



Speakers' Contributions

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION IN PRACTICE SEMINAR FOR CIVIL JUDGES



416DT13 Sofia, 18-19 February 2016



This series of seminars is organised with the financial support of the specific programme 'Fundamental Rights and Citizenship' JUST-2013-FRAC-AG of the European Commission.

The Charter of Fundamental Rights of the EU in Practice

Seminar for civil judges

Sofia, 18-19 February 2016

Speakers' contributions 416DT13

Yordan Konstaninov

- The Role of the Charter of Fundamental Rights of the European Union in the EU Legal Framework and the National Legal Systems

Filippo Fontanelli

- The scope of application and interpretation of the Charter in domestic legal proceedings
- Overview of key rights and principles in Titles II and III of the Charter

Sophia Koukoulis-Spiliotopoulos

- Case studies on the scope of application of the Charter (interactive exercise)

Donka Chakarova

- The right to an effective remedy and to a fair trial

Anna Śledzińska-Simon

- Workshop on the application of the Charter of Fundamental Rights of the European Union/Case studies

Johan Callewaert

- Fundamental Right and their judges in Europe
- The Charter of Fundamental Rights and the European Convention of Human Rights: complementing or competing systems of fundamental rights protection in Europe?



This publication has been produced with the financial support of the specific programme 'Fundamental Rights and Citizenship' JUST-2013-FRAC-AG of the European Commission. The contents of this publication are the sole responsibility of ERA and can in no way be taken to reflect the views of the European Commission.



NATIONAL INSTITUTE OF
JUSTICE



The Role of the Charter of Fundamental Rights of the European Union in the EU Legal Framework and the National Legal Systems

Yordan Konstantinov, judge in the Supreme
Administrative Court

THE PRESENTATION WILL COVER:

- Introduction to the Charter of Fundamental Rights of the European Union
- The Charter's significance for the national legal systems
- The system for protection of fundamental rights
- Legal value of the Charter (Article 6 TEU)
- EU means in case of violation of fundamental rights

Some background

- Magna Carta
- The Universal Declaration of Human Rights
- The European Convention on Human Rights

Background of the Charter and coming into being

- Need to legally regulate the fundamental rights in the framework of the process of integration
- Need of a proper EU mechanism for effective protection of the rights
- Responding to substantial legal issues of the European integration

Creating and applying the Charter prior to the Lisbon Treaty

- Drafting the Charter
- Proclamation of the Charter
- Application of the Charter

The Charter and the Lisbon Treaty

- Signing the Lisbon Treaty
- Ratifying the Lisbon Treaty

Content of the Charter

- [The Charter of Fundamental Rights](#) contains a preamble and 54 articles arranged in seven titles:
 - Title I: **Dignity**
 - Title II: **Freedom**s
 - Title III: **Equality**
 - Title IV: **Solidarity**
 - Title V: **Citizen's Rights**
 - Title VI: **Justice**
 - Title VII: **General Provisions.**

Application of the Charter

- Application by the EU institutions
- Relation to the European Convention on Human Rights
- Protocol No. 30 to the Treaties on the application of the Charter to Poland and the United Kingdom restricts the interpretation of the Charter by the Court of Justice of the EU and the national courts of these two States, in particular in relation to the rights enshrined in Title IV Solidarity.

References for preliminary rulings to the CJEU

- Commentary of particular preliminary rulings
- Opinions of Advocates General
- Acts of the Court of Justice of the European Union

The scope of application and interpretation of the Charter in domestic legal proceedings

Dr Filippo Fontanelli
Sofia – 18 February 2015
10:15-11:15



The University of Edinburgh
Edinburgh Law School

Outline

- Limits and scope of Charter's rights
- The riddle of the "implementation of EU law"
- The direct effect of Charter's rights
- The function of the explanations

Title VII of the Charter

Field of Application – Art. 51

- *Ratione materiae, ratione personae*

Interpretation of rights and principles – Art. 52

- What is the normative content of a Charter right?

Level of protection – Art. 53

- Coordination with ECHR and domestic rules

Prohibition of abuse of rights (circular) – Art. 54

The scope of application of the CFR

Art. 51

The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. **[i.e., limited subjective application]** They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties. **[conferral]**

Implementation of EU law?

Important: when the Charter applies to State measures, it can prevail over them and cause their disapplication (by virtue of the primacy of EU law, since *Costa v Enel*).

When is the MS “implementing” EU law?
Same doctrines used for the application of general principles (*ERT*, *Wachauf*): when the State measures falls “within the scope” of EU law, by way of *application* or *derogation*.

***Fransson (2013)* – zoom in**

Swedish law provides for the applicability of (both) fiscal and criminal sanctions to tax crimes.

This duplication might breach the principle of *ne bis in idem* (Article 50 of the Charter).

The question is: **are the Swedish measures implementing EU law?**

Otherwise, the Charter cannot apply.

(continued)

24 ... tax penalties and criminal proceedings ... are connected in part to breaches of ... obligations to declare VAT

26 ... Article 325 TFEU obliges the Member States to counter illegal activities affecting the financial interests of the EU [NB: VAT finances the EU's budget]

27 ... It follows that tax penalties and criminal proceedings for tax evasion ... **constitute implementation ... of EU law**, for the purposes of Article 51(1) of the Charter

Too wide? Art. 51(1) CFR

Generic checklist (see *Siragusa* 2014):

24: the concept of ‘implementing Union law’, as referred to in Article 51 of the Charter, requires a **certain degree of connection** above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other.

Is the measures intended to implement EU law? What is its nature? Does it have other goals than those supported by EU law? Does EU law regulate specifically the subject-matter of the measure?

***Delvigne* C-650/13**

French law provides that conviction for certain crimes entails the loss of the right to vote. This causes a restriction on convicted people's right to vote at European elections.

Does this mean that the French measures fall within the scope of EU law, under Art. 51(1) of the Charter?

AG Opinion of 4 June 2015

91. The situation of the loss of the right to vote in elections to the European Parliament ... as a result of the French law which, ...pursuant to EU law, governs elections to the European Parliament — by reference to the national general electoral law ..., which refers in turn to the relevant criminal law ... — is the consequence of a law adopted **in order to implement EU law.**

Which EU law?

Art. 223(1) TFEU - The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its Members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States. [**not acted upon**]

Doesn't matter: French law implements EU law even if the matter is not 'entirely determined by EU law' [**stretching *Melloni***]

Court of Justice, 6 October 2015

EU Law:

- 1976 Act: elections shall be by universal suffrage, and the procedure shall be governed by national provisions.

33. ...a Member State which, in implementing its obligation under ... the 1976 Act, makes provision in its national legislation ... to exclude Union citizens who... were convicted of a criminal offence ... **must be considered to be implementing EU law**

Article 41

Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time **by the institutions and bodies of the Union.**

This right includes: the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; the obligation of the administration to give reasons for its decisions.

Liability and right to obtain answers.

Coordination with Art. 51(1)?

Express reference to EU institutions, are MS authorities cannot be bound, not **even when they implement EU law?** (cfr. Art. 296 TFEU)

No, see C-227/11 *M*: “the right...of the applicant for asylum to be heard must apply fully to the procedure in which **the competent national authority** examines an application for international protection pursuant to rules adopted in the framework of the Common European Asylum System.”

(continued)

It seems to me neither consistent nor in accordance with the case-law of the Court for the wording of Article 41 of the Charter to allow the introduction of an exception to the rule laid down in Article 51... (C-249/13 ***Boudjlida* opinion**)

Accordingly, where... a Member State implements EU law, the requirements pertaining to the right to good administration... are applicable in a procedure for granting subsidiary protection, such as the procedure in question in the main proceedings, which is conducted by the competent national authorities. (C-604/12 ***H.N.* judgment**)

Cases of derogation

No direct obligations flowing from EU law, but national measures entail a derogation → the Charter binds them.

Example: *Pfleger* (C-390/12):

Austrian law sanctioning the use of unauthorised gaming machine **derogates** from the free circulation rules in the Treaty → Artt. 15-17 of the Charter must be respected.

Article 52: guidelines on interpretation

- Proportionality (par. 1)
- Duty to defer to the interpretation of equivalence principles deriving from ECtHR and common constitutional traditions (par. 3 and 4)
- Principles can only be used to interpret and review the legality of implementing acts (par. 5) → **[no direct effect?]**
- Explanations are authoritative (par. 7)

The Charter and the ECHR

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

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).

The explanations ... shall be **given due regard** by the courts of the Union and of the Member States.

zoom-in: *WebMindLicenses* C-419/14 Court of Justice, 15 December 2015

70. Article 7 of the Charter, concerning the right to respect for private and family life, contains rights which correspond to those guaranteed by Article 8(1) of the ECHR and **...is thus to be given the same meaning and the same scope as Article 8(1) of the ECHR**, as interpreted by the **case-law** of the ECtHR.

71. ...since interception of telecommunications constitutes interference with the exercise of the right guaranteed by Article 8(1) of the ECHR (see, ... *Klass and Others v. Germany*; *Malone v. the United Kingdom*; *Kruslin v. France* and *Huvig v. France*; and *Weber and Saravia v. Germany*), it also constitutes a limitation on the exercise of the corresponding right laid down in Article 7 ...

Article 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.**

***Melloni* (C-399/11)**

Is the Charter a “minimum standard” that Member States can increase? Not always.

Spanish authorities refused to execute an European Arrest Warrant from Italy, because the suspect had been tried *in absentia* in Italy.

Wrong: despite Article 53 of the Charter, a Member State cannot breach EU law (like the EAW Framework directive) invoking domestic standards.

zoom-in *Melloni*

56 [according to Spain, Art 53 authorizes a] MS to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law.

58 That interpretation of Article 53 of the Charter would **undermine the principle of the primacy of EU law**

64 ...Article 53 must be interpreted as **not allowing a Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State**, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.

German Constitutional Court

Order of 15 December 2015 - 2 BvR 2735/14, Facts similar to *Melloni*.

“...according to the jurisprudence of the CJEU, the EAW Framework Decision exhaustively deals with extraditions following sentences rendered in absence of the requested person; **this, however, does not relieve the [German court] from its obligation to ensure that the minimum procedural rights laid down in [the Constitution],** are protected in the context of an extradition based on a EAW”

Direct effect?

The question of direct effect goes back to ***Van Gend en Loos***: not just a matter of source, but also of content of the norm.

Hence, Treaty norms and general principles have been considered to have direct effect, insofar as they are clear and bestow unequivocally a right on the individual without need for implementing measures (*Mangold, Defrenne*)

Charter's rights?

Source of primary law. The test of direct effect should apply normally. BUT, remember Art. 52(5) CFR: **no direct effect for principles.** [Controversial distinction](#)

“[principles] do not...give rise to direct claims for positive action by the Union's institutions or Member States authorities.”

Horizontal direct effect?

Unimplemented Directives do not have it, whereas other norms of primary and secondary law **can** have it (*Bosman, Mangold, Laval*).

Charter's rights? Why not? But see *Association de Mediation Sociale*, Case C-176/12. The requisites of direct effect must be met.

AMS (zoom in)

...Art. 27 of the Charter...provides that workers must...be guaranteed information and consultation in the cases and under the conditions provided for by EU law and national laws and practices.

...for this article to be fully effective, it must be given more specific expression in EU or national law.

...the facts of the case may be distinguished from those which gave rise to *Kücükdeveci* in so far as the principle of non-discrimination on grounds of age ... is sufficient in itself to confer on individuals an individual right which they may invoke as such.

... Art. 27 CFR cannot, as such, be invoked in a dispute ... in order to conclude that the national provision which is not in conformity with Directive 2002/14 should not be applied.

...since [Art. 27] by itself **does not suffice to confer on individuals a right which they may invoke as such**, it could not be otherwise if it is considered in conjunction with that directive.

Praesidium's explanations

Referred to in Art. 52(7) CFR and Art. 6(1) TEU. Authoritative guidelines. Useful to identify sources of inspiration and relevant precedents. Increasingly superseded by new case law.

Also useful to draw the distinction between rights and principles, at least tentatively.

Thanks for listening!

Overview of key rights and principles in Titles II and III of the Charter

Dr Filippo Fontanelli
Sofia – 18 February 2016
14:30 – 15:30



The University of Edinburgh
Edinburgh Law School

Outline

- Introduction: Structure of the Charter
- Overview of the rights guaranteed in Titles II, III
 - Title II: freedoms
 - Title III: equality
- Interpretation of the rights in light of the ECHR, Art. 52 (3)
- Limits to these rights: Art. 52 (1)

Application in the case law of the CJEU

Outline

- Introduction: Structure of the Charter
- Overview of the rights guaranteed in Titles II, III

Title II: freedoms

Article 7 (private and family life)

Article 8 (protection of personal data)

Articles 16-17 (right to property and freedom of business)

Title III: equality

Article 24 (rights of the child)

- Interpretation of the rights in light of the ECHR, Art. 52 (3)
- Limits to these rights: Art. 52 (1)

Application in the case law of the CJEU

Structure of the Charter

Preamble

Title I: Dignity

Title II: Freedoms

Title III: Equality

Title IV: Solidarity

Title V: Citizens' Rights

Title VI: Justice

Title VII: General Provisions Governing the
Interpretation and Application of the Charter

Structure of the Charter

Preamble

Title I: Dignity

Title II: Freedoms

Title III: Equality

Title IV: Solidarity

Title V: Citizens' Rights

Title VI: Justice

Title VII: General Provisions Governing the
Interpretation and Application of the Charter

Title I: Dignity

Article 1: Human dignity

Article 2: Right to life

Article 3: Right to the integrity of the person

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

Article 5: Prohibition of slavery and forced labour

Title II: Freedoms

Article 6: Right to liberty and security

Article 7: Respect for private and family life

Article 8: Protection of personal data

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

Article 10: Freedom of thought, conscience and religion

Article 11: Freedom of expression and information

Article 12: Freedom of assembly and of association

Title II: Freedoms

Article 13: Freedom of the arts and sciences

Article 14: Right to education

Article 15: Freedom to choose an occupation and right to engage in work

Article 16: Freedom to conduct a business

Article 17: Right to property

Article 18: Right to asylum

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

Title III: Equality

Article 20 Equality before the law

Article 21 Non-discrimination

Article 22 Cultural, religious and linguistic diversity

Article 23 Equality between women and men

Article 24 The rights of the child

Article 25 The rights of the elderly

Article 26 Integration of persons with disabilities

Limitations to the rights

Art. 52(1) of the Charter:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. **Subject to the principle of proportionality**, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Same limitation provision for all rights

The test

A **restrictive measure** is justified if:

- Provided for by law
- Genuinely meets objective of a general interest or protects another right
- Necessary (no better measure is available)
- Proportionate (not excessively restrictive)
- Respects essence of the right

Right to Privacy and Data Protection (Title II)

Article 7 of the Charter:

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8:

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

Right to private and family life

Relevance of Article 7:

1. Child custody/abduction cases: *McB v L.E.* (C-400/10 PPU)

- Should an unmarried father's right to custody be automatic?
- Court: Art 7 **right of father** to be balanced with **right of child** under Art 24 and **right of mother** to free movement under the Treaties

2. Search of business premises

- Are they protected as 'home'? Probably, see C-94/00 (*Roquette-Frères*)

zoom-in: *WebMindLicenses* C-419/14 Court of Justice, 15 December 2015

To establish a tax abuse, can the authorities use information gathered unbeknownst to the person (e.g., intercepted calls and emails)?

Possible breach of Articles 7 and 8 CFR, because ECtHR considered these acts as a restriction of privacy.

Necessary to run the test of proportionality.

zoom-in *WebMindLicenses*

70. the measures ... **must not go further than is necessary** to attain the objectives of ensuring the correct levying and collection of VAT ...

76. [the measures] have an aim which meets an **objective of general interest** recognised by the EU.

90. [the measures are lawful] provided that the obtaining of that evidence in the context of the criminal procedure and its use in the context of the administrative procedure **do not infringe the rights guaranteed by EU law** [of defence, of effective remedy] (Articles 41, 47, 48 CFR)

Protection of personal data

Challenges to EU legislation:

- Data Retention Directive 2006/24/EC: *Digital Rights Ireland* joined cases C-293 and 594/12. Directive annulled under Art. 7 and 8 of the Charter (better: under Art. 52(1) CFR)

- Access to passenger name records?

- Case *Scarlet* (C-70/10): Art. 8 used as a competing interest in intellectual property case (peer to peer online exchange of copyrighted material)

Similar in UK: *Rugby Football Union v Viagogo* [2012] UKSC 55

Google Spain (2014)

Interpretation of secondary law (Directive 95/46) in light of the Charter. Interests and rights involved:

- the **individual's** right “to oblivion” (Art. 7-8 CFR)
- **Google's** economic interest (Art. 15-17 CFR)
- the right to information of **internet users** (Art. 11 CFR)
- “particular reasons” of **public** interest.

How is it possible to **balance** them all?

Google Spain (2014) – zoom in

97: ... the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available ... **those rights override** as a rule, not only the economic interest of the operator of the search engine but also **the interest of the general public in finding that information** ... However, that would not be the case if it appeared, for particular reasons ... **that the interference with his fundamental rights is justified by the preponderant interest of the general public** in having ... access to the information in question.

Title II

Article 13: Freedom of the arts and sciences

Article 14: Right to education

Article 15: Freedom to choose an occupation and right to engage in work

Article 16: Freedom to conduct a business

Article 17: Right to property

Article 18: Right to asylum

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

Freedom to conduct a business

Article 16

The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

McDonagh v RyanAir (2013)

Attempt to construe Regulation 261/2004 (the “charter” of passengers’ rights) in light of Article 16 of the Charter.

Ryanair invoked the release of carriers’ liabilities in the case of ‘super-extraordinary circumstances’ (Icelandic volcanic ash cloud in 2010), an option not contemplated in the Regulation.

McDonagh v RyanAir – zoom in

63 ... the referring court mentions Articles 16 and 17 of the Charter. However, it is also necessary to take account of **Article 38** thereof which, like Article 169 TFEU, seeks to ensure a high level of **protection for consumers**, including air passengers, in European Union policies.

64 It follows [that the applicable provision of EU law], must be considered to comply with the requirement intended **to reconcile the various fundamental rights involved and strike a fair balance between them.**

Right to Property

Article 17

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

2. Intellectual property shall be protected.

(continued)

Potentially far-reaching, whenever property is at stake (e.g. payment of a fine, etc) – contrast with ECHR (Protocol 1)

- Cf. *Ryanair* case: Art 17 was invoked with Art 16

Right to intellectual property: *Scarlet v SABAM* C-70/10

Facts: Application for injunction by company representing authors, composers, etc. (SABAM) that Scarlet (internet service provider) should block activities of its users which infringe copyright (in particular peer-to-peer sharing of music, etc.)

Question: Does EU law (five Directives) interpreted in light of CFR preclude the court from making such an injunction?

***Scarlet v SABAM* – zoom in**

Rights: **Art. 17(2)** (IP holders) and **Art. 16** (*Scarlet*) and **Art. 8,11** (users)

47 The ... filtering system involves monitoring all the electronic communications made through the network of the ISP concerned in the interests of those rightholders. ... that monitoring has no limitation in time, is directed at all future infringements and is intended to protect not only existing works, but also future works that have not yet been created at the time when the system is introduced.

49 ... the contested filtering system is to be regarded as not respecting **the requirement that a fair balance be struck** between, on the one hand, the protection of the intellectual-property right enjoyed by copyright holders, and, on the other hand, that of the freedom to conduct business enjoyed by operators such as ISPs.

Title III: Equality

Article 20 Equality before the law

Article 21 Non-discrimination

Article 22 Cultural, religious and linguistic diversity

Article 23 Equality between women and men

Article 24 The rights of the child

Article 25 The rights of the elderly

Article 26 Integration of persons with disabilities

Title III: Equality

Article 20 Equality before the law

Everyone is equal before the law.

Article 21 Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Relevance: Link with Equality Directives based on Art. 19 TFEU – secondary legislation construed in light of Art 21 CFR → Case C-236/09 *Test-Achats*

Title III: Equality

Article 23 Equality between women and men

Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Relevance:

- Similar to Art. 157 TFEU
- Cases *Elbal Moreno* (C-385/11) and *Roca Alvarez* (C-104/09)

The rights of the child (Title III)

1. Children shall have the right to such protection and care as is necessary for their well-being.

They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Relevance: custody and abduction cases

- *McB* (C-400/10 PPU): Court took child's best interest into account

McB (zoom-in)

Irish law attributes custody rights, by default, to the mother. This is compatible with EU secondary law. Is it also in compliance with Article 24 CFR?

62 [Irish law] enables the national court with jurisdiction to take a decision on custody of the child, and on rights of access to that child, **while taking into account all the relevant facts**, such as those mentioned by the referring court, and in particular the circumstances surrounding the birth of the child, the nature of the parents' relationship, the relationship of the child with each parent, and the capacity of each parent to take the responsibility of caring for the child. **The taking into account of those facts is apt to protect the child's best interests**, in accordance with Article 24(2) of the Charter.

Thank you for listening.

**The Charter of Fundamental Rights of the European Union
in practice**

ERA 18-19 February 2016

Sofia

**Case studies on the scope of application of the Charter
(interactive exercise)**

Sophia Koukoulis-Spiliotopoulos

Attorney and Counsellor at Law

We will discuss three cases in the light of the general provisions of Articles 51(1) (Charter's field of application regarding Member States) and 52(1) (limitations allowed) of the Charter, and where relevant of Article 52(3) (Charter-ECHR), in order to find out whether and to what extent certain substantive provisions of the Charter apply to these cases.

We will also examine whether and to what extent the "explanations" on each provision of the Charter must be taken into account, in accordance with Article 6(1), 3rd subparagraph, TEU ("*The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter [...] and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions*").

I. The application of Article 50 of the Charter (*non bis in idem* principle)

Article 50

Right not to be tried or punished twice in criminal proceedings for the same criminal offence

"No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."

Explanation on Article 50

Article 4 of Protocol No 7 to the ECHR reads as follows:

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and the penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention."

The '*non bis in idem*' rule applies in Union law (see, among the many precedents, the judgment of 5 May 1966, Joined Cases 18/65 and 35/65 *Gutmann v Commission* [1966] ECR 149 and a recent case, the decision of the Court of First Instance of 20 April 1999, Joined Cases T-305/94 and others *Limburgse Vinyl Maatschappij NV v Commission* [1999] ECR II-931). The rule prohibiting cumulation refers to cumulation of two penalties of the same kind, that is to say criminal-law penalties.

In accordance with Article 50, the '*non bis in idem*' rule applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States. That corresponds to the *acquis* in Union law; see Articles 54 to 58 of the Schengen Convention and the judgment of the Court of Justice of 11 February 2003, C-187/01 *Gözütok* [2003] ECR I-1345, Article 7 of the Convention on the Protection of the European Communities' Financial Interests and Article 10 of the Convention on the fight against corruption. The very limited exceptions in those Conventions permitting the Member States to derogate from the '*non bis in idem*' rule are covered by the

horizontal clause in Article 52(1) of the Charter concerning limitations. As regards the situations referred to by Article 4 of Protocol No 7, namely the application of the principle within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR.

The case

1. The plaintiff was convicted by final judgment of a penal court of a Member State (MS A) to incarceration for drug trafficking (illegal purchase, possession, trafficking and importation in State A of a certain quantity of drugs). He was pursued and convicted in another Member State (MS B) for the same act, regarding the same kind and quantity of drugs. He appealed against the latter judgment to the Supreme Penal Court of MS B.

2. The Penal Code of MS B contained the principle of *non bis in idem* regarding conviction or acquittal in any foreign State. However, certain criminal acts, among which was drug trafficking, were excepted. In these cases, the prosecution in MS B was not excluded, but the sentence already served in the country where the perpetrator was convicted for the first time was deducted from the sentence eventually inflicted in MS B.

3. Furthermore, MS B had entered a reservation to Article 54 of the Schengen Convention which contained the *non bis in idem* principle, as allowed by Article 55 of that Convention. According to the reservation, MS B was not bound by Article 54 of the Convention regarding drug trafficking.

4. The plaintiff invoked Article 50 of the Charter. He submitted that this provision embodies a general principle of EU law elaborated by the ECJ before the Charter entered into force. It also constitutes a particular expression of the more general EU law principle of "mutual recognition of judgments and judicial decisions" enshrined in Article 82 TFEU. He admitted that Paragraph 2 of Article 82 TFEU requires that the European Parliament and the Council adopt measures for the implementation of the principle of mutual recognition. He argued, however, that there is no need for executive measures aiming to implement the *non bis in idem* principle, as Article 50 of the Charter is clear and complete; the prerequisites for its application can be deduced from its text. Therefore, Article 50 of the Charter is directly applicable and produces direct effects in the domestic legal order.

5. Moreover, the plaintiff argued that the reservations eventually entered by Member States to Article 54 of the Schengen Convention are not valid anymore. This is so because Article 50 of the Charter does not allow exceptions, as the Schengen Convention does, while the conditions under which Article 52(1) of the Charter allows limitations are not satisfied regarding this fundamental right. In particular, the exception provided by the Penal Code of MS B regarding drug trafficking is not necessary and does not genuinely relate to an objective of general interest. Indeed, the criminal punishment of drug trafficking, in accordance with the legislation and the views prevailing in MS B, cannot be considered a necessary objective of general interest recognised in the EU.

Discussion:

- Would State B in this case "implement EU law", within the meaning of Article 51(1) of the Charter, as interpreted by the CJEU, i.e. would it act "*within the scope of EU law*"?
- Is there a connecting factor with EU law?
- Might other Charter provisions apply to the case?
- Can the explanations of Articles 50, 51 and 52 of the Charter be given "*due regard*", in accordance with Article 6(1), 3rd subparagraph, TEU?

- Do the explanations on Article 50 help?
- What should the decision of the Supreme Court of MS B be?

Relevant ECJ case law: C-617/10 *Åkerberg Fransson* [ECLI:EU:C:2013:105](#); C-144/04 *Mangold* [2005] ECR I-9981; C-555/07 *Küçükdeveci* [2010] ECR I-365; C-176/12 *Association de médiation sociale* [ECLI:EU:C:2014:2](#).

II. The application of Article 21 of the Charter (principle of non-discrimination)

Article 21

Non-discrimination

"1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited."

Explanation on Article 21

Paragraph 1 draws on Article 13 of the EC Treaty, now replaced by Article 19 of the Treaty on the Functioning of the European Union, Article 14 of the ECHR and Article 11 of the Convention on Human Rights and Biomedicine as regards genetic heritage. In so far as this corresponds to Article 14 of the ECHR, it applies in compliance with it.

There is no contradiction or incompatibility between paragraph 1 and Article 19 of the Treaty on the Functioning of the European Union which has a different scope and purpose: Article 19 confers power on the Union to adopt legislative acts, including harmonisation of the Member States' laws and regulations, to combat certain forms of discrimination, listed exhaustively in that Article. Such legislation may cover action of Member State authorities (as well as relations between private individuals) in any area within the limits of the Union's powers. In contrast, the provision in Article 21(1) does not create any power to enact anti-discrimination laws in these areas of Member State or private action, nor does it lay down a sweeping ban of discrimination in such wide-ranging areas. Instead, it only addresses discriminations by the institutions and bodies of the Union themselves, when exercising powers conferred under the Treaties, and by Member States only when they are implementing Union law. Paragraph 1 therefore does not alter the extent of powers granted under Article 19 nor the interpretation given to that Article.

Paragraph 2 corresponds to the first paragraph of Article 18 of the Treaty on the Functioning of the European Union and must be applied in compliance with that Article.

The case

1. The legislation of a Member State reduced the minimum wage for workers below the age of 25 to 68 % of the national minimum wage (*sub-minima*). A 23 year old worker claimed equal pay with his over 25 year old colleagues who were performing the same work or work of equal value in the same private undertaking. He invoked the EU principle of non-discrimination on grounds of age. He recalled that according to ECJ case law, this principle, which is enshrined in Article 21 of the Charter and is given specific expression in Directive

2000/78/EC,¹ has vertical and horizontal effect.² The Directive prohibits any discrimination in 'employment and working conditions, including dismissals and pay' (Articles 2(2), 3(1)(c)). He further argued as follows, also invoking ECJ case law:

2. Directive 2000/78 (Article 6(1)) allows differences of treatment on grounds of age 'if they are objectively justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and the means of achieving that aim are appropriate and necessary'. According to the ECJ, the means must 'genuinely reflect a concern to attain the aim in a consistent and systematic manner'³.

3. Allowing justifications is a mere option for Member States; the relevant provisions must be strictly interpreted as they constitute an exception to a fundamental right.⁴ There can be no justification where age is 'the sole criterion' of differentiation.⁵ Moreover, Article 157 TFEU (equal pay for men and women) which also applies to other grounds of discrimination in pay besides gender,⁶ allows no derogations.⁷

4. The case reached the national Supreme Court. The claimant contended that the issue fell within the scope of EU law and requested a preliminary reference to the ECJ. The Supreme Court ruled that the Charter did not apply, and it implicitly rejected the request for a preliminary reference.

Discussion:

- Does the above national legislation constitute "implementation" of EU law within the meaning of Article 51(1) of the Charter, i.e. does it fall "within the scope of EU law"?
- Is there a connecting factor with EU law?
- Can the courts give "due regard" to the explanation on Article 21 of the Charter, in accordance with Article 6(1), 3rd subparagraph, TEU?
- Does this explanation reflect ECJ case law?
- What should the decision of the national Supreme Court be? Should it make a preliminary reference to the ECJ?

Relevant ECJ case law: the case law mentioned in the footnotes and C-617/10 *Åkerberg Fransson* [ECLI:EU:C:2013:105](#); *Association de médiation sociale* [ECLI:EU:C:2014:2](#).

Regarding the request for a preliminary reference: C-283/81 *CILFIT* [1982] ECR 3415; ECtHR *Ullens de Schooten & Rezek v. Belgium*, 20.9.2011 (Applications Nos. 3989/07, 38353/07), paras. 58-62; *Dhahbi v. Italy*, 8.4.2014 (Application No. 17120/09), paras. 31-34.

European Committee of Social Rights: Decision on the merits of 23.05.2012, Complaint No. 66/2011, *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece*: The impugned legislation constitutes a violation of the European Social Charter (ESC).

¹ Directive 2000/78/EC (equal treatment in employment and occupation) OJ L 303/16, 2.12.2000.

² ECJ C-144/04 *Mangold* [2005] ECR I-9981; C-555/07 *Kücükdeveci* [2010] ECR I-365.

³ ECJ C-476/11 *HK Danmark* [ECLI:EU:C:2013:590](#); C-159-160/10 *Fuchs* [2011] ECR I-6919.

⁴ ECJ C-388/07 *Age Concern* [2009] ECR I-1569; C-447/09 *Prigge* [2011] I-8003.

⁵ ECJ C-144/04 *Mangold* [2005] ECR I-9981; C-297-298/10 *Hennigs* [2011] ECR I-7965.

⁶ ECJ C-67/06 *Maruko* [2008] ECR I-1757.

⁷ Well established ECJ case law since C-262/88 *Barber* [1990] ECR I-1889.

III. The application of Article 31(2) of the Charter (paid annual leave)

Article 31

Fair and just working conditions

- "1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave."

Explanation on Article 31

1. Paragraph 1 of this Article is based on Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work. It also draws on Article 3 of the Social Charter and point 19 of the Community Charter on the rights of workers, and, as regards dignity at work, on Article 26 of the revised Social Charter. The expression 'working conditions' is to be understood in the sense of Article 156 of the Treaty on the Functioning of the European Union.
2. Paragraph 2 is based on Directive 93/104/EC concerning certain aspects of the organisation of working time, Article 2 of the European Social Charter and point 8 of the Community Charter on the rights of workers.

The case

1. The legislation of a Member State provides that young persons aged 15-18 who are employed under a 'special apprenticeship contract' are not entitled to paid annual leave. A 17 year old worker employed under such a contract in a private undertaking claimed his right to paid annual leave. He alleged that the ECJ has recognized this right as a principle of EU social law of particular importance, expressly laid down in Article 31(2) of the Charter and referred to by Directive 2003/88/EC.⁸ He further alleged that this principle entitles every worker to at least four weeks paid annual leave; it allows no derogations – hence it is not liable to any limitation - and it has vertical and horizontal direct effect.

Discussion:

- Does the above national legislation constitute "implementation" of EU law within the meaning of Article 51(1) of the Charter?
- Might other Charter provisions, besides Article 31(2), apply to this case?
- Does the explanation on Article 31 "set out the sources" of Article 31(2), so that the courts should give it "due regard", in accordance with Article 6(1), 3rd subparagraph, TEU?
- Does this explanation reflect ECJ case law?

Relevant ECJ case law: C-173/99 *BECTU* [2001] ECR I-4881; C-78/11 *ANGED* EU:C:2012:372; C-579/12 *RX-II, Strack* EU:C:2013:570.

European Committee of Social Rights: Decision on the merits of 23.05.2012, Complaint No. 66/2011, *General Federation of Employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece:* The impugned legislation constitutes a violation of the European Social Charter.

⁸ Directive 2003/88 on the organisation of working time, OJ L 299/9, 18.11.2003, replaced and codified Directive 93/104/EC which is mentioned in the explanation.



NATIONAL INSTITUTE
OF JUSTICE



The right to an effective remedy and to a fair trial

Donka Chakarova, judge in the
Supreme Administrative Court
D.Chakarova@sac.justice.bg

1

LEARNING OBJECTIVES

By the end of this presentation, participants shall:

- Be introduced to the provision of Article 47 of the EU Charter of Fundamental Rights
- Be able to differentiate when a reference for a preliminary ruling to the Court of Justice of the European Union (CJEU) is admissible/inadmissible
- Be able to apply Article 47 of the Charter or draft a reference for a preliminary ruling where appropriate

2

Topics for discussion

- General review of the legal institute
- Access to justice and a fair trial under Article 47 of the EU Charter and Article 6 of the European Convention on Human Rights
- Case-law of the CJEU regarding access to justice
- Case-law of the CJEU regarding a fair trial
- Protection of personal data

3



Have you relied on Article 47 of the Charter in a dispute you adjudicated?



Let's practise!

What did you do?



BECAUSE ...



4

CHAPTER VI: JUSTICE

- Right to an effective remedy and to a fair trial;
- Presumption of innocence and right of defence;
- Principles of legality and proportionality of criminal offences and penalties;
- Right not to be tried twice in criminal proceedings for the same criminal offence.

5

Article 47 of the Charter

- Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
- Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

6

Article 47 of the Charter

- Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

7

Article 6 ECHR Right to a fair trial

- 1. In the **determination of his civil rights and obligations** or of any criminal charge against him, everyone is entitled to a **fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.**
- Judgment shall be pronounced publicly with some exceptions.

8

Article 6 ECHR Right to a fair trial

- 2. Everyone charged with a **criminal offence** shall be presumed innocent until proved guilty according to law.
- 3. (Amended SG no. 137/1998) Everyone charged with a **criminal offence** has the following minimum rights:

.....

r.

9

Access to justice – admissibility of the appeal

- Case T-493/10 – Persia International Bank plc (restrictive measures against Iran)
- Joined cases C-539/10 P and C-550/10 P Stichting Al-Aqsa (restrictive measures)
- Case C-567/13 – Nóra Baczó и János István Vizsnyiczai` (consumer protection, arbitration clause)

Access to justice – admissibility of the appeal

- Case C-562/12 – MTÜ Liivimaa Lihaveis (operational development programme)
- Case C-339/10 – Estov and Others (common plans for development of territory and the right to property)
- Case C-27/11 – Vinkov (deduction of points from a driving licence)
- Case C-510/13 – Földgáz Trade Zrt (internal market)

Access to court – procedural requirements

- Case C-93/12 – ET Agroconsulting-04-Velko Stoyanov (determination of the court with jurisdiction, operational development programme)
- Case C-137/14 – the European Commission against the Federal Republic of Germany (legal capacity to bring proceedings, environment)
- Case C-265/13 – Emiliano Torralbo Marcos (judicial fees, employment law)
- Case C-61/14 – Orizzonte Salute (judicial fees, public procurement)

Fair trial –
raising objections, acting of its own motion

- Case C-618-10 – Banco Español de Crédito (unfair terms, interest, consumer protection)
- Case C-415/11 – Aziz (unfair terms, consumer protection)

Fair trial –
raising objections, acting of its own motion

- Case C-280/13 – Barclays Bank (unfair terms, consumer protection)
- Case C-8/14 – BBVA SA (unfair terms, opposition, time-limits, consumer protection)

Fair trial –
raising objections, acting of its own motion

- Case C-32/14 – ERSTE Bank Hungary Zrt. (notary's duties, unfair terms, consumer protection)
- Joined cases C-482/13, C-484/13, C-485/13 and C-487/13 (unfair terms, consumer protection, interests)
- Case C-451/14 – Petrus (acquisition by prescription)

Fair trial –
right to higher-instance review

- Case C-169/14 – Juan Carlos Sánchez Morcillo and María del Carmen Abril García (consumer protection, right to appeal enforcement acts)
- Case C-539/14 – Juan Carlos Sánchez Morcillo and María del Carmen Abril García (consumer protection, right to an appeal)

Fair trial –
application for leave to intervene

- Case C- 470/12 - Pohotovost's.r.o. (unfair terms, consumer protection association)
- Case C-176/12 – Association de médiation sociale (employee representation, labour rights)

Fair trial –
suspensive effect

- Case C-239/1 – Abdoulaye Amadou Tall (multiple applications, suspensive effect of the application, asylum)

Fair trial –
stay of execution

- Joined cases C-537/12 and C-116/13 – Banco Popular Español and Banco de Valencia (unfair terms, consumer protection)
- Case C-169/14 – Sánchez Morcillo и Abril García (unfair terms, consumer protection)

Access to court –
determining the procedural rules

- Case C-472 Banif Plus Bank (unfair terms, consumer protection)
- Joined cases C-317/08 to C-320/08 Alassini and Others, (consumer protection, jurisdictions, competent to review applications regarding EU law)

Fair trial –
publicity

- Case C-329/13 – Ferdinand Stefan (environment, public access to environmental information – Exception to the obligation to disclose environmental information where the disclosure compromises the ability of any person to receive a fair trial)

21

Fair trial –
means of evidence

- Case C-419/14 – WebMindLicenses kft (evidence obtained in the context of a parallel criminal procedure, taxes)
- Case C-437/13 – Unitrading Ltd (means of evidence, procedural autonomy, duties)

Fair trial – the force of res judicata

- Case C-69/14 – Dragoş Constantin Târşia (revision of a final decision of a court or tribunal imposing payment of a **tax** which is incompatible with EU law)
- Case C-180/12 – Stoilov i Ko EOOD (determining due duties)

Reference for a preliminary ruling on validity of EU acts

- Judgment of the Court (Grand Chamber) of 8 April 2014 in joined cases C-293/12 and C-594/12
- Judgment of the Court (Fourth Chamber) of 17 October 2013 in case C-291/12

Protection of personal data

- Judgment of the Court (Grand Chamber) of 6 October 2015 Maximilian Schrems v. Data Protection Commissioner.
- Reference for a preliminary ruling: High Court - Ireland.
- Preliminary ruling – Personal data – Protection of natural persons in case of processing such personal data – the Charter of fundamental rights of the European Union – Articles 7, 8 and 47 – Directive 95/46/EC – Articles 25 and 28 – Transfer of personal data to third parties – Judgment 2000/520/EC – Transfer of personal data to the United States – Inadequate level of protection — Validity — Complaint by an individual whose data has been transferred from the European Union to the United States — Powers of the national supervisory authorities.
- Case C-362/14.

Protection of personal data

- Judgment of the Court (Grand Chamber) of 13 May 2014
- Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González.
- Reference for a preliminary ruling : Audiencia Nacional - Spain.
- Personal data – Directive 95/46/EC – Internet search engines – Processing data appearing on websites – Searching, indexing and storing such data – Liability of the person in charge of managing the Internet search engine – The Charter of Fundamental Rights of the European Union, Articles 7 and 8.
- Case C-131/12.

26

QUESTIONS?



27

Workshop on the application of the Charter of Fundamental Rights of the European Union

Dr Anna Śledzińska-Simon, University of Wrocław

Case no. 1

Protest on a highway

The Critical Mass in city A. wants to protest on a highway against the increasing truck traffic passing through the city and the natural landscape park, which surrounds the agglomeration to the east. According to the organization, transit of trucks which run primarily on the international route Vilnius – Warsaw destroys the zone of protected nature and pollutes the city. The notification of the protest by the Critical Mass was however rejected by the mayor of the city who found that the Assembly Law does not allow for demonstrations on bicycles. The refusal was also justified with the argument that the protest would block the traffic and obstruct the free movement of goods in the European Union.

Questions:

1. Is the EU law applicable in this case?
2. What is the connecting factor between the national law on assembly and the EU law?
3. Does the CFR apply to this case? If yes, which provisions?
4. Does the decision of the mayor to ban the protest infringe fundamental rights? If yes, is it justified?
5. What if the Critical Mass decides to block highway notwithstanding the ban? Can the organizers of an illegal demonstration invoke protection of their fundamental rights?

Case no. 2

Personal property declaration

According to the national law concerning limitations on business activity by persons performing public functions all public officials are obliged to make public their personal property declarations. On January 2, 2007 after taking the office the mayor of town B., Mr. S. Sponge completed his personal property declaration, in which he provided information about his financial standing, including owned real estate, cash, cars, but also a valuable numismatic collection.

His declaration was subsequently published in the Public Information Bulletin by the municipality except information about his residential address. Pursuant to the national law on local government information contained in personal property declarations are open and constitute public information concerning public office holders.

The declaration of Mr. M. Sponge was posted on the website on January 9, 2007 and it is still accessible on-line. Additionally, his declaration was further copied and posted on several other websites by the press and private parties due to ongoing discussions on the declared assets of the mayor.

On February 1, 2013 Mr. Sponge who no longer serves as the mayor or hold any other official functions requested the General Inspector of Data Protection (Inspector General) to issue a decision ordering removal of this declaration from the official website of the municipality and warrant all companies providing electronic services to remove from the Internet search engines results connecting his personal data with the content of his declaration.

The Inspector General rejected his request. Mr. Sponge against this decision to the administrative court.

Relevant provisions:

Please consult

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

Questions:

1. Does the EU law apply to this case?
2. What is the connecting factor between national provisions and the EU law?
3. Does the CFR apply to the circumstances described above? If yes, which provisions?
4. Does the decision of the General Inspector infringe fundamental rights?
5. Does the EU law mandate the removal of personal data from Internet in situations such as described in this case?

Case no. 3

Entry to a territory of a MS of same-sex partners

Circumstances of the case:

On November 14, 2011 the border guard at the Warsaw airport refused to allow entry into the territory of Poland to Mr. M.C., a citizen of the Philippines who travelled with his life partner, a Polish citizen. During the standard border control Mr. M.C. presented a valid passport and the residence permit of a family member of an EU citizen issued by the UK authorities in result of the conclusion of a civil partnership with a citizen of Poland. However, the border guard found that Mr. M.C. did not fulfill the conditions for entry into the territory of Poland.

According to the officer, due to the lack of recognition of same-sex partnerships under the Polish law, Mr. M.C. should have obtained a visa or another valid document entitling him to enter and stay on the territory of Poland. In result, the Commander of the Border Guards in Warsaw (the Commander) issued a decision refusing Mr. M.C. entry to the territory of the Republic of Poland (Decision No 9/2011/KGS).

Relevant provisions:

Directive [2004/38/EC](#) of the European Parliament and of the Council 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

Preamble

- (5) The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of 'family member' should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.
- (6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.
- (7) The formalities connected with the free movement of Union citizens within the territory of Member States should be clearly defined, without prejudice to the provisions applicable to national border controls.
- (8) With a view to facilitating the free movement of family members who are not nationals of a Member State, those who have already obtained a residence card should be exempted from the requirement to obtain an entry visa within the meaning of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are

exempt from that requirement [\(11\)](#) or, where appropriate, of the applicable national legislation.

(...)

Article 2

For the purposes of this Directive:

1. 'Union citizen' means any person having the nationality of a Member State;
2. 'family member' means:
 - (a) the spouse;
 - (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
 - (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
 - (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);
3. 'host Member State' means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

Article 3

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.
2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
 - (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
 - (b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

Article 5

1. Without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid

identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport.

No entry visa or equivalent formality may be imposed on Union citizens.

2. Family members who are not nationals of a Member State shall only be required to have an entry visa in accordance with Regulation (EC) No 539/2001 or, where appropriate, with national law. For the purposes of this Directive, possession of the valid residence card referred to in Article 10 shall exempt such family members from the visa requirement.

Member States shall grant such persons every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and on the basis of an accelerated procedure.

Article 10

1. The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called 'Residence card of a family member of a Union citizen' no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.

2. For the residence card to be issued, Member States shall require presentation of the following documents:

- (a) a valid passport;
- (b) a document attesting to the existence of a family relationship or of a registered partnership;
- (c) the registration certificate or, in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;
- (d) in cases falling under points (c) and (d) of Article 2(2), documentary evidence that the conditions laid down therein are met;
- (e) in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen;
- (f) in cases falling under Article 3(2)(b), proof of the existence of a durable relationship with the Union citizen.

Questions:

- 1) Is the EU law applicable in this case?
- 2) What is the problem related to the protection of fundamental rights?
- 3) How should the national court decide the case? If you consider the court should refer a preliminary question, what questions should it ask?
- 4) Should Mr. M.C be considered a family member in the light of the Citizens' Directive?
- 5) What are the obligations of a Member State towards same-sex partners accompanying EU citizens?
- 6) Should Mr. M.C. be considered a family member by a Member State which does not recognize same-sex partnerships or marriages?

7) Should Mr. M.C. be exempted from the duty to obtain visa?

Case no. 4

Destruction of an illegal Roma site

Circumstances of the case:

A group of Roma came to the town of X. in 2004, after the country accessed the European Union. It settled down on a plot of land belonging to the municipality X. in makeshift houses, with no access to water, electricity, or a sewage system. Their presence was tolerated by the local authorities for many years despite repeated complaints from the neighbours about littering, noise, and misbehaviour (begging). The local authorities began to provide the residents of the camp with water and mobile toilets.

The vast majority of the residents of the camp are citizens of another Member State of the European Union. Altogether there are around 30 families with children of different age, a total of 80 persons, living in the camp. Some of them do not avail of valid identity documents. The composition of the group is continuously changing. Some families temporarily leave the camp and go to other Member States for economic reasons. Some of them return to the camp or new Roma families come from their country of origin or other regions of the host country, and settle down.

In 2012, the local authorities ordered the immediate removal of Roma from the municipal plot, justifying this demand with the need to protect the property, public order (for prevention of criminal offences), natural environment (for protection of a safe environment), and the rights of other persons living in the neighbourhood. The authorities also stated that living with small children under the current conditions in the camp may lead to the breakout of epidemics.

Roma living in the camp do not have regular jobs and some of their children do not go to school. They earn a living by collecting scrap metal, undertaking odd jobs, and begging. They regularly pay fines for begging (petty offense) and for the lack of registration of the residence of a EU citizen over the period of 3 months (under the law implementing the Directive 2004/38/EC of the European Parliament and of the Council Directive 2004/38/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).

In 2013 the local authorities filed a lawsuit seeking the removal of 25 Roma, including children, from the plot. The families moved from the indicated plot to another one in the same area.

In 2015 the local authorities warned the inhabitants of the camp about the plan to destroy their houses as illegal construction in pursuance to the decision of the Provincial Construction Site Inspector. In summer 2015 two houses on the disputed plot were destroyed and remnants of the settling removed.

Relevant case-law:

European Court of Human Rights

Yordanova and Others v. Bulgaria (2012) – in this case the European Court of Human Rights in Strasbourg found that there had been a violation of Article 8 of the Convention (the right to

protection of private and family life and the protection of home) with regard to the order against Roma who were Bulgarian citizens to vacate plots belonging to the city of Sofia, neighbouring with a land sold for residential investments. In this case the Roma camp existed for decades. The Court did not find violation of Article 1 of Protocol No. 1 (protection of property) in conjunction with Art. 14 (prohibition of discrimination) .

Winterstein v. France (2013) – in this case the ECtHR found that there had been a violation of Article 8 of the Convention with regard to the removal of Roma, mostly French citizens, from the forest area they had been occupying for a longer period, because the local authorities included it in the special protection zone. The execution of the removal order led to homelessness of the majority of persons concerned. As in Yordanova, the Court found no violation of Article 1 of Protocol No. 1 in conjunction with Article 14 of the Convention.

In all the above cases, the Roma settlers occupied the municipal property without a legal title.

European Committee of Social Rights (a treaty body in the Council of Europe)

In a number of cases – i.e. in ECRR v. Italy, Application No. 27/2004, 12.07.2005; ECRR v. Bulgaria, Application no. 31/2005 , 18.10.2006; FEANTSA v. France, Application no. 39/2006, 12.05.2007; ECRR v. France, Application no. 52/2008, 26.10.2009 the Committee held a violation of provisions of the European Social Charter (the right to protection of the family, the right to housing and the prohibition of discrimination) with regard to the failure to take special measures to protect people at risk of social exclusion.

In more recent decisions – in Centre on Housing Rights and Evictions v. France, Application No. 63/2010, 28.06.2011, the Committee found the French policy of "O" tolerance for the Roma of Central and Eastern Europe living in illegal camps breaches the European Social Charter.

Questions:

1. What is the problem related to the protection of fundamental rights in this case?
2. Is the EU law applicable to the above circumstances?
3. Does the CFR apply to the above circumstances? If yes, which provisions?
4. Does the European Parliament and Council Directive 2004/38/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 apply to the facts of the case concerning the removal order?
5. Does the Directive of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin apply to this case?
6. Does the removal order amount to discrimination of Roma settlers?
7. Does the destruction of illegal construction amount to discrimination of Roma settlers?
8. What is the relevance of the jurisprudence of the European Court of Human Rights in this case?

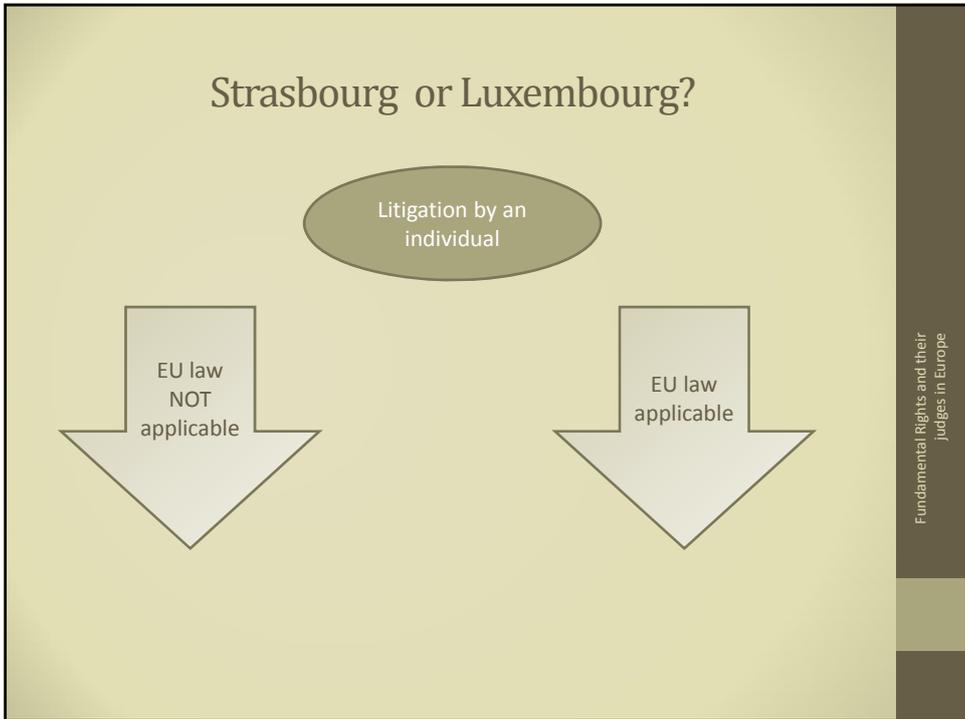
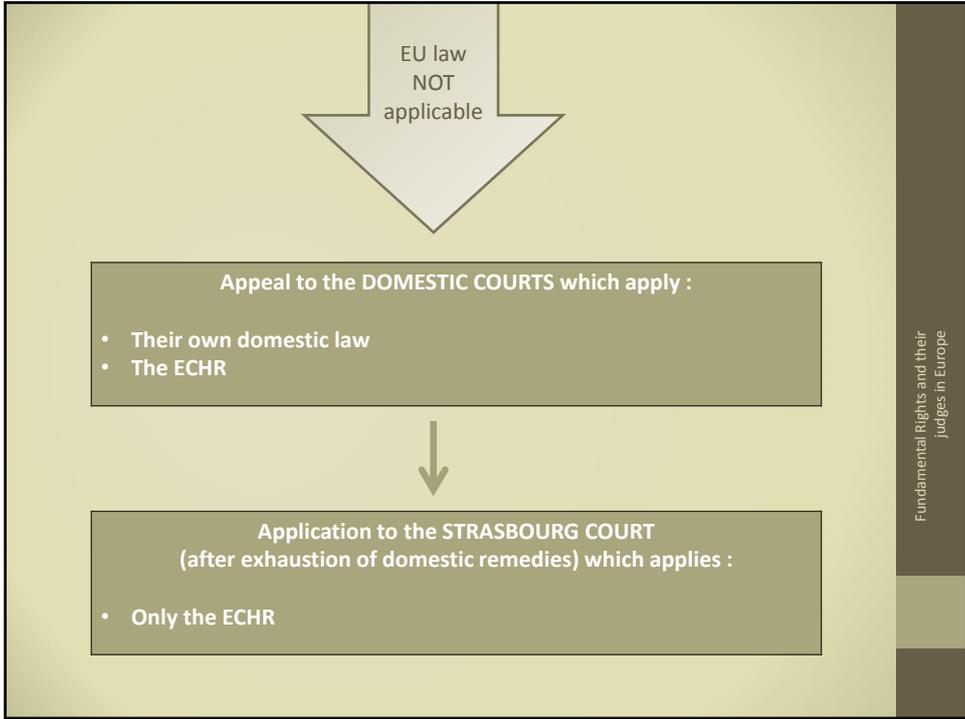
Fundamental Rights and their judges in Europe

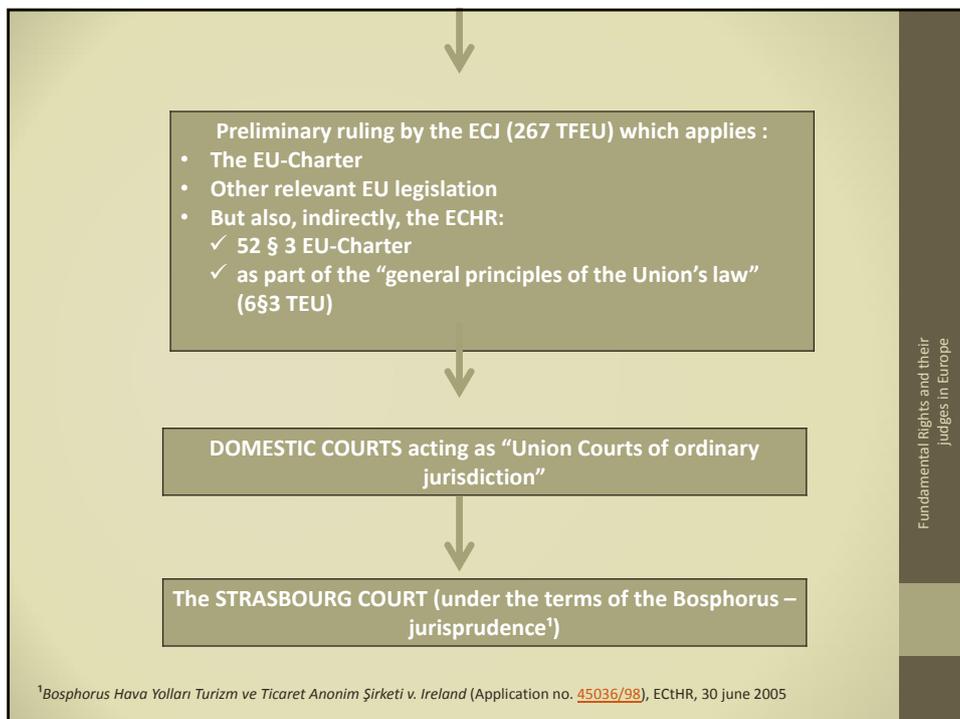
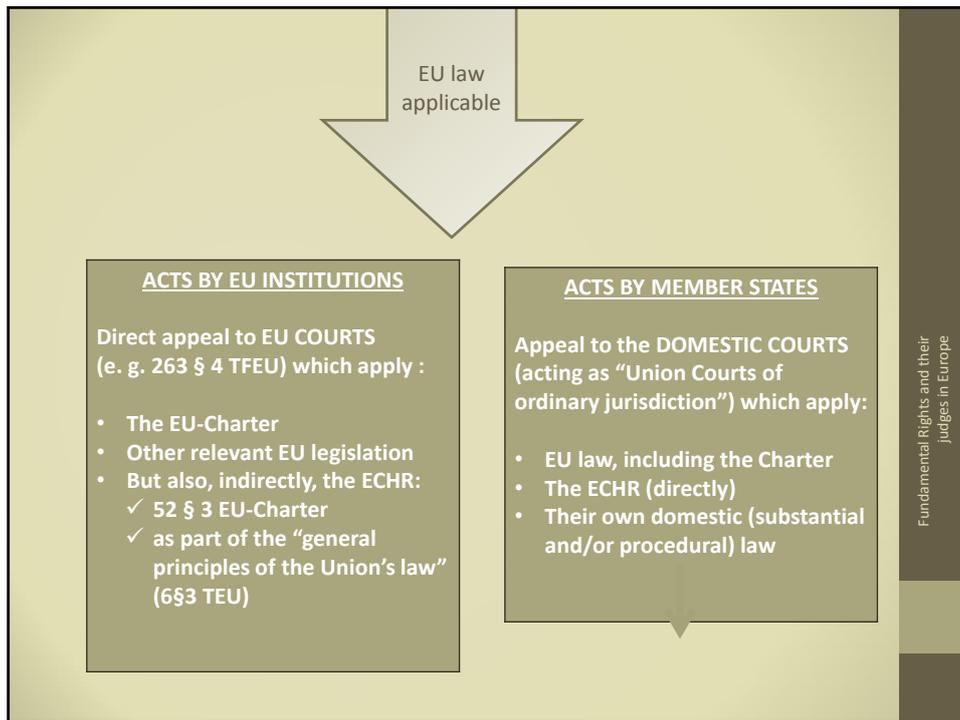
Strasbourg or Luxembourg?

Litigation by an
individual

EU law
NOT
applicable

EU law
applicable





SUMMARY

EU Law not applicable	EU law applicable	
DOMESTIC COURTS <ul style="list-style-type: none"> • Domestic law • ECHR 	EU COURTS <ul style="list-style-type: none"> • EU Charter • ECHR (indirectly, through 52§3 EU-Charter and 6§3 TEU) • Other EU legislation 	DOMESTIC COURTS (“ordinary jurisdiction”) <ul style="list-style-type: none"> • EU law, including the Charter • ECHR • Domestic law
STRASBOURG COURT <ul style="list-style-type: none"> • ECHR 		ECJ <ul style="list-style-type: none"> • EU Charter • ECHR (indirectly, through 52§3 EU-Charter and 6§3 TEU) • Other EU legislation
		DOMESTIC COURTS (“ordinary jurisdiction”)
		STRASBOURG COURT Bosphorus - jurisprudence

The Charter of Fundamental Rights and the European Convention of Human Rights: complementing or competing systems of fundamental rights protection in Europe?

Prof. Johan Callewaert
Deputy Grand Chamber Registrar



Bosphorus v. Ireland (45036/98)

If ... equivalent protection is considered to be provided by [an international] organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. (§ 156)



Bosphorus v. Ireland (II)

However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international co-operation would be outweighed by the Convention's role as a “constitutional instrument of European public order” in the field of human rights. (§ 156)



Bosphorus v. Ireland (III)

By “equivalent” the Court means “comparable”: any requirement that the organisation's protection be “identical” could run counter to the interest of international co-operation pursued. (§ 155)



Bosphorus v. Ireland (IV)

It remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations. (§ 157)



Michaud v. France (12323/11)

The Court is therefore obliged to note that because of the decision of the Conseil d'Etat not to refer the question before it to the Court of Justice for a preliminary ruling, even though that court had never examined the Convention rights in issue, the Conseil d'Etat ruled without the full potential of the relevant international machinery for supervising fundamental rights – in principle equivalent to that of the Convention – having been deployed. In the light of that choice and the importance of what was at stake, the presumption of equivalent protection does not apply. (§ 115)



To sum up the requirements of the Bosphorus presumption:

- No exercise of discretion by the domestic courts
- Relevant case-law of the CJEU
- No manifest deficiency



Art. 6 EU-Charter

Everyone has the right to liberty and security of person.



Art. 5 ECHR

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - a. the lawful detention of a person after conviction by a competent court;
 - b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Art. 52 § 3 EU-Charter

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.



Art. 52 § 3 EU-Charter

- Is the link between EU law and the Convention
- Was necessary, especially in view of the fact that the EU-Charter borrowed a large number of Convention provisions while giving them a different, simplified wording.
- Double rule:
 - Convention standards as minimum protection standards under EU law
 - Possibility for EU law to raise this protection level

Trend towards autonomy from the ECHR

- Formal autonomy: risk for legal certainty
- Substantial autonomy: affecting standards of protection



Formal autonomy

“Three criteria are relevant for the purpose of assessing whether tax penalties are criminal in nature. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (Case C-489/10 Bonda [2012] ECR, paragraph 37).” (Akerberg Fransson, C-617/10, § 35)

See also, e. g., Otis and Others (6.11.2012, C-199/11) and Y and Z (5.9.2012, C-71/11 and C-99/11)

Substantial autonomy

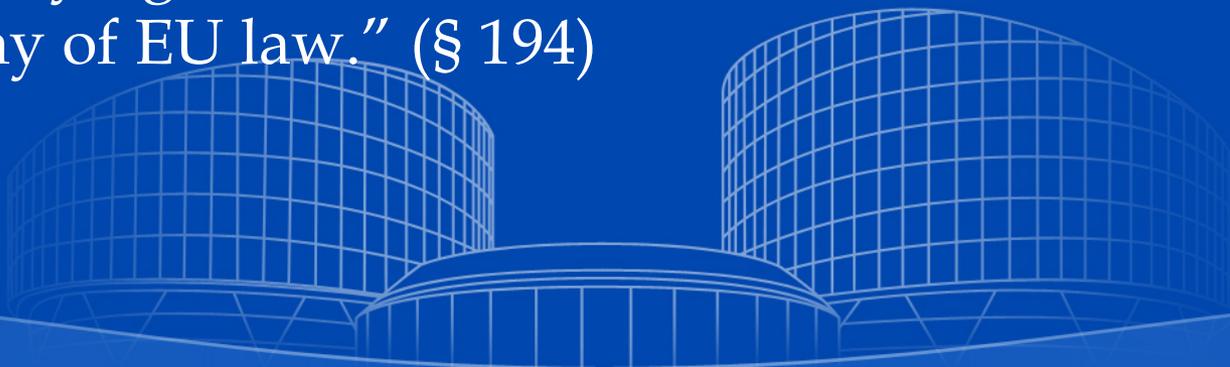
Two key questions relating to the methodology of mutual recognition:

- 1) Does an executing judge have the competence to assess respect for the fundamental rights of the person concerned in the requesting State, at least if he has reasons to fear a breach of those rights?
- 2) If so, should he assess those rights on a case-by-case basis?



Opinion 2/13

“In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.” (§ 194)



Opinion 2/13

It should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law. (§ 191)



N. S. & M. E. (C-411/10 & C-493/10)

It cannot be concluded from the above that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003.

At issue here is the *raison d'être* of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights. (§§ 82-83)

M.S.S. v. Belgium and Greece (30696/09)

Based on these conclusions and on the obligations incumbent on the States under Article 3 of the Convention in terms of expulsion, the Court considers that by transferring the applicant to Greece the Belgian authorities knowingly exposed him to conditions of detention and living conditions that amounted to degrading treatment.

(§ 367)



Tarakhel v. Switzerland (29217/12)

Were the applicants to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together, there would be a violation of Article 3 of the Convention, (§ 122)



Art. 6 § 2 TUE

The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.



“EU accession to the Convention, in the terms defined today by the CJEU, could only appeal to those who don't like human rights very much.”
(Steve Peers)



Thank you!

