THE IMPACT OF ACCESSION TO THE EUROPEAN UNION ON THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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INTRODUCTION

An efficient legal order, and a justice system that is in accordance with the fundamental principles of the "rule of law" (*Rechtsstaat*), are core elements of any democratic system. It is for this reason that the Konrad-Adenauer-Stiftung promotes the establishment and consolidation of "rule of law"-structures and -institutions world-wide. It does so not only through its country offices, but also, and in particular, through its regional rule of law programs, one of which is the Rule of Law Program South East Europe (*RLP SEE*) based in Bucharest.

One of the primary goals of the *RLP SEE* is to enhance, in its target countries (*i.e.* Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Romania, and Serbia), knowledge and understanding of the concept, institutional core elements, and functions of the "rule of law", and their implications for legal and political reforms as well as for judicial practice. For this purpose, the *RLP SEE* organizes seminars, training sessions, and conferences at the regional and national level within its five areas of concentration: Constitutional Law (both institutional and substantive) and Constitutional Adjudication; Procedural Law (insofar as it secures respect for fundamental rights and principles of the "rule of law"); Independence and Integrity of the Justice System, in particular the Judiciary; Protection of Human and Minority Rights (particularly the promotion and strengthening of national and international human rights protection systems), and Coping with the Past by Legal Means. In addition, the *RLP SEE* prepares publications on "rule of law"-issues related to its areas of concentration.

One such publication is the series "*Rechtsstaat* in Lectures" which encompasses selected lectures on "rule of law"-issues that have been presented in the context of *RLP SEE*-seminars, training sessions, conferences, etc. The Volume at hand is the first such lecture. It was delivered in Bucharest, Romania in 2006 by Dr. iur. Johan Callewaert at a training event for Romanian Magistrates on "EU Law and Judicial Practice", and thereafter revised for the purpose of publication. Dr. Callewaert's lecture on "The Impact of Accession to the European Union on the Application of the European Convention on Human Rights" analyzes and explains the main consequences of a country's accession to the European Union (EU) for its application of the European Convention on Human Rights. The lecture's purpose is to familiarize legal practitioners of the *RLP SEE's* target countries with the relationships and interdependence among the various human rights protection systems in place in a EU member country, *i.e.* the national protection system, the protection system under the European Convention of Human Rights, and the EU human rights protection system.

The *RLP SEE* wishes to contribute to the preparation for EU accession in the legal field of those target countries which are not EU members yet. We hope that the lecture at hand serves this purpose.

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Bucharest, May 2008

THE IMPACT OF ACCESSION TO THE EUROPEAN UNION ON THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Johan Callewaert[1]

The following is a short survey of the main consequences of a country's accession to the European Union ("the EU") on its application of the European Convention on Human Rights ("the Convention"). Four key areas will be considered: the legal sources (I), the scope of EU law[2] (II), the standards of protection (III) and the available legal remedies and procedures (IV).

The basic principle underlying the process is that membership of the EU does not cause any of the legal sources of fundamental rights in force in the Member States – the domestic legal system and the Convention – to be *replaced* by a single EU source, since the EU legal system itself does not replace domestic legal systems but rather operates *in combination* with them[3]. Thus, since EU law also represents an additional, autonomous source of fundamental rights, domestic authorities in the EU Member States may have to handle in parallel up to three different sources of fundamental rights. How this is to be achieved is the subject of the present paper.

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1 *Dr. iur. Johan Callewaert, Deputy Grand Chamber Registrar, European Court of Human Rights (Strasbourg); Lecturer at the German University of Administrative Sciences (Speyer). Any views expressed are personal.* The article is based on a lecture presented in Bucharest (Romania) on 8 April 2006 as part of a training for Romanian Magistrates on "EU Law and Judicial Practice" which was organized by the Rule of Law Program South East Europe of the Konrad-Adenauer-Stiftung and the Academy of European Law. It has been updated in conformity with recent developments as of 15.04.2008.

2 *The reference to EU law is to be understood as covering EU law as a whole or only Community law ("first pillar"), as the case may be.*

3 *"The Treaty has created its own legal order, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal order are not only the Member States but also their nationals" (ECJ 20.12.2001, Courage Ltd., C-453/99, § 19).*

I. LEGAL SOURCES

EU law has its own set of fundamental rights, which are to be observed by the Member States when they apply EU law[4]. While the main source of these fundamental rights remains the case-law of the European Court of Justice[5] (A), legislative sources, especially the EU Charter of Fundamental Rights, tend to play an increasing role in this area (B).

A. THE CASE-LAW OF THE EUROPEAN COURT OF JUSTICE

The vast majority of the binding fundamental rights currently applied under EU law have been gradually identified and developed by the European Court of Justice (ECJ), the first significant judgment in this respect dating back to 1969[6]. In this context, the ECJ developed the notion of *general principles of Community law* and considered fundamental rights to be part of them. Meanwhile, this judge-made approach received a legislative confirmation in Article 6 § 2 of the Treaty on the European Union (TEU), a key-provision in this respect which reads as follows:

> *"The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."*

Article 6 § 2 TEU also identifies two sources of fundamental rights under EU law: the European Convention on Human Rights and the so-called *constitutional traditions common to the Member States*. In practice, a large majority of fundamental rights currently applied by the ECJ have their origin in the former. Convention-provisions frequently referred to by the ECJ include Article 6 (right

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4 *"The requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules. Consequently, Member States must, as far as possible, apply those rules in accordance with those requirements" (ECJ 12.12.2002, Angel Rodriguez Caballero and Others, C-442/00, § 30). See also Article 51 of the EU Charter of Fundamental Rights (Article II-111 of the EU Constitutional Treaty).*

5 *The reference to the European Court of Justice is to be understood as covering either this Court only or also the Court of First Instance of the European Communities, as the case may be.*

6 *ECJ 12.11.1969, Stauder, 29/69.*

to a fair trial, including defence rights in criminal proceedings[7]), Article 8 (right to respect for private[8] and family life[9]), Article 10 (right to freedom of expression[10]) and Article 1 of Protocol no. 1 (protection of property[11]).

Thus no major substantial changes have to be expected by future or newly admitted Member States as a consequence of their accession to the EU, since they are all Contracting Parties to the Convention and therefore already quite familiar with it. However, what matters here is not so much the fact that Convention-rights are being applied under EU law, but rather whether under EU law they are given the same meaning as in the case-law of the European Court of Human Rights, which is solely qualified to give an authoritative interpretation of the Convention[12]. This question will be addressed below, in connection with the EU Charter of Fundamental Rights.

As for the notion of *constitutional traditions common to the Member States*, it is meant to enable EU law to take on board any rights other than those of the Convention on which there is a consensus among the Member States. While their number has remained rather limited so far, a good example of such rights can be found in the recent *Omega case* in which the ECJ acknowledged respect for human dignity as a general principle of Community law[13]. The right to pursue an economic activity would also appear to belong to this category[14].

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7 See e. g. ECJ 17.12.1998, Baustahlgewebe, C-185/95 P; ECJ 10.4.2003, Steffensen, C-276/01; 16.6.2005, Pupino, C-105/03.

8 See e.g. ECJ 20.5.2003, Österreichischer Rundfunk and Others, C-465/00 (processing of personal data).

9 See e.g. ECJ 11.7.2002, Carpenter, C-60/00 (expulsion of foreigners).

10 See e.g. ECJ 25.3.2004, Karner, C-71/02 (advertising); 12.6.2003, Schmidberger, C-112/00 (prohibition of a demonstration); 6.3.2001, Connolly, C-273/99 P + C-274/99 P (European civil service).

11 See e.g. ECJ 12.5.2005, Regione autonoma Friuli-Venezia Giulia et ERSA, C-347/03 (use of a brand).

12 Article 32 of the Convention.

13 ECJ 14.10.2004, C-36/02. The Convention contains no explicit right to respect for human dignity; according to the Strasbourg Court, however, "the very essence of the Convention is respect for human dignity and human freedom" (S.W. v. United Kingdom, 22.11.1995, A 335-B, § 46, p. 45; Pretty v. UK, 2346/02, 29.4.2002, § 65).

14 See e.g. ECJ 12.7.2005, Alliance for Natural Health and Secretary of State for Health, C-154/04 and 155/04.

B. LEGISLATIVE SOURCES

(1) Legislation in Force

To date, the EU legislation in force does not contain any autonomous fundamental rights catalogue similar to those appearing in most Constitutions of the Member States. Only individual provisions laying down specific fundamental rights can be found in both primary and secondary legislation. Given their sizeable number, they couldn't possibly be all mentioned or listed in this paper. Suffice it to refer, by way of example, to the prohibition of discrimination[15] and the protection of individuals with regard to the processing of personal data[16] as two of the main areas covered by such provisions.

(2) The EU-Charter on Fundamental Rights

Paradoxically, the only autonomous, comprehensive catalogue of fundamental rights existing under EU law – the Charter of Fundamental Rights – has not yet entered into force. It was first intended to be included in the EU Constitutional Treaty but the latter's entry into force was blocked by the negative outcome of the referenda held on the Treaty in France and the Netherlands[17]. The newly adopted Lisbon Treaty, however, now provides that the EU shall recognise "the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties" (Article 6 § 1 TEU).

While the ECJ itself has long been avoiding any explicit reference to the Charter in its judgments, it departed from this approach in a Grand Chamber judgment recently delivered in the case of *European Parliament v. Council* concerning *inter alia* the compatibility with fundamental rights of Directive 2003/86/EC on the right to family reunification[18]. In this judgment, the ECJ held:

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15 On discrimination on grounds of nationality, see e.g. Articles 12 and 13 TEC; Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. On gender-discrimination, see Articles 2, 3 § 2 and 141 §§ 1 and 3 TEC; Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

16 See e.g. Directive 95/46/EC 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.

17 On 25 May and 1 June 2005 respectively.

18 ECJ 27.6.2006, European Parliament v. Council, C-540/03.

> *"The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court … and of the European Court of Human Rights'."*[19]

This judgment **seems to acknowledge that even before its "entry into force" by virtue of Article 6 § 1 EU as amended by the Lisbon Treaty, the Charter already has** some legal status in the current EU legal system. Especially the reference to the fact that the "principal aim" of the Charter is to "reaffirm" fundamental rights "as they result" from a number of legal sources which are already in force might be seen as an indication that in the ECJ's view, a number of Charter provisions have already some binding effect.

a. Content of the Charter

Out of the 50 substantial rights laid down in the Charter, roughly half of them are borrowed from the Convention[20] or the Strasbourg case-law[21], but often with a different and shorter wording. The other half is made of rights which so far have never appeared side by side with classical civil and political rights in a legally binding instrument. They include a number of social and economical rights but also some so-called "new rights", relating for example to the protection of the environment[22] or the protection of consumers[23], even though the wording of these rights often prevents them from being properly justiciable, i. e. capable of being applied as such by a court.

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19 § 38.

20 Articles 2, 4 to 7, 9, 10 § 1, 11 § 1, 12 § 1, 14, 17, 19 § 1, 21, 45, 47 to 50.

21 Articles 1, 3, 8, 11 § 2, 13, 19 § 2, 22 to 26 and 37.

22 Article 37.

23 Article 38.

Interestingly, some of the rights set forth in the Charter would appear to be quite remote from the present competences of the EU. This applies for instance to the ban on the death penalty laid down in Article 2 of the Charter. In this respect, however, the Charter is absolutely clear: its provisions do not have the effect of extending the scope of EU competences[24]. Yet even fundamental rights not directly related to present EU competences may have some useful *indirect* impact on the exercise of such competences. It is clear, for instance, that when negotiating international judicial cooperation agreements with third countries, the EU will have to take into account whether or not the death penalty is still in force in those countries. Another example of such indirect impact is to be found in Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, where reference is made to Articles 2 § 2 and 4 of the Charter[25].

b. Relationship with the European Convention on Human Rights

From the very beginning, the relationship between the Charter and the Convention has been a major issue. Especially since, as has just been noted, roughly half of the Charter is made of rights borrowed from the Convention or the Strasbourg case-law, but with a different wording and structure, the question arose whether this was not going to undermine legal certainty and cause confusion among lawyers[26].

The solution found to the problem is laid down in Article 52 § 3 of the Charter, which reads:

> *"Insofar as [the] 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."*

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24 Article 51 § 2 (see point 2 below).

25 See recitals 3 and 4 of the Preamble.

26 Compare, for instance, Art. 5 of the Convention with Article 6 of the Charter which, according to the Explanations to the latter (Declaration concerning the explanations relating to the Charter of Fundamental Rights, Official Journal of the European Union, 16.12.2004, C 310/424 (429)), is meant to have the same "meaning and scope" as the former provision.

This provision contains two different rules. The first one guarantees under Union law the same minimum standard of protection as under the Convention, the reference to the latter being understood, according to the Explanations to that provision, as including the Strasbourg case-law. By virtue of the second rule, the EU is entitled to provide a more extensive protection, which is already being achieved by the Charter itself in respect of, for example, the right to marry and to found a family (Art. 9), the safeguard against discrimination (Art. 21), the right to an effective remedy (Art. 47 § 1) as well as to legal aid (Art. 47 § 3).

Unlike lower standards, higher standards are no challenge to the requisite harmony between the Convention and the Charter. For in line with the principle of subsidiarity underlying the Strasbourg system, the Convention itself, in its Article 53, allows its standards to be surpassed "under the laws of any High Contracting Party or under any other agreement to which it is a Party". Rather, what is decisive for the harmonious relationship between the two instruments is the fact that via the Charter, EU law adopts the Convention standards as its own minimum standards, thereby building upon them when developing its own standards, just as national legal systems do when developing domestic standards.

Thus, the Charter can be seen as establishing the link on the *legislative* level between EU law and the Convention. What should come next is the *procedural* and *institutional* complement to the Charter, which can only be provided by accession of the EU to the Convention. For only through accession can the EU act as a party in Strasbourg proceedings involving EU law and can Strasbourg judgments be made binding upon the EU *as such*, which is a pre-condition to ensuring the full execution of Strasbourg judgments with an impact on EU law. The legal basis enabling the EU to accede to the Convention is now provided in Article 6 § 2 TEU, as amended by the Lisbon Treaty.

II. THE SCOPE OF EU FUNDAMENTAL RIGHTS

As a matter of principle, EU fundamental rights can be vindicated *only where EU law itself applies*, since they are unable to extend by themselves the scope of EU law as determined by the EU Treaties[27].

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27 ECJ 17.2.1998, Grant, C-249/96, § 45. See also Art. 51 § 2 of the Charter, according to which: "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."

Some interesting applications of this principle can be found in the ECJ case-law. A first example is the case of *Kremzow*[28] in which the applicant, an Austrian retired judge, had been sentenced to life imprisonment on charges of murder. As he had been prevented from defending himself in person before the Austrian courts, the Strasbourg Court held that Article 6 of the Convention had been breached[29]. Kremzow then brought an action for damages for unlawful detention based on Article 5 § 5 of the Convention, claiming that as a consequence of the violation found in Strasbourg, his detention had been unlawful all along.

In the context of these proceedings, the Austrian Supreme Court made a reference for a preliminary ruling to the ECJ on a number of questions relating to the impact of the Convention in the domestic and Community legal orders. In the Supreme Court's opinion, there was a link between the facts of the case and Community law, since Kremzow's detention prevented him from exercising his right to freedom of movement and freedom to carry his trade or profession. The ECJ, however, declined to consider the request, on the following grounds:

> *"The appellant in the main proceedings is an Austrian national whose situation is not connected in any way with any of the situations contemplated by the Treaty provisions on freedom of movement for persons. Whilst any deprivation of liberty may impede the person concerned from exercising his right to free movement, the Court has held that a purely hypothetical prospect of exercising that right does not establish a sufficient connection with Community law to justify the application of Community provisions ….*
>
> *Moreover, Mr Kremzow was sentenced for murder and for illegal possession of a firearm under provisions of national law which were not designed to secure compliance with rules of Community law ….*
>
> *It follows that the national legislation applicable in the main proceedings relates to a situation which does not fall within the field of application of Community law."*[30]

Another, more recent example is provided by the case of *Attila Vajnai*, the Vice-President of a Hungarian political party, who had been sentenced to a one-year suspended sentence for displaying on his clothing, during a demonstration, a five-point red star, in breach of a provision of the Hungarian Criminal

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28 ECJ 29.5.1997, Kremzow, C-299/95.

29 ECHR 21.9.1993.

30 §§ 16-18

Code prohibiting the "use of totalitarian symbols". On appeal, the Budapest Metropolitan Court made a reference for a preliminary ruling on whether the provision applied was compatible with *inter alia* the principle of non-discrimination and Article 6 TEU. Here again, the ECJ declined to answer the questions, on the ground that:

> *"It is clear that Mr Vajnai's situation is not connected in any way with any of the situations contemplated by the provisions of the treaties and the Hungarian provisions applied in the main proceedings are outside the scope of Community law."*[31]

A further important limitation of the scope of Community law flows from the very nature of the single market and the four fundamental freedoms on which it is based: the free movement of persons, goods and services and the free circulation of capital across national borders. Many of the provisions designed to enable the exercise of these freedoms, for example those which prohibit discrimination on grounds of nationality, only apply to situations involving a trans-national economic activity. Hence, situations involving no such economic element and/or confined in all respects within one single Member State (the so-called "purely internal situations") will not give rise to application of EU law nor, consequently, to any of the fundamental rights protected under EU law.

A good illustration of this principle is to be found in the ECJ case-law on expulsion of foreign spouses of EU nationals. Only where an EU national has exercised some economic activity with another EU Member State – so as to trigger the application of one of the fundamental freedoms – will his/her third country spouse be entitled under Community law to protection against expulsion. Without a trans-national element of that kind, Community law will not apply[32]. This is an important difference with the Convention, which applies to all situations coming under the jurisdiction of the Contracting Parties, no matter what nationalities are involved and whether the said situations contain any economic and/or cross-border element[33].

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31 ECJ 6.10.2005, Vajnai, C-328/04, § 14.

32 ECJ 11.7.2002, Carpenter, C-60/00. A trend can however be observed in the recent case-law to infer a number of rights from the European citizenship (Articles 17-18 CE) rather than the classical fundamental freedoms (see ECJ 17.9.2002, Baumbast, C-13/99; ECJ 9.11.2006, Turpeinen, C-520/04).

33 See Article 1 of the Convention which provides : « The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms definde in Section I of this Convention » (emphasis added). See, among many others, ECHR 4.2.2005, Mamatkulov v. Turkey [GC], 46827/99.

III. STANDARDS OF PROTECTION – POTENTIAL CONFLICTS

It now remains to assess the level of protection afforded by fundamental rights under EU law and to determine how to solve potential conflicts with national (A) or Convention standards (B).

A. IN RELATION TO NATIONAL FUNDAMENTAL RIGHTS

As regards the relationship between EU and national fundamental rights, there is no general answer to the question whether, considered from the viewpoint of an individual plaintiff, EU law will offer a higher or lower protection than domestic law. Depending on the content of each individual right, a variety of different constellations can occur. As an example of a higher EU protection, reference can be made to a recent case where Belgian law was found in breach of EU law because it provided for the automatic expulsion of foreign citizens who did not comply with the formalities imposed by the Law on aliens. The ECJ considered this kind of sanction to disregard the principle of proportionality[34].

On the other hand, lower EU standards can be typically observed when national fundamental rights conflict with Community fundamental freedoms. Such a situation recently occurred in an Austrian case where the ECJ found a complete ban on lorry traffic on a motorway for the purpose of protecting the environment to be disproportionate and therefore incompatible with the free movement of goods[35].

As this example shows, in the event of a national standard colliding with a lower EU standard, the higher domestic standard will not prevail under EU law, as the hierarchy between the conflicting rights is not determined by their respective level of protection but only by the hierarchy between the respective legal systems to which they belong. This is the result of the combination of two key principles underlying EU law: primacy of EU law over national law – including constitutional law – of the Member States and uniform interpretation of EU law, which prevents the latter from being construed in different ways depending on where it is applied. The ECJ is very clear on this:

> *"The validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental*

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34 ECJ 23.3.2006, Commission v. Belgium, C-408/03.

35 ECJ 15.11.2005, Commission v. Austria, C-320/03.

rights as formulated by the constitution of that State or the principles of a national constitutional structure."[36]

An interesting application of this rule is provided by a high-profile German case in which the Basic Law was found to be in breach of an EU Directive against gender-discrimination for excluding women in the army from any post involving the use of arms.[37]

It should however be borne in mind that even where domestic law is found by the ECJ to be in breach of EU fundamental rights, this is being done by way of preliminary rulings[38] which themselves need to be observed by domestic courts when adjudicating the cases on the merits[39]. In other words, the ECJ does not adjudicate *ex post* (unlike the Strasbourg Court) nor does it have the power to quash domestic judgments.

B. IN RELATION TO THE CONVENTION

(1) Member States' Responsibility for the Implementation of EU Law

In relation to the Convention, conflicts between different rights are rather unlikely, given that by virtue of Article 6 § 2 TEU, the EU itself is bound to observe the Convention[40]. What may occur, however, are conflicts between different *interpretations* of the same Convention-right, which can represent an even greater challenge to legal certainty. There have been a few such instances in the past[41] but due to a good cooperation between the two European Courts in recent times, they tend to become quite rare, the ECJ being anxious to depart as little as possible from the Strasbourg jurisprudence.

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36 Internationale Handelsgesellschaft, C-11/70. See also the opinion by Advocate General Jacobs in the case of Schmidberger (C-112/00), § 98.

37 ECJ 11.1.2000, Kreil, C-285/98.

38 See Article 234 EC.

39 ECJ 3.2.1977, Benedetti v. Munari, 52/76, § 163.

40 See point 1 A above.

41 The main ones were about the notion of "home" within the meaning of Article 8 of the Convention (compare ECJ 21.9.1989, Hoechst, 46/87 and 227/88 with ECHR 16.12.1992, Niemitz v. Germany and ECHR 16.4.2002, Colas Est v. France, 37971/97) and the right to reply to the opinion of the Advocate General in proceedings before the ECJ (compare ECJ 4.2.2000 (Order), Emesa Sugar, C-17/98 and ECJ 11.7.2006, Cresson, C-432/04, §§ 49-52 with ECHR 20.2.1996, Vermeulen v. Belgium and ECHR 7.6.2001, Kress v. France, 39594/98).

Yet problems may occur when the ECJ has to adjudicate on a new Convention issue before the Strasbourg Court has had a chance to do so. For a reference for a preliminary ruling by the ECJ typically comes at an earlier procedural stage than an application to the Strasbourg Court, which presupposes that all domestic remedies have been first exhausted[42]. In such a scenario, it cannot be ruled out that domestic courts may be required by the ECJ to apply Community law in a way which, later on, could be found by the Strasbourg Court to be in breach of the Convention. This would place them in a very awkward position and should therefore be avoided at all costs.

It should be borne in mind, however, that as a rule, the Convention allows higher standards (from the point of view of the applicant) to be applied[43]. Hence – unlike lower standards – higher standards are not to be considered as conflicting with the Convention. As far as lower standards are concerned, the trouble is that so far, no formal hierarchy has been established between the EU legal system and the Convention. Consequently, neither EU law nor the Convention can claim primacy over the other, which is in sharp contrast with the relationship between EU law and the domestic law of the Member States. Fortunately, as indicated above, such conflicts are quite rare. The fact remains, however, that for as long as the EU as such will not have acceded to the Convention as provided for by the Lisbon Treaty[44], there will be no satisfactory legal answer to this problem.

Furthermore, it should be stressed that in practice, a varying amount of discretion is left by the ECJ to the domestic courts of the Member States. While there are indeed a good many of preliminary rulings in which the ECJ draws itself the conclusion emerging from the Strasbourg case-law, in quite a number of other rulings it confines itself to pointing to the relevant Strasbourg judgments, leaving it to the referring domestic court to apply it to the circumstances of the case at hand, thereby conferring on it some discretion as regards the impact of the Convention on the facts of the case.

A good illustration of these different approaches can be found by comparing the cases of *Carpenter*[45] and *Akrich*[46], which were both concerned with the expulsion of third country spouses of EU citizens. In the Carpenter case the ECJ ruled, having regard to the Strasbourg jurisprudence, that the decision to deport Mrs

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42 Article 35 § 1 of the Convention.

43 Article 53 of the Convention.

44 Article 6 § 2 TEU (see above).

45 ECJ 11 July 2002, Carpenter, C-60/00.

46 ECJ 23 September 2003, Akrich, C-109/01.

Carpenter constituted a disproportionate measure and therefore infringed her husband's right to respect for his family life within the meaning of Article 8 of the Convention. As a result, "Article 49 EC, read in the light of the fundamental right to respect for family life", precluded in such circumstances the refusal of the right of residence to the foreign spouse[47]. A similar problem, though involving different Community law provisions, arose in the case of Hacene Akrich, in which the ECJ considered that even though Regulation no. 1612/68 did not apply to the facts of the case, the authorities of a Member State, in assessing an application by the foreign spouse of an EU citizen to reside in that Member State, were under a Community law obligation "to have regard to the right to respect for family life laid down in Article 8 of the Convention". Unlike in the Carpenter case, however, the ECJ did not itself assess the impact of Article 8 on the facts of the case but confined itself to referring to the relevant Strasbourg judgments[48].

Be that as it may, even in the absence of a formal hierarchy, the Strasbourg approach is clear here, as it considers that the Member States remain bound in principle by their obligations under the Convention when they apply EU law. In other words: even as Member States of the EU, Contracting Parties to the Convention remain fully accountable in Strasbourg, including for their implementation and enforcement of EU law in their own legal system. On this basis, for example, the United Kingdom was found by the Strasbourg Court, in the well-known case of *Matthews v. United Kingdom*, to have infringed Article 3 of Protocol no. 1 to the Convention for giving effect to EU provisions precluding the residents of Gibraltar from participating in the elections for the European Parliament.[49] By contrast, the EU as such is not accountable before the Strasbourg Court, since it is no Contracting Party to the Convention. This will change in the future with the EU acceding to the Convention.

(2) The Bosphorus jurisprudence

Yet this approach has been recently refined and qualified in the case of *Bosphorus v. Ireland*[50]. The case concerned the impounding by the Irish

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47 For another example of preliminary ruling leaving no discretion to domestic courts, see ECJ 7.1. 2004, K.B., C-117/01.

48 For other examples of preliminary rulings leaving some discretion, see ECJ 22.10.2002, Roquette, C-94/00, § 52; ECJ 20.5.2003, Österreichischer Rundfunk and Others, C-465/00, operative provision no. 1; ECJ 6.11.2003, Bodil Lindqvist, C-101/01, operative provision no. 5.

49 Matthews v. UK, 24833/94, 18.2.1999. On the consequences of this judgment in the EU legal system, see ECJ 12.9.2006, Spain v. United Kingdom, C-145/04.

50 Bosphorus v. Ireland [GC], 30.6.2005, 45036/98.

authorities of an aircraft which had been leased by the Turkish applicant company from a Yugoslavian airline. The Irish authorities had acted in pursuance of EC Council Regulation 990/93 which, in turn, had implemented the UN sanctions regime against the Federal Republic of Yugoslavia. In a preliminary ruling delivered on 30 July 1996, the ECJ had found inter alia that in the light of the aim pursued by the impugned restrictions, their consequences for the applicant company were not disproportionate and therefore did not amount to a breach of its property rights. In view of these circumstances, the Strasbourg Court found no violation of Article 1 of Protocol no. 1 to the Convention, as the Irish authorities had done no more but to apply the Regulation at issue.

The Court noted that, on the one hand, the Convention did not prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue co-operation in certain fields of activity. Even as the holder of transferred sovereign power, such an organisation was not itself to be held responsible under the Convention for proceedings before, or decisions of, its organs as long as it was not a Contracting Party. On the other hand, a Contracting Party was responsible under Article 1 of the Convention for all acts and omissions of its organs, regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Consequently, the State retained Convention liability in respect of Treaty commitments subsequent to the entry into force of the Convention.

The Court reconciled both these positions by ruling that State action taken in compliance with legal obligations flowing from the State's membership of an international organisation was justified, as long as the relevant organisation was considered to protect fundamental rights in a manner which could be considered at least equivalent to that for which the Convention provided. "Equivalent" meant "comparable", as any requirement that the organisation's protection be "identical" could run counter to the interest of international co-operation pursued. If such equivalent protection was considered to be provided by the organisation, the presumption would be that a State had not departed from the requirements of the Convention when it did no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption could be rebutted if, in the circumstances of a particular case, it was 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. Furthermore, a State would be fully responsible under the Convention for all acts falling outside its strict

international legal obligations, including for the use of any discretion left by the ECJ in the implementation of preliminary rulings.

As to whether the fundamental rights protection under Community law was to be considered equivalent to the one ensured under the Convention, the Court answered in the affirmative, after an in-depth review of the substantive and procedural guarantees provided by Community law for this purpose. Consequently, the presumption arose that in the case at hand, Ireland had not departed from the requirements of the Convention when implementing Regulation 990/93. In the absence of any indication of a dysfunction of the mechanisms of control of Convention observance in the instant case, the presumption of Convention compliance by the respondent State had not been rebutted. It followed that there had been no violation of Article 1 of Protocol no. 1.

It should be noted that the Bosphorus-presumption can be rebutted on a case-by-case basis. Consequently, individual applications to the Strasbourg Court alleging a breach of fundamental rights resulting from compliance with Community law in a specific case are not inadmissible *ratione materiae* and thus not barred from being examined on the merits[51].

As for the notion of "manifest deficiency", it may in the end be expected to play a minor role in practice, given the ECJ's present commitment to follow closely the Strasbourg case-law when applying fundamental rights in general and the Convention in particular. An increased role of the Charter in the ECJ jurisprudence would only reinforce this expectation, since the Charter adopts the Convention standards as EU minimum standards[52].

IV. LEGAL REMEDIES – PROCEDURES

By adding the remedies before the EU courts to those before national courts or the Strasbourg Court, accession to the EU also has an impact on the legal remedies available to vindicate fundamental rights. The way in which these different categories of remedies and procedures co-exist and their combined effect in the present state of the legal systems concerned are presented in the table below.

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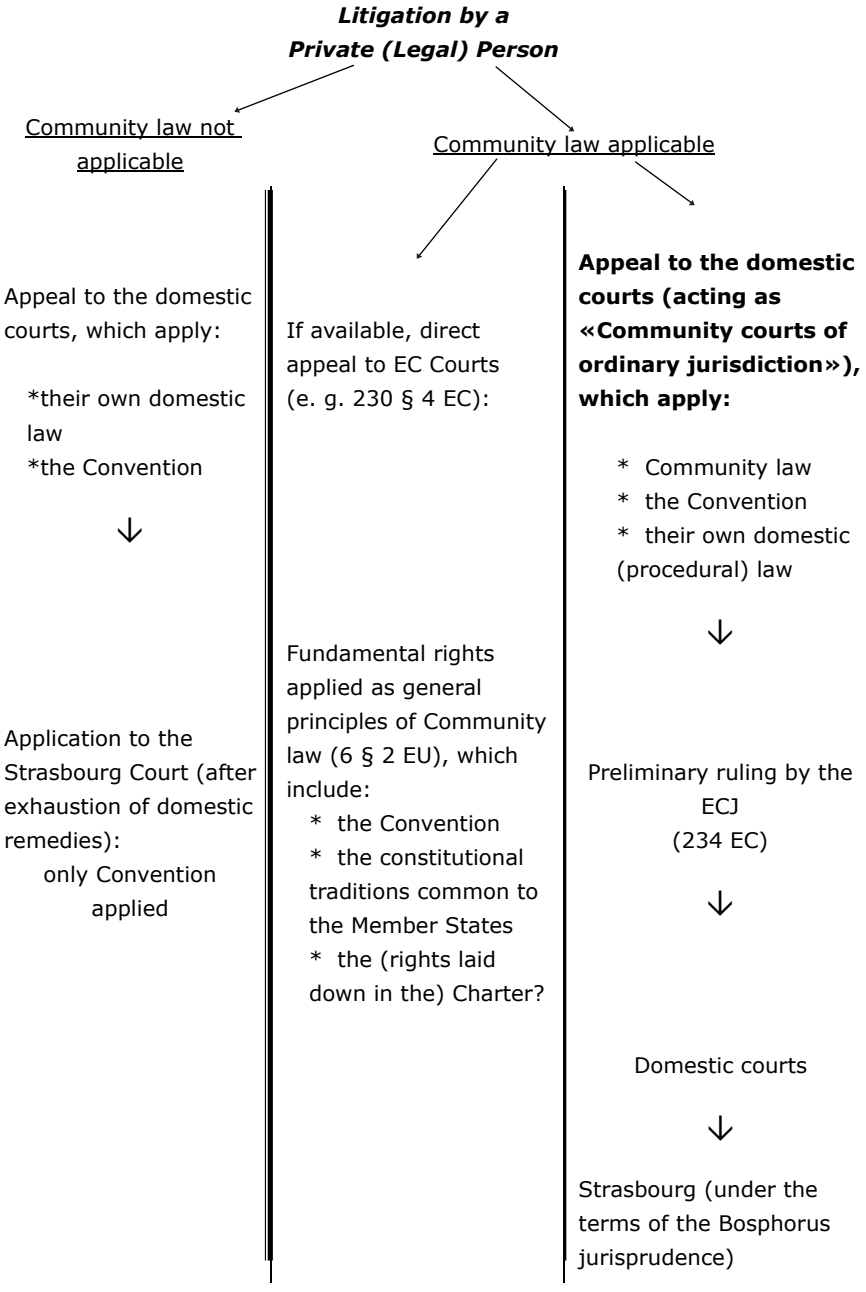
51 For a recent application of the Bosphorus-presumption, see ECHR 10.10.2006 (dec.), Coopérative des agriculteurs de Mayenne et Coopérative laitière Maine-Anjou v. France, no 16931/04.

52 See point I B above.


Litigation by a
Private (Legal) Person
Community law not applicable
Community law applicable
Appeal to the domestic courts, which apply:
*their own domestic law
*the Convention
Application to the Strasbourg Court (after exhaustion of domestic remedies):
only Convention applied
If available, direct appeal to EC Courts (e. g. 230 § 4 EC):
Fundamental rights applied as general principles of Community law (6 § 2 EU), which include:
* the Convention
* the constitutional traditions common to the Member States
* the (rights laid down in the) Charter?
Appeal to the domestic courts (acting as «Community courts of ordinary jurisdiction»), which apply:
* Community law
* the Convention
* their own domestic (procedural) law
Preliminary ruling by the ECJ
(234 EC)
Domestic courts
Strasbourg (under the terms of the Bosphorus jurisprudence)