECHR as a minimum standard:

‘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. This provision shall not prevent Union law providing more extensive protection.’

- For corresponding rights: see explanations to the Charter Art. 52(7) (whose authority is confirmed in Art. 6(1) TEU):

‘The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.’



## Article 52(3) CFR

Article 2: Right to life

= Article 2 ECHR

Article 4: Prohibition of torture and inhuman or degrading treatment or punishment

=Article 3 ECHR

Article 5: Prohibition of slavery and forced labour

=Article 4 ECHR

Article 6: Right to liberty and security

= Article 5 ECHR

Article 7: Respect for private and family life

= Article 8 ECHR

Article 9: Right to marry and right to found a family

= Article 12 ECHR, but wider scope

# Article 52(3) CFR



Article 10: Freedom of thought, conscience and religion

= Article 9 ECHR

Article 11: Freedom of expression and information

= Article 10 ECHR

Article 12: Freedom of assembly and of association

= Article 11 ECHR, but wider scope

Article 14: Right to education

= Article 2 Protocol 1 ECHR, but wider scope

Article 17: Right to property

= Article 1 Protocol 1 ECHR

Article 19: Protection in the event of removal, expulsion or extradition

= Article 3 ECHR

# The Charter and the ECHR



## Consequences:

- ECHR as a minimum standard
  - i.e. Articles to be interpreted like corresponding Convention Articles
  - This means that case law of European Court of Human Rights is of great importance,
    - Cf. Case *McB* (C-400/10 PPU), para 53
- But: Charter may provide for greater protection
- However, remember *Melloni*. Also, it is rarely a matter of pure restriction of a right, more often a balance is necessary *between two or more rights*. Impossible to certify higher protection conclusively.

## Current situation under the ECHR

- EU is not a party and cannot be sued in Strasbourg
- *But* EU Member States can be held responsible instead
- *Matthews v United Kingdom* (EU primary law)
  - According to EU's Act on Direct Elections (primary law), no elections to the European Parliament were held in Gibraltar
  - Applicant complained to ECtHR arguing there had been a violation of her right to vote under Art. 3 Protocol 1 ECHR
  - Court:

“The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be ‘secured’. Member States’ responsibility therefore continues even after such a transfer”

# Current situation

- *Matthews* (continued)
  - UK was held responsible for depriving UK citizens in Gibraltar of their right to vote in EP elections (Art. 3 Prot 2 ECHR)
  - *Matthews* established the principle that Member States of the EU cannot evade responsibility under the ECHR by transferring powers to the EU
- *Bosphorus v Ireland* (EU secondary law)
  - piece of EU legislation (Regulation) demanded that Yugoslavian aircraft be impounded
  - *Bosphorus* airlines had leased an aircraft from Yugoslav National Airways, which was impounded in Ireland
  - *Bosphorus* argued that violation of its right to property under Art. 1 Protocol 1 ECHR

# Traditional relationship

- *Bosphorus* continued
  - Court reaffirmed general responsibility of MS under *Matthews*
  - But introduced new rebuttable presumption:
    - EU offers protection of human rights which is equivalent to the ECHR
    - If the MS had no discretion, the MS is presumed not to have violated the ECHR if it does nothing more than implement its obligations
    - Presumption can be rebutted if in a particular case the protection was ‘manifestly deficient’
- What does ‘discretion’ mean?
  - In case of Directives: state discretion (always?) exists
  - If so: full review can be performed by ECtHR

## Traditional relationship

- Mind the gap: *Connolly v 15 Member States of the EU*
  - EU staff dispute: Commission official had been sacked
  - Difference to *Matthews* and *Bosphorus*: no Member State was involved
    - Purely EU-internal dispute
  - Complaint was deemed inadmissible since the act was not attributable to any MS
- **Thus there is a gap in the protection at present where no Member State is involved**

Recent application of *Bosphorus* in 2013: see *Michaud v France*(Application no. 12323/11); *Povse v Austria* (Application no. 3890/11)

# Competing legal orders?

- Basic framework
  - European Court of Human Rights will only accept applications where all domestic remedies have been exhausted, Art. 35(1) ECHR
  - Court of Justice of the EU: direct access extremely restricted, Art. 263 TFEU
    - Only where an EU act is addressed to an individual (or it is of direct and individual concern to them): e.g. fine issued by EU
  - Normally CJEU involved via preliminary reference procedure, Art. 267 TFEU
    - Request for ruling sent by national court to CJEU as part of domestic procedure



# Competing legal orders?



- What should a lawyer do? Two scenarios:
  - Purely domestic situation (no EU law involved):
    - Apply to domestic courts, exhaust legal remedies and then go to Strasbourg.
  - Where EU law is involved:
    - Where MS authorities have acted
      - Application to domestic courts (with possible reference to CJEU by domestic courts)
      - If domestic remedies exhausted: Strasbourg
    - Where EU authorities have acted (e.g. competition law)
      - Apply to General Court of EU (possibility of appeal to CJEU)
      - At the moment: no access to Strasbourg

# EU accession to the ECHR

## Original position

- No legal basis for EU accession in EU Treaties, Opinion 2/94
- No basis in ECHR (only open to states)

## NOW: Legal bases for accession

- Lisbon Treaty: Article 6(2) TEU  
“The EU shall accede to the ECHR”
- Protocol No 14 ECHR

## Negotiations since July 2010 (informal working group)

- Draft agreement in October 2011 – finalised by 47+1 in Spring 2013. Now a request for advisory opinion by the EU Court of Justice is pending (Opinion 2/2013), to certify the agreement’s compliance with the Treaties.

# Overview of judicial remedies post EU accession to the Convention

Not many changes in practice

- Usual route will be through the domestic courts
- Example: facts of *Bosphorus* case
  - Airline would have to instigate proceedings against impoundment of its aircraft in domestic court
    - If argument is made that EU Regulation on which impoundment is based is flawed, national court may make a reference to CJEU
  - Once domestic remedies exhausted: application to Strasbourg against the MS
    - EU can come in as co-respondent
    - If CJEU has not yet spoken: will be involved
- Judgment by Strasbourg: end of case

## Co-respondent mechanism and prior involvement

- A. Member States are primarily liable for breaches of the Convention through national measures (Art. 1). However, because national measures might be implementing EU law, the Union can choose to act as **co-respondent**, bearing equal and joint responsibility for the breach before the ECtHR (Art. 3).

What if MS had no discretion when implementing EU law?

- B. When the Union acts as co-respondent, and the Court of Justice has not had the opportunity to pronounce on the validity of the EU measure involved, it shall be granted a reasonable period to submit observations in the case pending before the ECtHR – **prior involvement procedure** under Art. 3(6) of the accession draft Agreement.

Corollary of prior exhaustion. Risk to highlight divergence

# The application of the CFR to national measures

The CFR applies to MS only when they implement EU law (Art. 51(1) CFR)

Agency concept: when MS act as “servants” of the EU, they are bound by the same general principles – these include human rights.

Case-law on general principles clarifies the agency scenario. Not just “implementation” of EU law, but also “derogation” from EU law obligations (compare *ERT* and *Wachauf*).

MS’ power to choose the preferred means of implementation or derogate from EU obligations cannot include the power to violate EU human rights.

# Effect of the application of CFR

- Direct application of the CFR to domestic measures might entail – in case of collision – the disapplication of the domestic norm.
- Immediate protection of human rights in domestic court (as opposed to a reference under Art. 267 TFEU or a complaint to the ECtHR).
- National take on Art. 51(1) CFR – the UK Supreme Court

*The Rugby Football Union v Consolidated Information Services Ltd* [2012] UKSC 55 (21 November 2012), par. 28

*Zagorski & Baze, R (on the application of) v Secretary of State for Business, Innovation and Skills & Anor* [2010] EWHC 3110 (Admin) (29 November 2010).

“the rubric, ‘implementing EU law’ is to be interpreted broadly and, in effect, means whenever a member state is acting ‘within the material scope of EU law.’”

# Effect of the application of CFR



- A possible checklist from *lida* (C-41/11), par. 79:
- “To determine whether [the national measure] falls within the implementation of European Union law within the meaning of Article 51 of the Charter, it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and **whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law**, and also whether there are specific rules of European Union law on the matter or capable of affecting it.”

Problem: Swedish legal system allows the imposition of a double sanction on tax evaders: a pecuniary penalty *and* the launching of criminal prosecution.

Claimant: this goes against the principle of *ne bis in idem*

Legal issue: does the CFR apply to the Swedish measures?

AG: the link with EU law is insufficient

CJEU: VAT is a component of the EU's budget, hence all national measures aimed at deterring tax evasion are implementing EU obligations relating to the collection of VAT



Problem: difference between *aim* and *effect* of a provision

The CJEU appears to confuse the two (par. 28):

the application of the Swedish measures “[**was**] **designed** to penalise the infringement of that directive” and, therefore, “[**intend[ed]**” to implement the obligation to protect the EU’s financial interests imposing deterrent measures.

Problem: the Swedish measures *predate* Sweden’s accession to the EU!

Solution? Charter applies when EU law applies. Easy? Not so quick...

Confirmed in case C-418/11 - *Texdata Software*

# The German Constitutional Court's reaction



In April 2013, the German Constitutional Court reacted to *Fransson*, with a decision that aims at clarifying that the decision of the CJEU cannot be interpreted extensively, and that it cannot apply to the Anti-Terror Database law.

To support its decision and distinguish *Fransson*, the German Court uses an excerpt of the CJEU's judgment *Annibaldi* (C-309/96), where the link between the national measures and the application of EU law was too thin to matter (paras 22-24):

“[the national measure] pursues objectives other than those covered by [EU law]... Accordingly ... national legislation such as the Regional Law ... applies to a situation which does not fall within the scope of Community law.”

# The German Constitutional Court's reaction



The German Constitutional Court warned that an extensive interpretation of *Fransson* would be tantamount to an act *ultra vires* and would not be obeyed by the Court.

Clear case of potential conflict between the highest human-right authorities in the respective legal orders. The principle of conferral must apply also to the protection of human rights, otherwise the CJEU would get universal jurisdiction (like the ECtHR).

Thank you for listening.