Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon

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Treaty of Lisbon – Fundamental Rights Charter – European Convention on Human Rights – Partial incorporation of Convention in Charter – Incorporation of Charter into EU law with Lisbon – Questions of loss of autonomy for the EU legal order – Gain in direct effect of Convention in EU member states

Introduction: The Convention in the Lisbon Treaty in different contexts

The Lisbon Treaty changed the situation regarding protection for human rights in the EU. One consequence of the Lisbon Treaty is that, by virtue of Article 6(1) of the Treaty on European Union (TEU),the Fundamental Rights Charter (FRC) has become a legally binding instrument of primary EU law ('same legal value as the Treaties'); its binding force on the EU institutions (and the member states) is confirmed by Article 51(1) of the Charter. The Lisbon Treaty also provides for an accession to the European Convention on Human Rights (ECHR). It is not, however, only the EU's accession that will bring about a new legal significance of the Convention for and within EU law. The importance of the Convention for EU law has already changed with the entry into force of the Lisbon Treaty due to Article 52(3) of the Charter, which provides that the meaning and scope of those rights in the Charter which correspond to rights guaranteed by the Convention is the same as those in the Convention. This provision materially incorporates core norms of the Convention (*see infra,* The legal status of the ECHR under the Lisbon Treaty, p. 69). The Convention, however, is also referred to in Article 6(3) TEU, which states that the fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the member states, constitute general principles of EU law. This provision, which corresponds, almost

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literally, to Article 6(2) TEU-Nice, mentions the Convention as one of the sources for the identification of general principles of EU law.[1] Hence, the Lisbon Treaty presents the Convention in different roles and contexts with different legal significance within Article 6 TEU: in paragraph 1 (read in conjunction with Article 52 of the Charter) the Convention at least partly became a source of EU law, whereas in paragraph 2 the same Convention is mentioned as an international treaty to which the EU will accede, and finally, in paragraph 3, the Convention appears in its traditional role in EU fundamental rights protection where the Convention was a mere source of inspiration (*see infra*, Challenges to the substance and methodology of human rights protection in the EU, p. 75).

These changes, and the somewhat contradictory statements in Article 6 TEU on the legal role and significance of the Convention with regard to protection of fundamental rights, prompt the need to reconsider the role of the Convention in EU human rights protection after the Lisbon Treaty. The partial incorporation of the Convention into EU law produces several challenges to the role of the Convention in the application of human rights by EU institutions and with regard to its domestic status, which this contribution will analyse in more detail. The EU fundamental rights regime, inherited from Nice and currently reflected in the practice of the EU institutions, appears not yet to have taken full account of all the changes brought about by Lisbon. First, these challenges refer to both the substance and the methodology of human rights protection in the EU provided for by the practice of the European Commission and ECJ case-law. Secondly, there are, closely related, challenges to the role and importance of human rights in the interpretation and application of EU law. Thirdly, the incorporation of many articles of the Convention into EU primary law alters the role and significance of the Convention within the member states' national legal orders. Finally, an accession of the EU to the Convention will challenge the approach adopted by the European Court of Human Rights (ECtHR) in its well-known *Bosphorus* decision, which showed a considerable, and unique, deference to the EU human rights

[1] That Art. 6(3) TEU refers only to the ECHR does not rule out other international human rights instruments (as questioned by M. Dougan, 'The Lisbon Treaty', *CMLRev* (2008) p. 617 at p. 665, n. 234) because the same wording of Art. 6(2) TEU-Nice did not hinder the ECJ from referring to other instruments, ECJ, Case C-540/03 *Parliament* v. *Council* [2006] ECR I-5769, para. 37; A. Rosas, 'The EU and International Human Rights Instruments', in Kronenberger (ed.), *The EU and the International Legal Order* (T.M.C Asser Press 2001), p. 53. The ECJ always interpreted Art. 6(2) TEU as a reaffirmation of its methodology: ECJ, Case C-415/93, *Bosman* [1995] ECR I-4921, para. 79; *see also* S. Douglass-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Aquis', *CML Rev* (2006) p. 629 at p. 633; R. Alonso Garcia, 'The General Provisions of the Charter of Fundamental Rights of the EU', *ELJ* (2002), p. 492 at p. 493 et seq. The same applies to the new Art. 6(3) TEU, cf. Dutheil de la Rochère, 'The Protection of Fundamental Rights in the EU: Community of Values with Opt-Out', in I. Pernice et al. (eds.), *Ceci n'est pas une constitution. Constitutionalisation without a Constitution?* (Nomos 2009), p. 119 at p. 122.

standards. At least with the accession, this recognition of autonomy will become highly questionable. Before these challenges to the EU human rights situation can be analysed, however, one has to clarify the position of the Convention within the triple layer of human rights protection under the Lisbon Treaty.

The different layers of fundamental rights under the Lisbon Treaty

The different contexts in which the Convention plays a role in the Lisbon Treaty are closely related to a problem that emerged very early in the codification process – the problem of maintaining a coherent, workable fundamental rights regime in the EU, which has become quite complicated with the advent of the Lisbon Treaty.[2] The Nice Treaty knew only one source for fundamental rights, the general principles (apart from the few fundamental rights enshrined in the Treaties, like the right to equal pay (Article 141 ECT, now Article 157 of the Treaty on the Functioning of the European Union – TFEU). In contrast, the Lisbon Treaty simultaneously recognises different sources, which raises the problem of defining the relationship between the different layers of fundamental rights in the EU: fundamental rights stemming from general principles of EU law, fundamental rights enshrined in the Charter, and those of the Convention. While the maintenance of the general principles on fundamental rights, the recognition of the Charter and the reference to the Convention might be confusing at first glance, one should bear in mind that even in domestic constitutional orders the fundamental rights situation might not be less complicated. Usually, there are explicit constitutional fundamental rights existing alongside non-written constitutional principles which give rise to further constitutional rights developed in the case-law of domestic courts. Additionally, as all EU member states are parties to the Convention, the Convention plays a different role in each domestic order. Taking Germany as an example, there are not only the human rights contained in the explicit human rights catalogue of the German Constitution (Articles 1-19 Basic Law), but also additional constitutional fundamental rights derived from the rule of law (e.g., the right not to incriminate oneself or the presumption of innocence) though not explicitly mentioned. Furthermore, the Convention has to be integrated within the domestic regime of fundamental rights protection (mainly by a harmonising interpretation). These different sources coexist simultaneously in a mutually complementary way. The parallel coexistence of the different sources, however, might not be the case in EU law, because the Charter provides for general horizontal rules on the interpretation and application of the Charter rights

[2] *See* Dougan, n. 1 at p. 663.

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(Articles 51-53), which also contain, in Article 52(2) to (4), explicit provisions on the relationship of Charter rights to other sources of fundamental rights. Whereas Article 52(2) and (4) of the Charter provide for harmony[3] between the Charter rights, on the one hand, and the other fundamental rights explicitly enshrined in the Treaties or recognised by the ECJ as general principles of EU law, on the other. This appraisal is confirmed by the fact that, before Lisbon, the ECJ made reference to the Charter as an inspirational source in determining general principles, aligning the Charter rights and its settled case-law. Article 52(3) of the Charter is slightly different, as it has two consequences. First, Article 52(3) provides that '[i]n so far as this Charter contains rights corresponding to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the said Convention.' This not only requires harmony between Charter rights and corresponding Convention rights, but absorbs these rights into the EU legal order (*infra,* The (partial) substantial incorporation of the ECHR by the Lisbon Treaty, p. 69). Secondly, Article 52(3) provides that it 'shall not prevent EU law from providing more extensive protection', which in essence means that the Convention is the minimum standard (*infra,* ECHR as a minimum standard: drawing consequences for other sources of EU fundamental rights and for the autonomy of EU law, p. 72). Other sources of EU fundamental rights (like the general principles) may provide for farther-reaching standards but must not be interpreted or applied so as to fall short of Convention standards. The application of the interpretive rules in Article 52(2) and (4) must not deviate from this. Thus, Article 52(3) expresses an hierarchical interpretive principle thus far.[4]

Looking beyond the doctrinal issues of clarifying the relationship between the different sources of fundamental rights, the maintenance of those sources of fundamental rights in the EU is deeply rooted in their genealogy and draws further legitimacy there from. The different sources reflect the foundations and the jurisprudential beginnings of EU human rights, and in a wider view also the legitimacy of the whole process of European unification. Whereas in the beginning the legitimacy for establishing the EEC was vested with the member states and their transfer of public powers (which is reflected in the source of EU fundamental rights being general principles derived from national constitutional traditions and international human rights instruments to which the EU member states were parties), legitimacy has shifted gradually towards the European citizenry. Where-

[3] *See* S. Peers, 'Taking Rights Away? Limitations and Derogations', in S. Peers and Ward (eds.), *The EU Charter of Fundamental Rights* (Hart 2004), p. 141 at p. 164, 169, 173 et seq.; W. Weiß, 'Grundrechtsquellen im Verfassungsvertrag', *Zeitschrift für Europarechtliche Studien* (2005), p. 323 at p. 327, 333.

[4] In essence this view is in line with the view by Peers, *supra* n. 3 at p. 175, who applies Art. 52(3) FRC exclusively in case of overlap with the other paragraphs of Art. 52.

as, under the Treaty of Maastricht, the EU was created as a Union of the peoples of Europe (*see* Article A, TEU[5]), with the Treaty of Lisbon it became a Union of the citizens as well,[6] which is not least reflected in the existence of a new human rights catalogue.

The multiple legitimacy claims of the European integration process are reflected in the multiply anchored EU fundamental rights order, and here one can observe a parallelism. On the one hand, there is the multilevel European constitutional development and its multiple 'anchorage' in nation states, peoples and citizens. On the other, there is the development of a multi-layered EU fundamental rights protection system resulting from the resort, first, to national constitutional traditions, secondly to the Convention, and finally now to the Charter. This multiple 'anchorage' of the EU fundamental rights standards brought about by the Lisbon Treaty still has its meaning in the current phase of European integration, because it corresponds to the specific constitutional situation of the EU, whose legitimacy derives from both the will of the citizens and of the member states (and no longer of the member states alone). The reference to common constitutional traditions and international human rights treaties, and their inclusion as a yardstick of fundamental rights protection in addition to the Charter, also reflects the recognition of different constitutional traditions and identities of the member states as confirmed in Article 4(2) TEU. Constitutional structures fundamental to the member states are expressed above all in their fundamental rights standards. This nexus is reasserted in the Preamble to the Charter and in Article 67(1) TFEU and it necessitates the preservation of national traditions as a source in the development of the EU's fundamental rights regime, besides the Charter as a human rights catalogue for the European *citoyens*. Therefore, a triple-layered fundamental rights protection in the EU remains to be welcomed in the perspective of legal and constitutional theory. Difficult as the clarification of the relationship of these different layers may be, the multiple 'anchorage' of EU fundamental rights protection nevertheless remains important, due to the specific constitutional characteristics of European integration.

[5] 'This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe.'

[6] The citizens are mentioned in conjunction with the EU in Arts. 3(2), 9, 10(2), (3) and 11(1) TEU.

The legal status of the Convention under the Lisbon Treaty

The (partial) substantial incorporation of the Convention by the Lisbon Treaty

Incorporation by virtue of Article 52(3) of the Charter

The Charter changed the legal value of the Convention, a novelty brought about by the Lisbon Treaty which is perhaps generally unnoticed. Article 52(3) Charter provides that 'in so far as this Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those [Charter] rights shall be the same'. This provision pays tribute to the fact that the Charter was drafted in the image of the Convention, as is recognized in the Fifth Recital of its Preamble and Declaration No. 1 to the Lisbon Treaty; half of the fifty substantial Charter provisions are taken over from the Convention and relevant Strasbourg case-law.[7] It intends to ensure consistency between the rights under the Charter and the Convention. The legal consequence of Article 52(3) of the Charter, however, is not beyond doubt because the Explanations to Article 52(3) of the Charter stress the autonomy of EU law (compliance with the Convention does not 'adversely affect…the autonomy of Union law and of that of the [ECJ]'). Thus, there are two mutually exclusive ways of interpreting Article 52(3) of the Charter. On the one hand, one could understand Article 52(3) as an interpretational guideline which takes care of 'interpreting' in harmony between the Charter and the Convention.[8] As an interpretational guideline, Article 52(3) might serve to ensure the autonomy of EU human rights law and the human rights methodology of the ECJ. On the other hand, one could interpret this rule as a material, substantial incorporation of the Convention into the Charter and, by virtue of Article 6(1) TEU, into primary EU law, in so far as its rights are reflected in the Charter. As Article 52(3) refers to both the meaning and the scope of the rights under the Convention, Article 52(3) goes beyond a mere interpretational guideline. Referring to meaning and scope encompasses the limits and possible justifications for interferences with a right which have become part of the fundamental rights regime of the EU even in the absence of any link to the wording of the corresponding Charter right. Thus, the wording of Article 52(3) of the Charter clearly speaks in favour of an incorporation of Convention standards,[9] all the more since substantive incorporation is the best way to harmonise Charter rights and Convention

[7] J. Callewaert, 'Unionisation and "Conventionisation" of Fundamental Rights in Europe', in J. Wouters et al. (eds.), *The Europeanisation of International Law* (T.M.C. Asser Press 2008) p. 109 at p. 116.

[8] *See* I. Pernice, 'The Charter of Fundamental Rights in the Constitution of the European Union', WHI Paper 14/02, at p. 10; reprinted in D. Curtin et al. (eds.), *The Emerging Constitution of the EU* (Oxford UP 2003).

[9] Callewaert, *supra* n. 7 at p. 117: 'indirect adoption'.

standards. The reference to the autonomy of the EU law contained in the Explanations to Article 52(3) of the Charter is a purely jurisdictional point on the lack of subjection to the jurisdiction of the ECtHR of the EU.[10] Therefore, Article 52(3) is not merely an interpretational guideline but a substantial incorporation of corresponding Convention rights which have become legally binding on the EU institutions.[11] Further consequences with regard to the binding force of the jurisprudence of the ECtHR and the significance of the Convention rules on limitations will be developed below (*infra,* Consequence: authoritativeness of Strasbourg's interpretations and limitation provisions, p. 82). Article 52(3) of the Charter, however, does not lead to a complete and comprehensive incorporation of the Convention. The incorporation of the Convention is limited to those specific rights that have corresponding twin provisions in the Charter.

What are the corresponding rights? Or: the authoritative value of the Explanations

The question instantly following the above is the determination of those rights which correspond to rights under the Convention. The 'Explanations' relating to the Charter[12] are a very helpful instrument in this respect. These Explanations were adopted by the Praesidium of the Convention and were later updated by the Praesidium of the European Convention that drafted the failed Constitutional Treaty. These Explanations are a valuable tool for the interpretation of the Charter, as they have been intended to clarify the provisions of the Charter. Thus, they are not just one point of reference in the interpretation of the rights, but the Charter has to be interpreted 'with due regard to the Explanations' according to Article 52(7) of the Charter and the final sentence of the Fifth Recital to its Preamble. Paragraphs 4 to 7 of Article 52 and the final sentence of the Fifth Recital have been added to the original version of the Charter by the Constitutional Treaty. The Charter referred to in Article 6(1) TEU is the amended version adopted by the Strasbourg European Council in 2007[13] taking over the amendments to the Charter by the Constitutional Treaty. One core characteristic of the amendments is the strengthened relevance of the Explanations for the interpretation of the Charter. The legal significance of the Explanations as authoritative interpretative tools is confirmed not only by the latter provisions of the Charter, but also by the Lisbon Treaty itself. Article 6(1) subparagraph 3 TEU provides that the Charter rules 'shall be interpreted in accordance with the general provisions in Title VII of the Charter' (which comprises Article 52(7)), and repeats that 'due regard' must be given 'to the explanations referred to in the Charter, that set out the sources of

[10] Peers, *supra* n. 3 at p. 170.
[11] Ibid., p. 171.
[12] *OJ* 2007 C 303/17.
[13] Republished in *OJ* 2010 C 83/389.

those provisions.' Thus, the guiding force of the Explanations for the interpretation of the Charter is confirmed three times in EU primary law (the Preamble and Article 52(7) of the Charter, and Article 6(1) TEU being placed prominently among the basic principles and objectives of the EU). This does not render the Explanations legally binding but grants an authority to them that makes it difficult to deviate from the interpretational hints and approaches contained in the Explanations, at least for the practical application of the Charter rights.[14] A deviation from the interpretations given in the Explanations might be possible for mandatory reasons only. It is hard, however, to imagine this, given the quite general character of the Explanations, which explain intentions and sources of the Charter provisions and refer to landmark decisions of the European Courts.

For this reason, the Explanations to the Charter are the authoritative source of interpretation also with regard to Article 52(3) and the related question as to which rights correspond to those of the Convention. In this regard, the Explanations of Article 52 clarify that the reference to the Convention comprises its protocols as well. Furthermore, they contain a list of provisions of the Charter which correspond to the Convention, *inter alia* Article 7, on the respect for private and family life (corresponding to Article 8 ECHR), Article 17 on the right to property (corresponding to Article 1 of the Convention protocol), Article 48 on the presumption of innocence and the rights of defence (corresponding to Article 6(2) and (3) ECHR) and Article 49 on legality and proportionality of (criminal) offences and penalties (corresponding to Article 7 ECHR). With regard to the right to a fair trial (Article 47(2), (3) of the Charter), the Explanations state a meaning that corresponds to Article 6(1) ECHR, but a scope of application that goes beyond the limitations inherent in that article (the latter only applying to the determination of civil rights and obligations or to criminal charges). Thus, these Convention provisions became legally binding on EU entities (and also on national authorities) as from 1 December 2009. Consequently, there is no leeway on the part of the EU institutions to depart from the Convention level of human rights protection.

Legal rank of incorporated Convention rights

One has to add here that the incorporation of these Convention rights is at the level of EU primary law, since the Charter shares the same legal value as the Treaties. This is all the more noteworthy since the accession of the EU to the Convention could not add more legal significance to these rights. On the contrary, from a formal standpoint, the effect of the accession of the EU to the Convention would

[14] I. Pernice, 'The Treaty of Lisbon and Fundamental Rights', in S. Griller and J. Ziller (eds.), *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?* (Springer 2008), p. 235 at p. 242.

be formally to grant to the provisions of the Convention a rank in between primary and secondary EU law by virtue of Article 216(2) TFEU, according to which 'agreements concluded by the Union are binding upon' the EU institutions and the member states. Conversely, this has been interpreted by the ECJ as granting a legal status to the agreements which is below that of primary law, but has primacy over secondary EU law.[15] Furthermore, given the character of the incorporated convention rights in EU law, they share the priority and direct effect as well as the direct applicability of EU law as the cornerstones of the legal effects of EU law within the domestic legal orders of the EU member states.

The Convention as a minimum standard: drawing consequences for other sources of EU fundamental rights and for the autonomy of EU law

The second sentence of Article 52(3) of the Charter makes clear that the incorporation of the Convention does not prevent EU law providing more extensive protection: the Convention standards reflected in Charter rights serve as a minimum guarantee in the EU,[16] so that other EU standards of fundamental rights can be more far-reaching, but must never fall short of the level of the Convention. Article 53 of the Charter confirms this, without being restricted to the corresponding rights, as is Article 52(3) of the Charter.[17] Article 53 of the Charter, with its broader scope and uneasy drafting technique,[18] is a general provision of harmony between fundamental rights protection in the EU and the complete Convention.

As a consequence of the Convention being the EU minimum standard – even prior to accession of the EU to the Convention[19] –, the Convention prevails in case of multiple protection of the same fundamental right in the general principles, the Convention and maybe also in the Treaties (as with equal pay of men and women, see Article 157 TFEU). In the case of conflict between the different levels of protection, the standards of Convention rights have priority.[20] In practical terms,

[15] ECJ, Case C-61/94, *Commission* v. *Germany* [1996] ECR I-3989, para. 52.

[16] *See also* ECtHR 30 June 2005, Appl. No. 45036/98, *Bosphorus,* para. 159.

[17] *See also* the joint concurring opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlickito ECtHR, *Bosphorus*, ibid., para. 4.

[18] There is much debate about Art. 53 FRC and its interpretation, cf. Alonso Garcia, *supra* n. 1 at p. 507 et seq. Since it is drafted in the image of the safeguard clause of Art. 53 ECHR, one may at least conclude that the ECHR is intended to be a minimum standard. *See* Callewaert, *supra* n. 7 at p. 117.

[19] Conversely, the European Parliament, in its resolution of 19 May 2010, on the institutional aspects of the EU's accession to the ECHR, opined that this Convention would constitute the minimum standard of protection for human rights, only after accession to it (2009/2241(INI), in no. 17).

[20] *See* Alonso Garcia, *supra* n. 1 at p. 498, footnote 35; C. Grabenwarter, 'Die Grundrechte', in *Verfassungsvertrag der EU* (FS Öhlinger2004) p. 469 at p. 476.

this means that the general principles on EU fundamental rights will never be interpreted in such a way as to contradict Convention standards. The exception is where the general principles or Charter rights provide a higher level of fundamental rights protection,[21] or grant rights that do not exist in the Convention. Although the Preamble to Protocol No. 30 on the application of the Charter to Poland and the UK states that the Charter makes the rights recognized in the EU more visible and does not create new rights or principles, the Charter introduces new rights and principles into the EU's legal order by providing a greater spectrum of rights than the Convention.[22] For example, Title IV of the Charter on solidarity, contains rather new social and economic rights,[23] admittedly sometimes with less binding force, due to Article 52(5) of the Charter.[24] If the Charter introduced no new rights, there would not have been any need for amendments to the Charter in 2004, such as Article 52(5), which excludes the direct enforceability of principles and which was a consequence of British concerns.[25] Thus, one has to confine the meaning of this preamble to stating that the Charter does not contain completely novel rights the scope of which would depart strongly from the pre-Lisbon human rights situation.

In the case of additional rights, or rights with a higher level of protection, the general principles, and hence the settled ECJ case-law on fundamental rights issues, can be maintained without further ado. Thus, the Charter leaves room for the further development of EU fundamental rights through the recognition of novel rights or the extension of the level of protection of existing standards. It might not be the Charter itself that functions as a basis for further development of the EU human rights situation, but the other sources, in particular the case-law of the ECJ on general principles.[26] One example of a recent courageous human rights development was the postulation of a right against age discrimination as a general principle by the ECJ,[27] which was later confirmed by reference to Article 21 of the Charter.[28] Another is the extensive charging of EU citizenship with

[21] *See also* P. Craig and G. de Burca, *EU Law*, 4th edn. (Oxford UP 2008) p. 386.

[22] Douglass-Scott, *supra* n. 1 at p. 662.

[23] T. Blanke and B. Veneziani, in B. Bercussion (ed.), *European Labour Law and the EU Charter of Fundamental Rights* (Nomos 2006) p. 258 et seq., p. 295. Art. 28 on collective action, for example, is quite new and has subsequently been identified as a general principle of EU law; *see* recently ECJ, Case C-341/05, *Laval* [2007] ECR I-11767, para. 91 et seq. Another example is Art. 36 on access to services of general economic interest, the interpretation of which is very contentious.

[24] Art. 52(5) FRC is far from being precise and clear cut, *see* Dougan, *supra* n. 1 at p. 663-664.

[25] *See* Dutheil de la Rochère, *supra* n. 1 at p. 123.

[26] *See* D. Chalmers and G. Monti, *European Union Law. Updating Supplement* (Cambridge UP 2008) p. 69.

[27] ECJ Case C-144/04, *Mangold* [2005] ECR I-9981, para. 75.

[28] ECJ 19 Jan. 2010, Case C-555/07, *Kücükdeveci*, para. 21 et seq.

social rights.[29] Within the limits demanded by the Convention as a minimum standard, the legal autonomy of the EU fundamental rights area is maintained, and the independence of the ECJ case-law retained, in the same way as domestic constitutional fundamental rights' protection is not interfered with by the standards of the Convention.

The autonomy retained by the EU fundamental rights order as regards a higher level of protection might suggest a method of dealing with the drafting deficiencies of the Charter. If the scope and legal effects of ECJ case-law leads to a higher level of protection, then the case-law is decisive and not the Charter text, all the more so since Article 52(4) of the Charter aligns the Charter with the general principles.[30] For example, the EU member states are bound to respect EU fundamental rights, not only with regard to their implementation of EU law (as provided for in Article 51(1) of the Charter), but even beyond in all matters within the scope of EU law, including derogations from fundamental freedoms – as is demanded by ECJ case-law.[31] The recent application of the principle of non-discrimination on grounds of age (Article 21 of the Charter) demonstrates that the ECJ applies the Charter rights to cases that fall under the scope of EU law and does not confine itself to the limited wording of Article 51(1) of the Charter.[32] This is all the more so since the codification of rights in Article 21 of the Charter is treated as a mere confirmation of a previously recognized general principle of EU law.

Conclusion

Generally speaking, the different sources of EU fundamental rights are equal and should be interpreted in harmony. There is no hierarchy apart from the fact that the Convention plays a prominent role in that it is a minimum standard. Two consequences emerge from this. The standards of the Convention will have an impact on the identification and interpretation of general principles and on the interpretation of the Charter. General principles and the Charter rights, however, will prevail over Convention standards only if they grant a higher level of protection. The special significance of the Convention for the fundamental rights protection in the EU to which the case-law of the ECJ regularly refers[33] is nevertheless retained by the Lisbon Treaty, but at a higher level. No longer is it a (mere) inspi-

[29] ECJ, Case C-456/02, *Trojani* [2004] ECR I-7573, paras. 37-46.

[30] *See* the proposal by Dougan, *supra* n. 1 at p. 665, to treat the FRC as the authoritative source for fundamental rights and to overcome its deficiencies by *interpretive* perseverance.

[31] ECJ, Case C-260/89, *ERT* [1991] ECR I-2925, paras. 42-43.

[32] ECJ, *Kücükdeveci*, *supra* n. 28 at paras. 21-23.

[33] *See*, *inter alia*, ECJ, *ERT*, *supra* n. 31 at para. 41.

rational source (albeit a prominent one), but it forms the main substantial foundation of EU fundamental rights.

For this reason, it is not contradictory to mention the Convention in different contexts and to attribute different roles to it. Indeed, it can make sense. Whereas the reference to the Convention in Article 52(3) of the Charter incorporates part of the Convention as a minimum standard, Article 6(3) TEU's maintenance of general principles of EU law allows for the recognition of more far-reaching rights by the ECJ with a higher level of protection. In this process the Convention – together with domestic constitutional traditions – serves as an inspirational source. The accession of the EU to the Convention, envisaged in Article 6(2) TEU, will ensure that EU law not only includes the substantive contents of the Convention standards, but also that the Convention system of judicial protection as provided for by the ECtHR applies to the EU. Thus, the various references to the Convention attribute different roles to it in a number of respects and provide space for the continued – though limited – autonomy of EU human rights standards.

Consequences for and challenges to the application of EU fundamental rights

The partial incorporation of the Convention into the EU's legal order by virtue of Article 52(3) of the Charter produces several challenges to the identification and application of EU human rights and, as a consequence, to human rights standards relevant for the application of EU law. These challenges will be explored here in more detail.

Challenges to the substance and methodology of human rights protection in the EU

First, there are challenges with regard to the current situation in human rights standards provided for by the practice of the Commission and ECJ case-law. These challenges refer to both the substance and the methodology of human rights protection in the EU because the ECJ case-law (and the Commission's practice derived from it) is based on an approach to the Convention that is no longer tenable because of the partial incorporation of the Convention into EU primary law.

The ECJ's pre-Lisbon methodical autonomy

As is well known, the fundamental rights standard in the EU in pre-Lisbon times was created by the ECJ case-law developing fundamental rights as general principles, by referring to the constitutional traditions common to the member states and to international human rights treaties binding on the member states.[34] The

[34] ECJ, Case 4/73, *Nold* [1974] ECR 491, para. 13; Case 44/79, *Hauer* [1979] ECR 3727, para. 20.

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Convention was held to be 'of particular significance in that regard'[35] on four grounds:

1. The Convention as a European legal instrument allows for accord between the European domestic legal systems with respect to human rights.
2. The standards of the Convention for national administrative and criminal proceedings are increasingly acknowledged and will be found within the domestic legal orders as a consequence of their implementation.
3. The EU is bound to consider the legal problems resulting from the binding force of the Convention for the member states in their implementation of EU law (*see* Article 351 TFEU on pre-existing agreements with third countries[36]).
4. Finally, the Convention perceives itself, as expressed by the ECtHR,[37] as the nucleus of a common European constitutionalisation process in the area of human rights.

Despite its particular character, the Convention formerly served as a mere source of inspiration in the determination of general principles on EU human rights, since it was not legally binding for the EU,[38] neither formally (the EU was and still is not a Convention member) nor materially (since, prior to the Lisbon Treaty, the only sources of fundamental rights were the general principles of EU law). Accordingly, the EU Courts declined to assess the conformity of EU acts with the provisions of the Convention.[39] The ECJ uses an autonomous method in the determination of EU human rights.[40] The human rights enshrined in domestic law or the Convention serve as an inspirational, non-binding, source in the identification of EU general principles and thus do not represent in themselves a binding source of EU law. The ECJ did not feel bound, but reserved an adaptation to the structure, aims and peculiar circumstances of the respective area of EU law

[35] ECJ, Joined Cases 46/87 & 227/88, *Hoechst* [1989] ECR 2859, para. 13.

[36] For more detail on the impact of Art. 351 TFEU, *see* J. Klabbers, *Treaty Conflict and the EU* (Cambridge UP 2009), p. 163 et seq.

[37] ECtHR 23 March 1995, Appl. No. 15318/89, *Loizidou*, para. 75: 'constitutional instrument of European public order.'

[38] CFI, Case T-54/99, *max.mobil* [2002] ECR II-313, para. 48; Case T-99/04, *AC Treuhand* [2008] ECR II-1501, para. 45.

[39] CFI, Case T-99/04, *AC Treuhand* [2008] ECR 1501, para. 45. *See* already CFI, Case T-112/98, *Mannesmann Röhrenwerke* [2001] ECR II-729, paras. 59, 75.

[40] Recently exemplified in ECJ, *Mangold*, *supra* n. 27 at para. 74-5. For a detailed discussion, *see* T. Tridimas, *The General Principles of EU law*, 2nd edn. (Oxford UP 2007) p. 6, 23 ('creative and eclectic judicial process'); W. Weiß, *Verteidigungsrechte im EG-Kartellverfahren* (Heymann 1996) p. 31-61. Similarly A. Andreangeli, *EU Competition Enforcement and Human Rights* (Edward Elgar 2008) p. 10, and A.G. Mazák, opinion in Case C-411/05 *Palacios de la Villa*, para. 87 et seq.

in which a human rights issue arises because, 'the protection … must be ensured within the framework of the structure and objectives of the Community.'[41]

Accordingly, the ECJ sometimes develops general principles by a generalisation of specific rules enshrined in EU law or starts with an analysis of secondary law instead of constitutional traditions.[42] The personal scope of the legal professional privilege, for example, was developed by reference to fundamental freedoms (so that the privilege does not apply to third country lawyers not established in the EU).[43] Thus, general principles are often specifically tailored to the peculiarities or needs of the EU's legal order.

The pre-Lisbon 'particular significance' of the Convention

The particular significance of the Convention is reflected in the attitude of the ECJ, which, to a great extent, tries to respect the rights enshrined in the Convention. It appears that, in particular during the last decade, the ECJ has increasingly aligned its jurisprudence on fundamental rights towards the Convention. Reference to the Convention and the respective ECtHR case-law has increased. The first reference to the case-law of the ECtHR and an alleged lack of case-law took place in 1989 in the well-known *Hoechst*[44] and *Orkem* decisions[45] (on the right to respect for one's business premises under Article 8 ECHR and the right to remain silent under Article 6 ECHR in competition enforcement proceedings). After around ten years of silence, in temporal, and maybe also causal, coincidence with the adoption of the Charter, the EU Courts greatly increased their references to and discussions of the case-law of the ECtHR in their judgments, the *Conolly* case being the most pronounced one in this regard.[46] An in-depth examination of the judgments, however, reveals that the EU Courts still do not feel legally obliged to follow the Convention and the ECtHR case-law completely and in every respect. Though the ECJ stated that developments in the case-law of the

[41] ECJ, Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, para. 4. CFI, Case T-112/98, *Mannesmann Röhrenwerke* [2001] ECR II-729, para. 59; Case T-43/02, *Jungbunzlauer* [2006] ECR II-3435, para. 74, with further references to judgements of the ECJ.

[42] *See*, e.g., ECJ, Case 117/76, *Ruckdeschel* [1977] ECR 1753, para. 7; Case C-36/92 *SEP* [1994] ECR I-1911, para. 36; Case 155/79, *AM&S* [1982] ECR 1575, para. 13.

[43] ECJ, Case 155/79, *AM&S.* 1982] ECR 1575, para. 25-6; the ECtHR appears to be more generous, Andreangeli, *supra* n. 40 at p. 120.

[44] ECJ, Joined Cases 46/87 and 227/88, *Hoechst* [1989] ECR 2859, para. 18. In contrast, ECtHR confirmed the protection of business premises under Art. 8 ECHR in a decision adopted some months before, Appl. No. 10461/83, *Chappel* v. *UK*, judgment of 30 March 1989, paras. 51, 64.

[45] ECJ, Case 374/87, *Orkem* [1989] ECR 3283, para. 30.

[46] ECJ, Case C- 274/99 P, *Conolly* [2001] ECR I-1611, paras. 39-49.

ECtHR must be taken into account by the EC judicature,[47] this does not necessarily lead to a change in its previous case-law.[48]

One example is the right to remain silent in antitrust enforcement.[49] In *Orkem*, the ECJ decided that undertakings cannot be forced to admit their commission of an infringement, but they are in any event obliged to answer factual questions and to disclose self-incriminating documents.[50] After the ECJ in 2004 repealed its statement in the *Orkem* decision that neither the wording of Article 6 ECHR nor the case-law of the ECtHR recognized any right not to give evidence against oneself, the ECJ stated that the EC judicature must take into account further developments in the case-law of the ECtHR when interpreting fundamental rights.[51] Some commentators then, prematurely, identified a change in jurisprudence.[52] The Court, however, had still rejected the complaint of a violation of a right to remain silent in this case, for the reason that the self-incriminating documents were handed over to the Commission in conformity with a non-compelling request for information instead of a compelling formal decision.[53] In a later decision, the ECJ confirmed that the duty of an undertaking to cooperate with the Commission also meant that the undertaking may not evade requests for documents on the ground that it was being required to give evidence against itself.[54] The ECJ explicitly did not assess the case-law of the ECtHR as demanding an alteration of the *Orkem* principles,[55] although there is a divergence between ECJ and ECtHR case-law. Article 6 ECHR's right to remain silent encompasses a right not to be forced to contribute to one's own incrimination. The Convention does not differentiate with regard to the type of information requested, whether purely factual or other. Article 6 ECHR protects both from compulsion to answer factual questions as well as leading questions.[56] Also Court of First Instance

[47] ECJ, Case C-238/99 P et al., *LMV* [2002] I-8375, para. 274; CFI, Case T-236/01, *Tokai Carbon* [2004] ECR II-1181, para. 405.

[48] *See* CFI, Case T-236/01, *Tokai Carbon* [2004] ECR, II-1181, para. 405, with regard to the right to remain silent.

[49] This is one area where inconsistencies between the ECJ and the ECtHR are observed: F. van den Berghe, 'The EU and Issues of Human Rights Protection', *European Law Journal* (2010) p. 112 at 120 et seq.

[50] ECJ, Case 374/87, *Orkem* [1989] ECR 3283, paras. 29, 34 et seq.

[51] *See* ECJ, Case 238/99 P. et al., *LMV* [2004] ECR I-8375, para. 271, 274.

[52] E.g., M. Araujo, 'The Respect for Fundamental Rights within the European Network of Competition Authorities', in B.E. Hawk (ed.) *Antitrust Law and Policy* (Fordham Corp. L. Inst. 2005), p. 511 at 520 et seq.; Van den Berghe, *supra* n. 49 at p. 121 (with regard to protection of business premises).

[53] *See* ECJ, Case 238/99 P et al., *LMV* [2004] ECR I-8375, para. 279.

[54] ECJ, Case C-301/04 P, *SGL Carbon* [2006] ECR I-5915, para. 48.

[55] Ibid., para. 43.

[56] ECtHR, Appl. No. 10828/84, *Funke*, para. 44; Appl. No. 19187/91, *Saunders*, paras. 69, 71, 76; Appl. No. 31827/97, *J.B.* v. *Switzerland*, paras. 64-71; recently, Appl. Nos. 15809/02 and 25624/02, *O'Halloran and Francis*, paras. 45 et seq.

(CFI – now General Court) case-law shows that the ECJ's exhortation to consider ECtHR case-law was not meant to reverse the *Orkem* doctrine. The CFI still applies the *Orkem* doctrine and does not understand the ECJ's *LMV* judgment as a reversal of previous case-law either.[57] The CFI even assumes that the *Orkem* standard is equivalent to the standard under Article 6 ECHR,[58] which definitely is not the case insofar as ECJ case-law differentiates fact from opinion.[59] Thus, the EU case-law falls short of Convention standards,[60] which, however, have now become binding by virtue of Article 52(3) of the Charter. That the binding nature of Convention standards comprises the relevant ECtHR jurisprudence will be explained *infra*, *Consequence: authoritativeness of Strasbourg's interpretations and limitation provisions*, p. 82).

Further evidence of the rather loose perception of ECtHR judgments by the ECJ emerged with regard to the protection of business premises. Although the ECJ in *Roquette Fréres*[61] took note of the change of jurisprudence in the ECtHR regarding protection of business premises,[62] and said that 'regard must be had to the case-law' of the ECtHR in the light of the judgment in *Hoechst*, the ECJ[63] still did not indicate whether the *Hoechst* ruling should be altered.[64] The ECJ merely ruled that the protection in Article 8 ECHR may in certain circumstances be extended to cover business premises, and that the state may intervene in a more far-reaching way. In the subsequent *Varec* decision the ECJ stated, in a carefully worded way, that the notion of private life could not be taken to mean that the

[57] CFI, Case T-236/01, *Tokai Carbon* [2004] ECR II-1181, para. 405.

[58] *See* CFI, Case T-112/98, *Mannesmann Röhrenwerke* [2001] ECR II-729, para. 77; *Tokai Carbon*, *supra* n. 57 at para. 406.

[59] *See* Andreangeli, *supra* n. 40 at p. 147, 149.

[60] S. Brammer, *Cooperation between National Competition Agencies in the Enforcement of the EC Competition Law* (Hart 2009), p. 250 et seq., p. 510, footnote 92.

[61] ECJ, Case C-94/00, *Roquette Frères* [2002] ECR I-9011, para. 29.

[62] The ECtHR held that Art. 8 ECHR also applies to business premises (Appl. No. 13710/88, *Niemitz*, para. 29).

[63] *See* ECJ, Case C-238/99 P, *LVM* [2002] ECR I-8375, para. 251. In this case the ECJ did not rule on the merits of the CFI's statement (in Case T-305/94, *LVM* [1999] ECR II-931, para. 420) that the 'development of the case-law of the ECtHR relating to Art. 8 of the ECHR has no direct impact on the merits of the solutions adopted in *Hoechst*.'

[64] For a concurring view, *see* H. Scheer, 'The Interaction between ECHR and EC Law', *Zeitschrift für Europarechtliche Studien* (2004) p. 663 at 677, footnote 64; C. Nowak, 'Grundrechte im europäischen Konstitutionalisierungsprozess', in T. Bruha and C. Nowak (eds.), *Die Europäische Union: Innere Verfasstheit und globale Handlungsfähigkeit* (Nomos 2006) p. 107 at p. 134. Other scholars contend that the ECJ conformed to Strasbourg case-law, *see*, e.g., Callewaert, *supra* n. 7 at p. 113; F. Jacobs, 'The ECHR, the EU Charter of Fundamental Rights and the ECJ', in I. Pernice et al. (eds.) *The Future of the European Judicial System in a Comparative Perspective* (Nomos 2006) p. 291 at p. 292.

professional or commercial activities of either natural or legal persons are excluded from the protection of Article 8 ECHR.[65]

These decisions prove that the ECJ technically feels bound neither by the Convention nor by the relevant case-law of the ECtHR. Though one can observe a well developed human rights dialogue in Europe which results in a 'growing European human rights *acquis*'[66] and in 'progressively more common standards of protection'[67] and which has achieved a 'fair amount of harmonisation between the Convention and EU law,'[68] some standards still are unharmonised:[69] the conformity of EU human rights standards to that of the Convention thus largely depends on the willingness of the ECJ to follow the ECtHR. Accordingly, the relationship between the EU and the Convention has been described as 'symbiotic, incremental and even messy and unpredictable.'[70] The fact that the ECJ can sometimes be perceived as scrupulously following the line of reasoning of the ECtHR (as exemplified by the above-mentioned *Conolly* judgment) or recognizing a decision of the ECtHR,[71] adds to the unpredictability and confusion concerning the application of Convention requirements to EU law by the ECJ.

Methodical change demanded by Lisbon

This generally rather loose, to some extent even contradictory, approach of the ECJ towards the Convention, which gave rise to concerns about discrepancies between EU and Convention human rights standards, is no longer acceptable, because of the formal legal force of core rules of the Convention by virtue of Article 52(3) of the Charter. The incorporation of core rules of the Convention raises the intricate question whether the ECJ is now also technically bound by the decisions of the ECtHR interpreting the incorporated Convention rules, to the effect that the ECJ is legally obliged to interpret the corresponding Charter provisions in the same way. If so, ECtHR case-law would have become binding on the ECJ and would deprive the ECJ of any flexibility about adopting a divergent interpretation of an incorporated Convention right.

The incorporation of Convention provisions as mandatory law unavoidably has a bearing on the treatment of the relevant case-law of the ECtHR. A clear indication in this regard is the mention made of the case-law of the ECtHR in the

[65] ECJ, Case C 450/06, *Varec* [2008] ECR I-581, para. 48.

[66] Douglass-Scott, *supra* n. 1.

[67] Andreangeli, *supra* n. 40 at p. 8.

[68] J. Callewaert, 'The European Convention on Human Rights and European Union Law: A Long Way to Harmony', *EHRLR* (2009) p. 768 at p. 769.

[69] *See* ibid., p. 774 et seq., where Callewaert mentions in particular the right to remain silent in antitrust enforcement.

[70] Douglass-Scott, *supra* n. 1 at p. 665.

[71] Cf. ECJ, Case C-145/04, *Spain* v. *UK* [2006] ECR I-7917, para. 95.

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fifth recital of the Preamble to the Charter and the usage by and references to the case-law of the ECtHR in the Explanations relating to the Charter. The Explanations of Article 52(3) state that the meaning and scope of the Convention rights are determined by the normative text of the relevant Convention provisions (including protocols) and by the respective ECtHR case-law. Admittedly, this sentence also mentions the case-law of the ECJ, which might cause confusion about the decisive significance of the Strasbourg case-law. As already explained above (*supra*, Incorporation by virtue of Article 52(3) FRC, p. 69), the reference to ECJ case-law and to the autonomy of EU law makes a purely jurisdictional point.

Incorporated Convention rights are interpreted for the EU first of all by the ECJ which, however, has to follow the interpretation of a fundamental right adopted by the Strasbourg court if contentious issues have already been clarified by the latter.[72] This is so because the incorporation of Convention provisions has simultaneously incorporated the relevant ECtHR case-law, as its decisions interpret the norms of the Convention in an authoritative way.[73] The Convention provisions have been embraced by the EU legal order with the same meaning as they enjoy in Strasbourg. Otherwise, the aim of ensuring consistency between the Charter and the Convention would not have been attained, and the incorporation of core norms of the Convention would be incomplete, even counteracted, at least in practical terms. One cannot reconcile incorporation and full application of Convention rights with the ECJ retaining discretion over the scope and interpretation of these rights.[74] A merely static incorporation of (part of) the Convention would contradict the very nature of the Convention as a 'living instrument'[75] which evolves as the case-law of the ECtHR progresses. Thus, the teleology of Article 52(3) speaks in favour of a binding interpretational force of the ECtHR jurisprudence. Consequently, the incorporation of the Convention implies a considerable change to the ECJ's attitude towards the judgments of the ECtHR. The ECJ's perception of the Convention and the treatment of the case-law of the ECtHR has to change.

[72] *See also* Alonso Garcia, *supra* n. 1 at p. 499, footnote 36.

[73] The interpretation given in a case is binding upon the parties to the dispute (Art. 46(1) ECHR), but enfolds a quasi *ergo-omnes*, *de-facto* binding effect beyond the individual case, because the observations made by the ECtHR are generally applicable to comparable situations in all state parties (N. Lavranos, *Legal Interaction between Decisions of International Organisations and EU Law* (Europa Law 2004) p. 168); and the ECtHR may authoritatively interpret its judgments, Art. 46(3) ECHR.

[74] A.W. Heringa and L. Verhey, 'The EU Charter: Text and Structure', *Maastricht Journal of European and Comparative Law* (2001) p. 11 at p. 17; C. Lenaerts and E. de Smijter, 'The Charter and the Role of the European Courts', *Maastricht Journal of European and Comparative Law* (2001) p. 90 at p. 99; Peers, *supra* n. 3 at p. 171.

[75] *See* ECtHR 25 April 1978, Appl. No. 5856/72, *Tyrer*, para. 31.

Consequence: authoritativeness of Strasbourg's interpretations and limitation provisions

The authoritativeness of the ECtHR's interpretation is relevant with regard to defining the personal scope, i.e., the applicability, of fundamental rights to legal entities, in contrast to natural persons. This is not explicitly dealt with in the Charter (apart from specific references, as in Article 42 of the Charter). The Charter rights apply to every person (*see*, e.g., the right to good administration, Article 41 of the Charter) or everyone (Articles 47 and 48 on fair trial, presumption of innocence and rights of defence) which might include legal persons. With regard to the Convention, the situation is much clearer since the right to individual applications (Article 34 ECHR) applies to any person, non-governmental organisation (NGO) or group of individuals so that the rights can be enforced not only by natural but also by juridical persons. According to ECtHR case-law regarding several Convention rights, they apply also to business companies or business premises – for example as regards the protection of private life and home (*see* Article 8 ECHR – but with looser standards for the scrutiny of state measures than in the case of an application of Article 8 ECHR to private homes).[76] Even the intrinsic nature of a right cannot prevent it from being claimed by a juridical person, as was decided with regard to Article 10 ECHR, the freedom of expression which applies also to commercial activities.[77] The rights enshrined in Article 6 ECHR apply also to corporations.[78]

Another corollary of the integration of the corresponding provisions of the Convention into the EU's legal order is the significance of the Convention's limitation provisions for these rights. Though the Charter contains its own rules on the application and limitation of its rights and principles in Articles 51 and 52, the incorporation of the corresponding rights of the Convention also integrated the relevant rules on interpretation and, in particular, the relevant limitations as provided for in the Convention. This is a consequence of Article 52(3) referring to the meaning and scope of the Convention rights, which necessarily implies the relevant limitations to these rights as well. Otherwise the meaning and scope of the rights would not be the same and the aim of consistency between EU law and ECHR standards would not be attained. This understanding of Article 52(3) of the Charter corresponds to the intentions of the drafters, as Article 52(3) was

[76] *See* Andreangeli, *supra* n. 40 at p. 15 et seq.

[77] ECtHR, Appl. No. 12726/87, *Autronic*, para. 47.

[78] Report of the European Commission on Human Rights of 30 May 1991, Appl. No. 11598/85, *Stenuit*, para. 66; implicitly ECtHR, Appl. No. 53892/00, *Lilly France*, para. 23 et seq. *See also* Brammer, *supra* n. 60 at p. 253 et seq., 301. Contra, with regard to the right to remain silent, *see* W. Wils, 'Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement', *World Competition* (2006) p. 3 at p. 19, footnote 66.

introduced intentionally, in order to avoid the risk of reducing the level of human rights protection under the ECHR by applying the general limitation provision of Article 52(1) of the Charter.[79] The Explanations of Article 52(3) state that the reference to meaning and scope includes 'authorised limitations'. This is significant, as several of the incorporated rights have very specific limitation provisions (e.g., Article 8(2) ECHR), whereas others do not contain limitations at all (*see* Article 6 ECHR), although this does not necessarily imply that no limitations to those rights are possible. The relevance of the Convention limitation provisions to the corresponding Charter rights is noteworthy because the Convention limitations depart from Article 52(1) of the Charter, the general rule which provides for limitations in a rather broadly worded way: It suffices that the limitation is provided for by law and respects the essence of the right and the principle of proportionality. Since the limitation shall meet objectives of general interest only, the grounds for limitations are limitless.[80] Article 52(1) reflects the ECJ case-law, which recognizes any public interest as a viable public policy objective capable of limiting the enjoyment of EU fundamental rights.[81] The situation under the Convention is different. Some Articles are subject to carefully drafted limitation provisions, like Article 8(2) ECHR, exhaustively listing the policy objectives suitable for justifying interference with the protection of privacy. Other Convention rights, like Article 6 ECHR, do not contain limitations. The ECtHR, however, clarified that the right to access to a court contained in Article 6(1) ECHR is not absolute (in contrast to other Convention rights like Article 3) but subject to limitations due to the need for regulation of this right. In regulating access to courts, states enjoy a latitude that is not, however, so broad as to impair the essence of the right. Furthermore, any limitation must serve a legitimate aim and respect proportionality.[82] Complying with international obligations like the sovereign immunity of states is a legitimate aim.[83] Thus, although the starting point of the ECtHR for limitations to Article 6(1) is different (as it refers to the need for legislation on the ways to gain access to courts), the practical result appears to be more or less in

[79] Alonso Garcia, *supra* n. 1 at p. 497 et seq; P. Lemmens, 'The Relation between the Charter of Fundamental Rights of the EU and the European Convention on Human Rights – Substantive Aspects', *MJ* (2001) p. 49 at p. 54 et seq. *See also* Peers, *supra* n. 3 at p. 164; W. Sadurski, 'The Charter and Enlargement', *ELJ* (2002) p. 340 at p. 354.

[80] Peers, *supra* n. 3 at p. 166.

[81] Peers (ibid. p. 153 et seq., p. 166) observes a difference between ECJ case-law and Art. 52(1) FRC, in that the necessity requirement and the 'prescribed by law' requirement were new. The necessity requirement, however, is part of the proportionality assessment usually made by the ECJ, and the 'prescribed by law' requirement has sometimes also been addressed by the ECJ (cf. ECJ, Case 46/87, *Hoechst* [1989] ECR 2859, para. 19). It is possible that, in the future, Art. 290 TFEU might have an impact: it explicitly reserves the essential elements of an area for legislative acts.

[82] *See* ECtHR 21 Nov. 2001, Appl. No. 35763/97, *Al Adsani* v. *UK*, para. 53.

[83] Ibid., para. 54.

conformity with Article 52(1) of the Charter. But this might not always be the case. It is, for example, contested whether an interference with the exercise of a right under the Convention not containing explicit limitations could be justified by referring to the protection of conflicting Convention rights of others.[84] In contrast, under Article 52(1) of the Charter, any objective of general interest suffices as a limitation.

Another consequence is that the ECJ can no longer apply its (quite broad) rules on limitations of EU rights when subsuming Convention rights, as has happened several times.[85] Instead, the ECJ has to follow diligently the relevant rules on limitations in the Convention. Due to the differences between the Convention and the Charter, the leeway for justifying interference with a Convention right is more restrained than in the case of Charter rights. Consequently, one can expect that the application of the Convention's rules on limitations will result in an increase in the level of effective human rights protection in the EU.[86]

Challenges to the role and importance of human rights in the interpretation and application of EU law

Secondly, there are challenges to the role and importance of human rights in the interpretation and application of EU law. This will be exemplified by the EU antitrust procedure Regulation 1/2003, which demonstrates more respect for human rights than the previous Regulation 17/62. Its 37th recital, which gives an interpretational guideline, 'respects the … rights of the [Charter]' and provides that 'this Regulation should be interpreted and applied with respect to' the Charter, and – more importantly –its Article 27(2) contains a recognition of 'full respect' for the rights of the defence.

Interpreting the concept of rights of the defence

As the regulation does not define the rights of the defence, the Charter and the Convention become relevant and guide its interpretation and application. Article 48(2) of the Charter, providing for respect for the rights of defence of anyone who has been charged, materially incorporates the rights enshrined in Article 6(2) and

[84] *See* C. Grabenwarter and T. Marauhn, in Grothe and Marauhn (eds.), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (2006), ch. 7, mn. 17.

[85] Cf. Peers, *supra* n. 3 at p. 147 et seq., p. 178 et seq. Examples: CFI, Joined Cases T-222/99, T-327/99, and T-329/99, *Martinez and de Gaulle* [2001] ECR II-2823, paras. 230 et seq. (upheld by the ECJ, Case C-488/01, *Martinez* [2003] ECR I-3355, para. 78 et seq.), where the CFI mentions Art. 11 ECHR and does not refer to Art. 11(2) but applies the general EU limitations. ECJ, Case C-112/00, *Schmidberger* [2003] ECR I-5659, paras. 77-80 refer to Arts. 10 and 11 ECHR and their limitation provisions but applies only the general limitation standards of EC law.

[86] Peers, *supra* n. 3 at p. 141.

(3) ECHR (see the Explanations of Article 48); Article 47(2) of the Charter on the rights to a fair trial correspond to Article 6(1) and incorporate the right of anyone charged to remain silent. The decisive question for the applicability of Article 6(2) and (3) ECHR is then whether an antitrust enforcement procedure relates to a criminal charge. This depends on the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the so-called Engel criteria. Article 23(5) Regulation 1/2003 (fines 'shall not be of a criminal law nature') is not decisive, since the term 'criminal' in Article 6 ECHR is interpreted autonomously. EU antitrust procedures are quasi-criminal procedures by nature, due to the increased emphasis on deterrence,[87] the use of core criminal law concepts, and the considerable amount of fines,[88] thus falling under the scope of Article 6 ECHR embracing 'non-hard' criminal law.[89] The ECJ acknowledged the fact that the presumption of innocence, as guaranteed, *inter alia,* in Article 6(2) ECHR applies to EU antitrust enforcement, since a company investigated is comparable to a person charged with a criminal offence.[90] Thus, the rights enshrined in Article 6 ECHR apply to EU antitrust procedures and are incorporated into the EU if corresponding Charter rights exist, as is the case with the presumption of innocence (Article 48(1) of the Charter) and other detailed rights of defence, like the right to have adequate time and facilities for the preparation of defence, the right to examine, or have examined, witnesses and to obtain the attendance and examination of witnesses, and the legal professional privilege.[91]

The Charter contains further rights relevant for antitrust enforcement and which could – at least partly – be designated as rights of defence in the context of

[87] *See* the Commission's Guidelines on the method of setting fines, *OJ* 2006 C 210/2, paras. 4, 30, 37.

[88] *See* D. Slater et al., 'Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?', Global Competition Law Centre Working Paper 04/08, p. 12-15, and the riposte by W. Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review, and the ECHR', *World Competition* (2010) p. 5.

[89] ECtHR, Appl. No. 73053/01, *Jussila*, para. 43. This judgment raised some debate about what exactly Art. 6 ECHR demands in the case of 'non-hard' criminal law, as the ECtHR opined that 'the criminal-head guarantees will not necessarily apply with their full stringency.' *See*, on the one hand, Wils, *supra* n. 88 at p. 20 et seq., and, on the other, A. Riley, 'The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?', *ECLR* (2010) p. 191 at p. 199.

[90] ECJ, Case C-235/92 P, *Montecatini* [1999] ECR I-4539, para. 176, where the Court makes reference to the criteria of the leading *Özturk* case on the applicability of Art. 6 ECHR on quasi-criminal procedures by the ECtHR. *See also* European Human Rights Commission, *YECHR* (1990) p. 46 at p. 52; Wils, *supra* n. 88 at p. 18.

[91] For its implication in Art. 6(3) ECHR, *see* ECtHR, Appl. Nos. 12629/87 and 13965/88, *S* v. *Switzerland*, para. 48; E. Gippini-Fournier, 'Legal Professional Privilege in Competition Proceedings', in B. Hawk (ed.), *International Antitrust Law and Policy* (Fordham Int. L Inst. 2005) p. 587 at p. 613 et seq.

Article 27(2) Regulation 1/2003, like the right to remain silent, which is discussed by the CFI in the context of rights of defence,[92] the right to respect for home and communications (Article 7 of the Charter, corresponding to Article 8 ECHR) and the right to good administration (Article 41 of the Charter), in particular a right to fair treatment, a right to be heard and a right to have access to files (*see* Article 41(2) of the Charter).

Higher value of fundamental rights against exigencies of effective enforcement

Generally speaking, as a consequence of the existence of a fundamental rights 'catalogue' and the partial incorporation of the Convention, there is no longer room for manoeuvre for the European Commission or the EU Courts to balance fundamental rights against the need for the effective enforcement of EU competition law.[93] The latter without any doubt is a public good, but it can be pursued by the Commission in the exercise of its investigative powers only insofar as the limits and inherent constraints of fundamental rights/rights of defence allow room for considering efficiency or expediency of enforcement. It is no longer tenable to see the rights of defence of the undertakings concerned only as restraints of and 'unjustified hindrance'[94] to the Commission's duty to enforce competition law. It is the other way round: it is not the extent and scope of rights of defence which need to be justified, but the scope and intensity of the Commission's investigative powers and the way the Commission makes use of them. Unfortunately, the EU Courts perceive the rights of defence as the exception in need of justification. A very telling statement was made by the CFI (in a pre-regulation 1/2003 case) which

> recalled that the protection of the legal professional privilege is an exception to the Commission's powers of investigation. Therefore, the protection … affects the conditions under which the Commission may act in a field as vital … as … competition … For those reasons, the [EU Courts] have been at pains to develop a Community concept of legal professional privilege.[95]

Such a statement is not in line with the full respect for the rights of defence demanded by Article 27(2) Regulation 1/2003 and the incorporation of the relevant rights as set out by the Convention.

[92] *See* CFI, Case T-112/98, *Mannesmann Röhrenwerke* [2001] ECR II-729, paras. 66 et seq.

[93] An example of this is CFI, Case T-112/98, *Mannesmann Röhrenwerke* [2001] ECR II-729, paras. 66 et seq.

[94] Ibid.

[95] CFI, Joined Cases T-125/03 and T-253/03, *Akzo Nobel* [2007] ECR II-3523, para. 176.

Interpreting the Commission's powers in conformity with Convention standards

The incorporation of Convention standards into EU law offers further challenges to the Commission's use of its investigative and decision-making powers. The Convention ´s requirements have to be respected when applying EU law, all the more so since investigative and decision-making powers were extended.[96] More sophisticated powers imply a higher interference with fundamental rights. Hence, the Commission, in applying its extended powers, has to respect human rights more carefully than before. The procedural exigencies of 'due process' increase when the weapons of the investigator become sharper. Secondary law, like Regulation 1/2003, however, often only partly reflects the exigencies of applicable Convention standards, as can be shown by an analysis of Article 20, Regulation 1/2003 on the right to protect one's home. An EU right to privacy and to the inviolability of private homes of natural persons[97] is clearly reflected in Article 21, Regulation 1/2003, which allows for an inspection only in case of reasonable suspicion that relevant records are being kept in any premises. Prior authorisation from the national judicial authority is required. In that respect, the standards conform to Article 8 ECHR and the Charter. Still subject to debate, however, is the protection of business premises. With the entry into force of the Lisbon Treaty, the Charter's protection of private and family life, home and communications, in Article 7, became part of the fundamental rights to be respected when inspecting business premises under Article 20, Regulation 1/2003. By virtue of Article 52(3), Article 7 of the Charter incorporates Article 8 ECHR and the respective case-law, as explained above. With regard to Article 8 ECHR, the ECtHR decided that, in certain circumstances, Article 8 ECHR includes the right to respect for business premises.[98] Consequently, the authorities have to conform with the limitations contained in Article 8(2) ECHR. The respective standards, as interpreted by the ECtHR, in particular as regards its requirements for proportionality, will play an important role in the interpretation of Article 20 Regulation 1/2003 in the case of enforced inspections. If a targeted undertaking opposes an inspection, the national authorities shall afford the necessary enforcement assistance: Article 20(6) Regulation 1/2003. A judicial authorisation is not generally prescribed by the Regulation, or by general principles of EU law, but is necessary for the enforcement if such authorisation is required by national rules (Article 20(7) Regulation 1/2003). In several EU member states, domestic law does not require judicial authorisation, so inspections could be enforced by the officials of national competition authorities or by police officers. This could conflict with the requirement of proportionality because, according to the ECtHR, the exceptions to Article 8 ECHR have to be interpreted narrowly and they must be convinc-

[96] Commission Staff Working Paper accompanying the Report on the Functioning of Regulation 1/2003, SEC (2009) p. 574 final, p. 21 et seq.

[97] *See* ECJ, Joined Cases 46/87 & 227/88, *Hoechst* [1989] ECR 2859, para. 17.

[98] ECtHR, Appl. No. 37971/97, *Stés Colas Est SA*, para. 41.

ingly established.[99] This requires that the national rules afford adequate and effective safeguards against the abuse of public powers to interfere with the undertaking's right to respect for its premises.[100] In assessing this, the ECtHR considers whether the authorities have very wide powers giving them exclusive competence to determine the expediency, length and scale of inspections, and whether a prior warrant was issued by a judge, or the inspections were undertaken in the presence of a senior police officer. These limits apply also to antitrust enforcement, although the ECtHR acknowledges that the entitlement of public authorities is more far-reaching in the case of business premises.[101] Thus, the Convention requires material as well as institutional safeguards against the abuse of powers of inspection. Given the extensive investigative powers in Article 20 Regulation 1/2003 and the severe consequences of enforcement proceedings under Regulation 1/2003, one must conclude that the Convention also calls for considerable safeguards against abuses in EU competition enforcement. Thus, dawn raids by the Commission under Article 20 Regulation 1/2003 are not beyond doubt as regards Article 8 ECHR.[102] The Commission has to take care, that enforcement of inspections under Article 20 Regulation 1/2003 are in conformity with these standards, even though the relevant national rules may allow for easy enforcement. The wording of Article 20(6), (7) Regulation 1/2003 does not reflect these requirements either: Article 20(6) Regulation 1/2003 provides for 'assistance of the police or of an equivalent enforcement authority' only 'where appropriate.' This means that this assistance is neither compulsory, nor is it necessary for a senior police officer to be present. Article 20(7) Regulation 1/2003 refers only to national rules, not to Article 8 ECHR.

Consequences for the role of the Convention within the national legal orders

Harmonisation of legal value in the member states

As another consequence, the incorporation of many articles of the Convention into EU law alters the role and significance of the Convention within the domestic legal orders of the EU member states. The partial incorporation of the Convention leads to a primary law status of these rights, as they are part of the Charter by virtue of Article 52(3) of the Charter. Being part of EU primary law, the in-

[99] Ibid., para. 47.
[100] Ibid., para. 48.
[101] Ibid., para. 49.
[102] *See also* I. Aslam and M. Ramsden, 'EC Dawn Raids: A Human Rights Violation?', *Comp. Law Review* (2008) p. 61 at p. 76 et seq.; M. Lienemeyer and D. Waelbroeck, 'Case Comment', *CML Rev* (2003) p. 1481 at p. 1496.

corporated Convention rights enjoy priority over the domestic law of the EU member states and are directly effective due to their sufficient precision and unconditionality. This has an impact on the domestic role of the Convention as well.

Before the entry into force of the Lisbon Treaty, the constitutional orders of the member states defined the domestic legal status of the Convention. Whereas few member states ascribe constitutional rank to the Convention, most of them formally see the Convention only as a binding international instrument with limited legal value within the domestic legal order. In Germany, for example, according to the prevailing opinion, the Convention rights enjoy the status of a federal statute only, below constitutional level.[103] Nevertheless, fundamental rights in Germany have to be interpreted in harmony with those of the Convention. The Federal Constitutional Court does not, however, oblige courts to implement ECtHR decisions strictly in cases which Germany has lost, but has restrained the legal value of the Convention's stipulations more or less to a point of consideration in legal argument. The Convention and the relevant Strasbourg case-law have to be considered, but there is no need to follow the interpretation given by a judgment of the Strasbourg court finding a violation of the Convention by Germany. Courts are free to deviate if the grounds for doing so are compelling.[104] In contrast, in Austria, the Convention is directly applicable constitutional law, filling the human rights gap in the Austrian Constitution, which gives the ECtHR decisions an immense impact on the Austrian legal order.[105] In the Netherlands, the Convention, being an international treaty, has a supreme position, also in relation to the Constitution.[106] Hence, the Netherlands *Hoge Raad* accords primacy to ECtHR decisions, over all conflicting Dutch law.[107]

[103] For more detail, *see* C. Tomuschat, 'The Effects of the Judgments of the European Court of Human Rights according to the German Constitutional Court', *German Law Journal* (2010) p. 513 at p. 518.

[104] Decision of the Federal Constitutional Court, Vol. 111, p. 287 at p. 324: The official English translation (available at <www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html>, last visited 7 June 2010) reads in the relevant part (para. 50): 'If, in … proceedings in which … Germany is involved, the ECHR establishes that there has been a violation of the Convention …, and if this is a continuing violation, the decision of the ECtHR must be taken into account in the domestic sphere, that is the responsible authorities or courts must discernibly consider the decision and, if necessary, justify understandably why they nevertheless do not follow the international law interpretation of the law.' For a riposte, *see* Tomuschat, *supra* n. 103 at p. 522-525.

[105] D. Thurnherr, 'The Reception Process in Austria and Switzerland', in H. Keller and A. Stone Sweet (eds.) *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford UP 2008), p. 311 at p. 312, 325, p. 344-351.

[106] E. de Wet, 'The Reception Process in the Netherlands and Belgium', in H. Keller and A. Stone Sweet (eds.), *A Europe of Rights*, *supra* n. 105 at p. 229, 235 and 253.

[107] Lavranos, *supra* n. 73 at p. 180-181.

Due to the new status of some Convention rights as part of EU primary law, relevant decisions of the ECtHR become binding in a material sense insofar as they interpret these incorporated provisions of the Convention. As shown above (*supra,* Methodological change demanded by Lisbon, p. 80), the incorporation of the corresponding Convention provisions by virtue of Article 52(3) of the Charter encompasses the relevant ECtHR case-law. In the same way as domestic courts have to follow Luxembourg case-law, they now have to implement Strasbourg decisions. This legal effect of Strasbourg decisions will be generalised to all Convention rights once the EU accedes to the Convention. For the time being, prior to the accession, the binding force of Strasbourg case-law is limited to those Convention rights corresponding to Charter rights. To that extent, the adoption of Convention rights by EU law has the capacity strongly to harmonise the variety of impacts of the Convention on the domestic legal orders of the EU member states. The incorporation will supersede the different mechanisms chosen by those states to implement the Convention into domestic law and – by virtue of their priority and direct effect – will enhance the effectiveness of the Convention all the more since national reservations will not apply. The reluctance shown by the German Federal Constitutional Court in following precisely the judgments of the ECtHR is no longer tenable in relation to incorporated Convention rights.

The new dimension of the legal effect within the domestic legal order of the corresponding Convention rights applies only within the scope of the Charter, i.e., only if the EU member states implement EU law or act within the scope of EU law. EU member states are bound by the EU human rights standards if acting in cases to which EU law applies. The limited wording of Article 51(1) of the Charter is not an obstacle to this conclusion, because the Explanations on Article 51 of the Charter refer to decisions of the ECJ which define the obligations of the EU member states in broader terms than Article 51(1) of the Charter and stress the binding force of EU human rights also with regard to all domestic actions within the scope of EU law. That Article 51(1) of the Charter did not alter the received case-law is confirmed by a recent ECJ judgment in which the Court did not take issue with the limited wording of Article 51(1) of the Charter but referred to Article 21 of the Charter within the scope of EU law (*supra,* ECHR as a minimum standard: drawing consequences for other sources of EU fundamental rights and for the autonomy of EU law, p. 72).

As a consequence of the above, national reservations to the Convention and the particularities of national implementation mechanisms remain decisive only with regard to the application of corresponding Convention rights outside the scope of EU law or in relation to Convention rights not incorporated by Article 52(3) of the Charter.

Impact of the EU's accession to the Convention

As regards the *latter* limitation on the new significance of the Convention within the domestic legal orders, the situation will change only with the EU's accession. Once the Convention applies as an international treaty of the EU, all provisions of the Convention become part of EU law, with binding effect on the member states, by virtue of Article 216(2) TFEU. The binding effect of EU treaties on the EU member states applies not only with regard to the legal instruments themselves, which become an integral part of EU law,[108] but also with regard to decision-making bodies thereby created.[109] Thus, the judgments of the ECtHR take effect within the binding force and the primacy and direct effect of EU law upon the domestic legal orders.[110]

As regards the *former* limitation on the new significance of the Convention (i.e., the limited scope of EU law), one might assume that the significance of the Convention as EU law will still be limited to cases within the scope of EU law and that national particularities could still, therefore, be decisive outside its scope. There are two arguments in favour of such a view. First, the restriction contained in Article 6(2) TEU, according to which accession shall not affect the EU's competences as defined in the Treaties and which in this respect might mean that the binding force of EU fundamental rights, and the related competences of the ECJ, will not reach beyond the scope of EU law. Secondly, according to Article 2 of the related Protocol No. 8 to the Treaty of Lisbon, the accession agreement shall affect neither the powers of the institutions (in this regard, the jurisdiction of the ECJ might be relevant), nor the situation of each member state in relation to the Convention. In this context, specific mention is made of the reservations to the Convention made by the EU member states. The final answer to these issues will depend on the content of the accession agreement and on whether the EU will also accede to the Convention's protocols.

Conclusion: Incorporating the Convention and the autonomy of EU law

The entry into force of the Lisbon Treaty engendered some uneasy developments with regard to human rights in the EU. While at first glance the introduction of the Charter as a binding human rights 'catalogue' ameliorated the human rights

[108] ECJ, Case 181/73, *Haegeman* [1974] ECR 449, para. 5; Opinion 1/91 *EEA Agreement* [1991] ECR I-6079, para. 37 (on ex-Art. 300(7) ECT, now Art. 216(2) TFEU).

[109] *See* ECJ, Case 30/88, *Greece* v. *Commission* [1989] ECR 3711, para. 13; Case C-188/91, *Shell* [1993] ECR I-363, para. 17; Case C-192/89, *Sevince* [1990] ECR I-3461, para. 9. For the well-known exception of WTO law, *see* Craig and de Burca, *supra* n. 21 at p. 206 et seq.

[110] *See* Lavranos, *supra* n. 73 at p. 53.

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situation, it added specific problems, like the need to clarify the relationship of the different sources of human rights in the EU. Furthermore, the Convention is mentioned – somehow contradictorily – in different contexts. This paper shows that, at the current stage of European integration reached by the Lisbon Treaty, the different layers of EU fundamental rights and the references to the Convention in different contexts both reflect the multiple legitimacy claims of the EU and impart different roles to the Convention. Beyond that, the binding force of the Charter has brought about a new legal importance for the Convention. The Charter materially incorporated corresponding rights of the Convention into the EU's legal order as part of primary EU law by virtue of Article 52(3) of the Charter. As analysed above, this new development produces several consequences challenging the status quo of the human rights jurisprudence of the ECJ, the interpretation of EU law, in particular the use of the Commission's powers under secondary law instruments like Regulation 1/2003, and, finally, the legal status of the Convention within the domestic legal orders of the EU member states. The EU Courts are now bound by the standards of those Convention provisions corresponding to Charter rights. The incorporation also encompassed the limitation provisions enshrined in the Convention and the relevant ECtHR case-law. Other sources of EU fundamental rights, in particular the general principles, are retained and become significant if they provide for a higher standard of protection or for additional rights, since the Convention serves only as a minimum standard. While all of these developments considerably promote further homogeneity in the European human rights area, the autonomy of the EU human rights order is maintained insofar as the ECJ can identify standards higher than, or additional to, those contained in the corresponding rights of the Convention.

Nevertheless, the partial incorporation of the Convention may give rise to concerns about the autonomy of human rights protection in the EU against the background of specific national traditions. The tension between accession to the Convention and the autonomy of EU law has also been recognized in the European Parliament (EP), which in its resolution,[111] expressed the hope that 'accession will not in any way call into question the principle of the autonomy of the Union's law'. For the Parliament, the ECJ 'will remain the sole supreme court adjudicating on issues relating to EU law and the validity of [its] acts,' and the ECtHR 'must be regarded not only as a superior authority but rather as a specialised court exercising external supervision over the Union's compliance' with the Convention; 'the relationship between the two European courts shall not be hierarchical but rather a relationship of specialisation; thus the [ECJ] will have a status analogous to that currently enjoyed by the supreme courts of the member states in relation to the [ECtHR].' This statement fails, however, to take note of the direct effect of the

[111] Resolution of 19 May 2010, *supra* n. 19, sub. 1, last recital.

Convention and the binding force of ECtHR decisions upon the EU and its member states by virtue of Article 216(2) TFEU, so that the relation between the ECtHR and the ECJ cannot be compared with that of domestic constitutional courts to the ECtHR.

Additionally, the Lisbon Treaty increased the attention given to the respect for national identities. Article 4(2) TEU provides that the EU 'shall respect … [the] national identities inherent in their fundamental structures, political and constitutional.' The Charter in its preamble explicitly recognizes that the development of EU fundamental rights intends to respect 'the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the member states' (Article 67(1)). The TFEU, also, creates a nexus between fundamental rights and the diversity of the member states.

Such peculiarities also give rise to different standards of fundamental rights to which the ECJ may defer, as exemplified in the *Omega* case,[112] in which the ECJ recognized that the principle of respect for human dignity has a particular status in Germany as a fundamental right. The Court added that the member state is not under an obligation to follow a common conception shared by all member states as regards the way in which a fundamental right is protected. States may choose different levels of protection, in particular if the level of protection is guaranteed by the constitution. The constitutional specific of the high rank of human dignity within Germany thus played a role in assessing the proportionality of interference with fundamental freedoms. This case witnesses the sensitivity of the EU legal order for the variety of human rights standards in the member states and other constitutional *specifica*.[113]

This sensitivity might collide with a uniform standard developed in the Convention which is interpreted and applied uniformly to all parties.[114] There is no leeway for parties to justify interferences with Convention rights by constitutional specifics, because the formulations in the Convention are interpreted autonomously, within a framework of an equality of obligations on all State Parties.[115] The ECtHR does not consider the specifics of individual State Parties – except in cases where provisions of the Convention refer to national law (e.g., Articles 7 and 12 ECHR). Deference to a member state's assessment also takes place under the theory of a national margin of appreciation developed by the ECtHR, according to which a member state's initial assessment of proportionality in certain cases will

[112] ECJ, Case C-36/02, *Omega Spielhallen GmbH* [2004] ECR I-9609; for what follows, *see* paras. 34-39.

[113] *See* L. Besselink and J.H. Reestman, 'Editorial', *EuConst* (2008) p. 199 at p. 204.

[114] *See* the statements by its former president, L. Wildhaber, in an interview conducted by S. Greer, *EHRLR* (2010) p. 165 at p. 170, 174 et seq.

[115] F. Matscher, 'Methods of Interpretation of the Convention', in R. Macdonald et al.(eds.), *The European System for the Protection of Human Rights* (Kluwer 1993), p. 63 at p. 70 et seq.

be respected.[116] Apart from these two cases, the ECtHR adopts an autonomous interpretation which considers all or a majority of domestic legal concepts when interpreting Convention formulations, in order to find European denominators which stem from the *corpus* of national legal systems.[117]

Such uniform standards might collide with the respect for diversity enshrined in EU law. This collision is not avoided by the fact that the Convention standards are only minimum standards allowing for higher levels of protection. The *Omega* case was not an issue of higher versus lower fundamental rights standards in the EU. On the contrary, the case dealt with justifications and specific proportionality assessments motivated by the constitutional specifics of a member state which play a role in balancing conflicting fundamental rights (human dignity as a positive obligation of public authorities to interfere with economic activities versus economic freedom). The ECJ was faced with a particular national definition of a high level of protection of a public good against which the proportionality of a national interference with a fundamental freedom of the then ECT had to be assessed. The theory of margin of appreciation is not helpful in such a situation, because a margin of appreciation applies in the balancing of conflicting rights, but not with regard to defining those rights; also, there is no room for a margin of appreciation if a uniform European standard exists.[118] In contrast, the ECJ in *Omega* explicitly stated that Germany was not under an obligation to follow a conception common to all member states.[119]

The only instance in which the ECtHR recognized the sufficiency of different, but comparative, fundamental rights standards is that of the *Bosphorus* decision, which in essence declined to use the Convention as a yardstick for assessing the conformity of (the national implementation of) EU law with the Convention standards because the level of EU human rights protection was perceived to offer equivalent protection.[120] This is a considerable deference to EU human rights standards and ECJ case-law[121] and amounts to a limited recognition of the autonomy of EU standards of fundamental rights. The problem of the *Bosphorus* decision, however, is that, after the EU ´s accession, it might no longer be accept-

[116] *See* ECtHR, Appl. No. 5493/72, *Handyside*, para. 48; G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford UP 2007) p. 86, 90 et seq.; F. Ost, 'The Original Canons of Interpretation of the European Court of Human Rights', in M. Delmas-Marty (ed.), *The European Convention for the Protection of Human Rights* (Kluwer 1992) p. 283 at p. 305-306, 308-309.

[117] Ost, *supra* n. 115 at p. 305.

[118] *See* ECtHR 30 March 2004, Appl. No. 74025/01, *Hirst*, para. 40; Ost, *supra* n. 115 at p. 306; Letsas, *supra* n. 115 at p. 91; A. Torres Pérez, *Conflicts of Rights in the European Union* (Oxford UP 2009) p. 30.

[119] *See* ECJ, *supra* n. 112 at para. 37.

[120] ECtHR 30 June 2005, Appl. No. 45036/98, para. 155 et seq.

[121] F. van den Berghe, *supra* n. 49 at p. 117.

able to other parties of the Council of Europe, because the ECtHR does not accord the same respect to the domestic human rights system of any State party to the Council of Europe. Currently, the specific treatment of the EU by *Bosphorus* can be justified by the fact that the EU is not a party to the Convention. After its accession, however, the *Bosphorus* line of dealing with the domestic human rights systems of individual parties to the Convention will prove no longer to be tenable. One may doubt whether *Bosphorus* will provide a durable guideline for deciding competence conflicts between the ECJ and the ECtHR. In addition, it is doubtful whether the *Bosphorus* approach will be applied also with regard to other Convention parties that have a sophisticated and sufficiently high level of fundamental rights protection (assessment of which requires consideration of the material as well as the procedural fundamental aspects of the human rights situation). At any rate, the increased importance of the Convention offers a challenge to the 'unity in diversity' approach of European integration. There is a tension between aligning EU human rights standards with the uniformly conceptualised Convention and the very essence of European integration.

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