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# **The ECHR in the EU**

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## The ECHR in the EU

- The long-term relationship between the European Convention on Human Rights (ECHR) and EU law on the protection of fundamental rights in Europe.
- A common responsibility for fundamental rights in both legal systems.
- The remarkable progress already achieved, further efforts towards achieving harmony are required.
- The main challenge to ensure in both systems the legal certainty and harmony.

## Overview of human rights protection instruments in Europe

- **The UN** (the Universal Declaration of Human Rights 1948; The Genocide Convention 1948, International Covenant on Civil and Political Rights, 1966); International Covenant on Economic, Social and Cultural Rights 1966).
  - **The Council of Europe** (European Convention for the Protection of Human Rights and Fundamental 1950. Individuals, as well as legal persons, may take complaints of human rights violations directly before the court. Jurisdiction all Member States of the European Union ("EU") and potential members).
  - **The European Union** (Each of the original members of the EU had strong human rights protections in their national constitutions or laws. In addition, since each Member State is party to the ECHR, the guarantees of the Strasbourg process are available to its citizens. The Charter of Fundamental Freedoms for the European Union was proclaimed in 2000).

## The EU Charter of Fundamental Rights

The art.52(3) of the Charter is based on two complementary rules:

- the rights same as from the Convention are to be given the same meaning and scope as under the Convention, regardless of their wording and regard is to be had to the jurisprudence of the European Court of Human Rights and the ECJ.
- EU law is free to offer more extensive protection. It helps by formally acknowledging the ECHR standards as minimum EU standards.

Human dignity, liberty, equality, solidarity, citizenship and justice

## **EU membership to the ECHR and ongoing process**

- EU accession to the ECHR a legal obligation
- Opinion of the ECJ and identified problems
- The impact of the Protocol 16 to the ECHR
- The EU Parliament resolution of 12 February 2019
- The CDDH ad hoc negotiation group

## **Relationship between the Charter and the European Convention on Human Rights (ECHR) and cooperation between ECJ and ECtHR**

- The ECJ and the ECtHR have been seeking to adjust to each other's case law for long time.
- In the last couple of years, there is a rapidly growing number of issues of relevance to both legal systems.
- Both European courts are aware that any discrepancies in the interpretation of the same fundamental rights would be detrimental for citizens and Member States.
- While a fair amount of harmonisation between the Convention and EU law has been achieved by the European courts, some standards remain unharmonised.

# The European Court of Justice

- As early as 1975 the ECJ ruled that the Convention had “special significance” among the legal sources to be taken into account when identifying the fundamental rights applicable under EU law (*Rutili v Ministre de l’Interieur* (36/75) [1975] E.C.R. 1219 ECJ).
- Since that time, the ECJ has been relying on this doctrine, later reinforced by art.6 of the Treaty on European Union (TEU).
- The result today: an impressive list of judgments illustrating the ECJ’s commitment to have regard to the Convention and adhere to Strasbourg’s interpretation when applying fundamental rights. The rights most often referred to in this context include the right to a fair trial, the right to respect for private and family life, the right to freedom of expression and the right to protection of property.

# The European Court of Human Rights

- In the years behind, the ECtHR has shown a concern about harmony with EU law and ECJ jurisprudence.
- The most comprehensive contribution by the ECtHR towards maintaining harmony with the jurisprudence of the ECJ came with the judgment in the landmark case of *Bosphorus v Ireland*, which established a presumption of “equivalent protection”.
- There is an increasing number of judgements drawing on EU legal sources, sometimes even in support of changes to the case law of the ECtHR.

## In harmony with EU law and ECJ jurisprudence

- **DH v Czech Republic** (“reliable and significant” statistics could constitute prima facie evidence of indirect discrimination),
- **Maslov v Austria** (support in ECJ jurisprudence for considering that it was an applicant’s actual expulsion, rather than the expulsion order, that had to pass the Convention test),
- **Zolotukhin v Russia** (the notion of “offence” within the meaning of art.4 of Protocol No.7 to the ECHR (non bis in idem) was henceforth to be understood as referring only to the facts underlying an offence),
- **Scoppola v Italy** (had regard to art.49(1) of the EU Charter on Fundamental Rights and relevant ECJ jurisprudence when ruling that art.7(1) ECHR implicitly imposed to retrospectively apply the more lenient criminal law in pending proceedings)
- **Micallef v Malta** (relied on ECJ case law in reaching the conclusion that art.6 ECHR would henceforth apply to injunction proceedings initiated with a view to taking interim measures, to the extent that those measures determine civil rights and obligations within the meaning of the provision)
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## The presumption of equivalence

Given the ECJ's commitment to following Strasbourg case law, to date no "manifest deficiency" has been identified by the ECtHR.

With the EU Charter playing an increasingly important role in ECJ the emergence of such a "manifest deficiency" becomes ever more unlikely,

The Charter itself adopts the Convention as the EU minimum standard.

In practice it may be important to clarify the scope of the presumption of equivalence. Several criteria come into play:

- First, the Convention must be applicable *ratione personae* to the State concerned.
- Second, a question arises concerning the amount of discretion which the ECJ sometimes leaves to the domestic courts regarding the implementation of preliminary rulings.
- Third, by limiting the scope of the Bosphorus judgment to Community law in the narrow sense, to the so-called first pillar, the scope of the presumption is also limited.
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## Standards to harmonise

There are still areas where such harmonisation has yet to take place:

- the privilege against self-incrimination
- the detention of asylum seekers.

The number of “unharmonised” areas remain modest and they raise the question how any differences in fundamental rights standards can be justified;

## **The privilege against self-incrimination**

- The two European courts are in broad agreement about the need to respect the privilege against self-incrimination as an element of the right to a fair trial.
- They disagree on whether the privilege should cover statements which are not incriminating by themselves, such as exculpatory remarks or information confined to questions of fact.
- Under the Convention such statements are covered by the privilege, the ECtHR considering that even if they can be regarded as non-incriminating when they are being made, they might still be used against the accused at a later stage of the proceedings and serve as a basis for his conviction. Consequently, an accused cannot be forced to make such statements and their use in criminal proceedings would give rise to a breach of art. 6.
- Under EU law the privilege is particularly relevant in the context of investigations into breaches of EU competition law by private companies. However, in contrast to the Strasbourg case law, the privilege is limited to statements which directly involve an admission of guilt.

## Detention of asylum seekers

- In the case of *Saadi v United Kingdom* the ECtHR was called to decide whether asylum seekers could lawfully be detained for the purpose of speeding up the processing of their application.
- The applicant had been detained for seven days, even though he had always reported as required by the authorities. The ECtHR after examining the facts of the case reached the conclusion that, “given the difficult administrative problems with which the UK was confronted during the period in question, with an escalating flow of huge numbers of asylum-seekers... it was not incompatible with Article 5 § 1(f) of the Convention to detain the applicant for seven days in suitable conditions to enable his claim to asylum to be processed speedily”.
- This is in conflict with the EU directive on minimum procedural standards for granting and withdrawing refugee status, which provides inter alia that “Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum”.

# Protection of foreigners against expulsion

- The protection of foreigners against expulsion has developed into a vast and complex area.
- Under EU law the status and rights which a person seeking protection from expulsion is entitled to claim will vary according to whether this person is an EU citizen, a person who has exercised his right of freedom of movement, a family member of one of the former categories or none of the above.
- The decisive consideration when assessing whether protection from expulsion should be granted under art.8 ECtHR will be the extent of their social integration in the host country. Under the EU law the specific legal category to which a foreigner belongs will usually be decisive for determining the protection against expulsion to which he is entitled, but on the other side any foreigner can qualify for protection under art.8
- Differences exist between the two systems as regards the procedural safeguards against expulsion. On the one hand, the ECtHR declined to apply art.6 of the ECHR to expulsion procedures, considering that, “decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant’s civil rights or obligations or of a criminal charge against him, within the meaning of art.6 § 1 of the Convention”.
- On the other hand, however, in contrast to the ECtHR approach, under EU law an increasing number of safeguards, comparable to those laid down in art.6 ECHR, are being provided in expulsion procedures.

## Non bis in idem

- Over the years has given rise to different formulations and interpretations to non bis in idem.
- In the Convention, non bis in idem is laid down in art.4(1) of Protocol No.7. The importance attaching to the principle is reflected in art.4(3) which elevates non bis in idem to one of the few rights from which derogation is not allowed under art.15 ECHR.
- The art.50 of the EU Charter on fundamental rights uses roughly the same wording, except for the limitation to criminal convictions within the same country.
- Under current EU law, non bis in idem plays a role in two different areas, each regulated by different provisions. The first area is **competition law** and in facilitating **the free movement of persons** in the area of Freedom, Security and Justice, notably through art.54 ECHR implementing the Schengen Agreement.

## Concluding remarks:

- The fundamental rights go to the basic needs of every human being and they should be enjoyed in the same way by the largest possible number of people.
- The fundamental nature of fundamental rights has to do with their universality, but .... universality is not uniformity.
- The ECHR and the EU Charter allow higher standards in human rights protection.
- Flexibility can be a way to varying situations, by the margin of appreciation allowed to domestic authorities.
- Small number of differences currently existing between the two European legal systems.
- Varying fundamental rights standards between two European legal systems is covered either by the principle of subsidiarity underlying the ECHR or the supremacy of EU law in relation to domestic law.
- No formal hierarchy between the ECtHR and EU law.
- There is a common responsibility of European legislatures and courts to preserve the fundamental nature of fundamental rights.