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# Relationship between the CFR and ECHR

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# Outline

- Relationship between CJEU and ECtHR
- Relationship between CFR and ECHR
- Special focus on the role of both courts in this relationship
- Relationship between Article 47 CFR and 6 ECHR

# CJEU/ECtHR

- ✦ EU not a party to the ECHR, but all its MS are
  - ✦ 47 parties to ECHR
  - ✦ European Court of Human Rights in Strasbourg (ECtHR)
  - ✦ Direct access to ECtHR for anyone
- ✦ 27 MS of the EU
  - ✦ CJEU in Luxembourg
  - ✦ Access to CJEU mainly via preliminary reference procedure



## CJEU

- **Institution of the EU**
  - Its function is more integrative – to help build **unity**
- **CJEU can refer to the EU principles of supremacy, direct effect and state liability** which ensure that national legislation inconsistent with EU law is actually changed

## ECtHR

- Rising from an **agreement** between European states
  - Aiming at building **community**
- The implementation of its judgments is much **more dependent on national states discretion**

## CJEU

- **Direct access extremely restricted:** Only where an EU act is addressed to individuals or it is of direct and individual concern to them, Art. 263 TFEU
- Normally access via preliminary reference procedure (part of domestic procedure)

## ECtHR

- **Direct access,** but it will only accept applications where all domestic **remedies have been exhausted**, Art. 35 (1) ECHR

# Is there a remedy to the ECtHR?

## No EU law involved:

- Apply to domestic courts, exhaust legal remedies and then go to Strasbourg

## EU law involved

### 1. Where MS authorities have acted

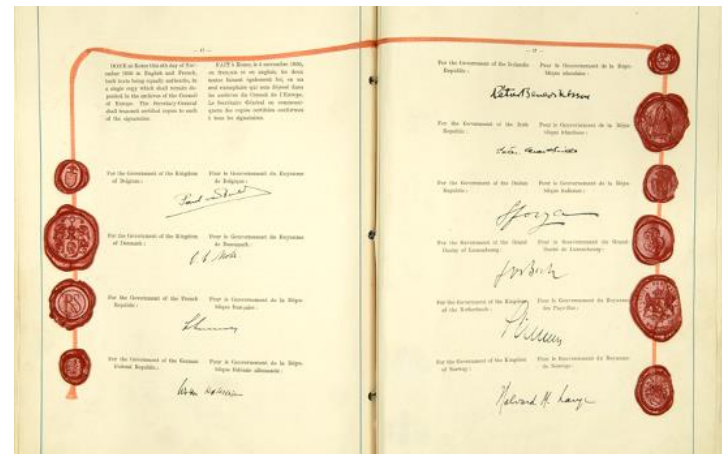
- Application to domestic courts (with possible reference to CJEU by domestic courts)
- If domestic remedies exhausted: Strasbourg

### 2. Where EU authorities have acted (e.g. competition law)

- Apply to General Court of EU (possibility of appeal to CJEU): no way to go to Strasbourg

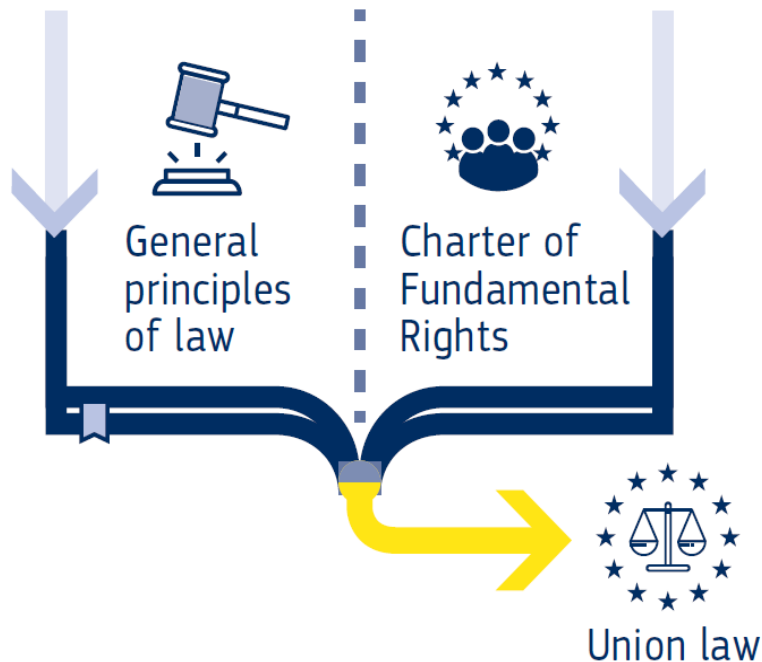
# ECHR/CFR

- ✦ **ECHR**: human rights instrument with history and case-law
- ✦ **CFR**: binding since 1 December 2009 - an incorporation of human rights based on gradually developing case law in the initially economic community



# Two sources of human rights protection in EU

## EU FUNDAMENTAL RIGHTS



- Before the entry into force of the CFR, CJEU relied on **unwritten general principles of EU law**, such as fundamental rights, proportionality, legal certainty, subsidiarity, equality before the law
- ECHR was an important **source of inspiration** for CJEU when defining these principles
- *TEU explicitly states: “Fundamental rights, as guaranteed by the ECHR as they result from the constitutional traditions common to the MS, shall constitute general principles of the Union’s law.”*

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# Articles where both the meaning and the scope are the same as corresponding Articles of the ECHR

- Article 2 (**right to life**) corresponds to Article 2 of the ECHR,
- Article 4 (**prohibition of torture and inhuman or degrading treatment or punishment**) corresponds to Article 3 of the ECHR,
- Article 5(1) and (2) (**prohibition of slavery and forced labour**) corresponds to Article 4 of the ECHR,
- Article 6 (**right to liberty and security**) corresponds to Article 5 of the ECHR,
- Article 7 (**respect for private and family life**) corresponds to Article 8 of the ECHR,
- Article 10(1) (**freedom of thought, conscience and religion**) corresponds to Article 9 of the ECHR,



- Article 11 (**freedom of expression**) corresponds to Article 10 of the ECHR,
- Article 17 (**right to property**) corresponds to Article 1 of the Protocol to the ECHR,
- Article 19(1) (**protection in the event of removal, expulsion or extradition**) corresponds to Article 4 of Protocol No 4,
- Article 19(2) (**prohibition of torture and inhuman or degrading treatment or punishment**) corresponds to Article 3 of the ECHR as interpreted by the ECtHR,
- Article 48 (**presumption of innocence and right of defence**) corresponds to Article 6(2) and(3) of the ECHR,
- Article 49(1) (with the exception of the last sentence) and (2) (**principle of legality**) correspond to Article 7 of the ECHR.



# The same meaning but wider scope

- ▶ Article 9 (**right to marry and found a family**) covers the same field as Article 12 of the ECHR, but its scope may be extended to other forms of marriage if these are established by national legislation,
- ▶ Article 12 (1) (**freedom of assembly and association**) corresponds to Article 11 of the ECHR, but its scope is extended to EU level,
- ▶ Article 14(1) (**right to education**) corresponds to Article 2 of the Protocol to the ECHR, but its scope is extended to cover access to vocational and continuing training,
- ▶ Article 47(2) and (3) (**right to a fair trial**) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights or criminal charges does not apply as regards Union law,
- ▶ Article 50 (**right not to be tried or punished twice in criminal proceedings for the same criminal offence**) corresponds to Article 4 of Protocol No 7 to the ECHR, but its scope is extended to EU level between the Courts of the Member States,

# Example: Art. 9 CFR v Art. 12 ECHR

➤ Article 9, CFR:

*The right to marry and the right to found a family shall be guaranteed **in accordance with the national laws** governing the exercise of these rights.*



➤ Article 12, ECHR:

***Men and women** of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right.*



# Minimum standard of protection

CFR, Article 52(3) states the **minimum standard of protection**: the floor but not the ceiling

“In so far as this Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

# Level of protection

- ▶ Article 53 (**non-regressive clause**) stipulates that no provision may be interpreted as restricting fundamental rights protected by other mechanisms which the EU or its MS are party to, including the ECHR.

- ▶ This means **that case law of ECtHR is of great importance.**
- ▶ Important for **absolute character of rights:**  
e.g. Art. 3 ECHR is absolute, hence Art. 4 CFR must be absolute, too

- ▶ Case C-400/10 *J. McB. v L. E.*, para 53:

*“Article 7 of the Charter must therefore be given the same meaning and scope as Article 8(1) of the ECHR, as interpreted by the case-law of the ECtHR.”*

# Traditional position of the ECtHR: “Strasbourg compromise”

- **EU is not a party to the ECHR and cannot be sued in Strasbourg but MS can be held responsible**
- *Matthews v UK* (1999, EU primary law) According to EU’s Act on Direct Elections (primary law), no elections to the European Parliament were held in Gibraltar. Mrs Matthews alleged a breach of her right to vote under Art. 3 Protocol 1 ECHR on account of the fact that the UK has not organised elections.
- ECtHR: *“The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be ‘secured’. MS’ responsibility therefore continues even after such a transfer”* Breach of Art. 3 Protocol 1 ECHR



- ✦ **Bosphorus v Ireland** (2005): the application of the doctrine of equivalent protection
- ✦ The principle of equivalent protection was no invention of the ECtHR, but had already been introduced by other jurisdictions **facing the challenges resulting from overlapping legal systems.**



➤ A piece of EU legislation (secondary EU law) demanded that Yugoslav aircraft be impounded. Bosphorus Airways had leased an aircraft from Yugoslav National Airways, which was impounded in Ireland. Bosphorus argued violation of its right to property under Art. 1 Protocol 1 ECHR

- ECtHR reaffirmed general responsibility of MS under *Matthews*
- But it introduced new rebuttable presumption: **EU offers protection of human rights which is equivalent to the ECHR**
- If the MS had no discretion, the MS is presumed not to have violated the ECHR if it does nothing more than implement its obligations
- Presumption can be rebutted if in a particular case the protection was ‘**manifestly deficient**’

# CJEU: Referring to ECtHR while stepping further

- ▶ In some cases the CJEU seems to have made use of the right provided by Art. 52(3) CFR, granting more extensive rights than those provided by the ECHR. In these “broadening” cases, the CJEU emphasized that its ruling was meant **not in conflict with the ECtHR precedent**, but beyond it. By widely referring to the ECtHR precedents, in several cases it recalled the importance of taking it **as a starting point, allowing itself to expand the right at stake**, but not to depart from it.
- ▶ Case DEB v Bundesrepublik Deutschland involved **an expansion of the right** of effective judicial protection. After having engaged in a thorough analysis of ECtHR case law, the CJEU eventually relied mainly on Art. 47 CFR to expand the right to legal aid also to legal persons and not only to natural persons, thus reaching an outcome that did not clearly emerge from the ECtHR jurisprudence. Also in this case, however, the court devoted wide attention to ECtHR case law: “the meaning and the scope of the guaranteed rights are to be determined **not only by reference to the text of the ECHR, but also, inter alia, by reference to the case law of the ECtHR.**”

# Limitations on the exercise of rights and freedoms

- ▶ Article 52 (1) of the CFR says that **any limitation on the exercise of the rights and freedoms** recognized by CFR must be **provided for by law** and **respect the essence of those rights and freedoms**. Subject to the **principle of proportionality**, limitations may be made **only if they are necessary and genuinely meet objectives of general interest** recognized by the Union or the need to protect the rights and freedoms of others.

No explicit criteria determining the choice between paragraphs 1 and 3 of Article 52 !!!!

# Competing legal orders?

- References to the ECHR diminished since the CFR had gained legal force (the CJEU has said in *Europese Gemeenschap v. Otis NV and Others* (CJEU 2012) that since Article 47 CFR secures protection afforded by Article 6 ECHR, it would henceforth refer only to Article 47)
- The CJEU's priority is uniform application of EU law, facilitation of legal co-operation, establishment of an area of freedom, security and justice

- In some cases it has deviated from standards set by the ECtHR case law in order to preserve the autonomy and effectiveness of EU legislative measures. Its approach is based on what the CJEU has repeatedly stressed as “**the particular characteristics of EU law**”
- Sensitive areas: mutual recognition of of judicial decisions, e.g. in child abduction cases (Brussels II bis regulation) and cases concerning asylum seekers

✦ In **Melloni case** the CJEU considered the relationship between the CFR and constitutional guarantees on a domestic level (of which the Convention can be an integral part). The CJEU refused an interpretation of Art. 53 CFR allowing a MS to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the CFR.

Account needs to be taken of **the primacy of EU law**. CJEU stated (Melloni, C 399/11, para 64):

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

# Opinion 2/13

- **Article 6/2 TEU foresees the accession of the EU to the ECHR.** Following complicated negotiations the negotiators were able to finalise the draft accession agreement in April 2013. The CJEU was asked by the Commission (as per Article 218(11) TFEU) to give its opinion on the competence of the EU to conclude it.
- The CJEU held that the draft Accession Agreement is **incompatible with EU law**. The central theme: the draft Accession Agreement does not sufficiently take into account the autonomy of EU law, the position of the CJEU itself and certain specific features of Union law as they currently exist.



# Some reactions

- ▶ Former President of the ECtHR Dean Spielman: *'For my part, the important thing is to ensure that there is no legal vacuum in human rights protection on the Convention's territory, whether the violation can be imputed to a State or to a supranational institution'*.



Or less diplomatic:

- ▶ “A legal bombshell”
- ▶ “Fundamentally flawed [... and] an unmitigated disaster”

# In the aftermath of the Opinion: the CJEU softening the approach?

- In **Aranyosi case** (C 404/15) a Hungarian investigating magistrate issued two European arrest warrants with respect to Mr Aranyosi, a Hungarian national, so that a criminal prosecution could be brought for two offences of forced entry and theft, allegedly committed in Hungary. The man having been located in Germany, it was the task of the German authorities to examine the warrants.
- Higher Regional Court of Bremen, which had to decide whether those warrants should be executed, found that the detention conditions to which Mr Aranyosi might be subject were contrary to fundamental rights, in particular the provision of the CFR prohibiting inhuman or degrading treatment or punishment. In judgments of 10 June 2014 and 10 March 2015 the European Court of Human Rights held that Hungary had infringed fundamental rights due to the prison overcrowding which is characteristic of their prisons.
- The German court sought to ascertain from the CJEU whether, in such circumstances, the execution of European arrest warrants can or must be refused

- The CJEU held that 'in exceptional circumstances' a MS may ignore the principle of mutual trust. In case of information that is 'objective, reliable, specific and properly updated' pointing to the existence of 'deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention'. That information may be obtained from, inter alia, 'judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing MS, and also decisions, reports and other documents produced by bodies of the CoEurope or under the aegis of the UN'.

# Back to the accession of the EU to ECHR

- Negotiations continue...
- EU will be able to act as respondent in Strasbourg
- fields of application: violations of human rights by EU institutions, e.g. EC in cartel proceedings, staff disputes...
- Where MS acted on basis of EU law (Bosphorus-like cases)
- EU accession will not change the ambit of the Charter rights as ECHR is already the minimum standard



# Art. 47 CFR/Art. 6 and 13 ECHR

| Charter of Fundamental Rights |  | Corresponding provisions of ECHR (incl. OPs) <sup>1</sup> | Other corresponding CoE instruments <sup>2</sup> | UN Human rights instruments <sup>3</sup>                         |
|-------------------------------|--|---|--|--|
| 47 first paragraph            | Right to an effective remedy before a tribunal | Art. 13   |  | Art. 2 (3) ICCPR; Art. 13 CRPD; Art. 40 (2)(b) CRC; Art. 6 ICERD |
| 47 second paragraph           | Fair and public hearing                        | Art. 6 (1)  |  | Art. 14 (3)(d) ICCPR ; Art. 40 (2)(b) CRC                        |
| 47 third paragraph            | Legal aid (needs-based)                        | Art. 6 (1)  |  | Art. 14 (3)(d) ICCPR; Art. 40 (2)(b) CRC                         |

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# Scope

## Right to a fair trial

Article 6 of the ECHR applies to criminal charges, disputes concerning civil rights, and obligations recognised in domestic law.

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Article 47 of the EU Charter of Fundamental Rights applies to the rights and freedoms guaranteed by EU law. It applies only when Member States are implementing EU law.

- Article 47 applies to all rights and freedoms arising from EU law
- It corresponds to the rights in Article 6 (1) of the ECHR, without Article 6's limitation on civil rights and obligations
- Article 47 therefore secures, as a minimum, the protection offered by Article 6 of the ECHR, in respect to all rights and freedoms arising from EU law.
- This means that the ECtHR case law as a general rule is also relevant in EU law. However, the CFR applies domestically only when MS are implementing (or derogating from) EU law.

