Interaction between the States’ obligations under the European Convention on Human Rights (ECHR) and the European Union Law

EJTN-AEAJ WEBINAR on Conflicts of Norms – Multi-level protection in the application of Fundamental Rights, 18-19 March 2021

Prof. Dr. Danutė Jočienė
Justice of the Constitutional Court of the Republic of Lithaunia
Former Judge of the ECtHR (2004-2013)
Council of Europe and European Union: two different legal systems:

• **Council of Europe** – international regional organization created in 1949 by the Treaty of London (10 States).

• **NOW (2021)** – 47 Member States;

• Main task – protection and promotion of human rights, rule of law and democracy in the European region.

• **The European Union** (with 3 original EU organisations (European Economic Community, European Coal and Steel community, Euratom) – is a unique economic and political union;

• supranational organization (NOW - 27 Member States); unique features - direct effect and supremacy [primacy] of EU law over national law.
Council of Europe and European Union (EU):

• All 27 Member States of the European Union are at the same time Member States of the Council of Europe (and, also, States Parties to the ECHR);

• Therefore, the States must fulfil all obligations arising out of international treaties adopted within the framework of the Council of Europe,

• and, also, all obligations arising from the EU law (including The EU Charter of Fundamental Rights (CFR)).
Council of Europe – regional International Organization:

- Based in Strasbourg, France; 47 Member States.
- Under the ECHR – the European Court of Human Rights (ECtHR) was established (and also, the European Commission on Human Rights which was abolished in 1998).
- The main task of the ECtHR – to observe how the States Parties are implementing the standards of the Convention at national level (Art. 19 of the Convention).
- Individual petition (Art. 34) – Central aspect of the Convention system;
- Art. 46 – the judgments of the ECtHR are obligatory.
The European Union (EU)/history in brief:

• The predecessor of the EU was created after the Second World War. **The first steps - to foster economic cooperation: to create a single market;**

• **Treaty of Rome (EEC), signed on 25 March 1957 established the European Economic Community (EEC); at the same time – another Treaty established the European Atomic Energy Community (EAEC or Euratom).**

• EEC brought together 6 countries (Belgium, Germany, France, Italy, Luxembourg and the Netherlands) **to work towards integration and economic growth, through trade.** It created a common market based on the free movement of: goods, people, services, capital.

• The Treaty of Rome has been amended on a number of occasions, today - the **Treaty on the Functioning of the EU.**

• The EU has, **among others, created a single currency, the euro, making the single market more efficient.**

• A purely economic union has evolved into an organization spanning **policy areas**, from climate, environment and health to external relations and security, justice and migration.
Maastricht Treaty (signed on 7 February 1992, in force from 1 November 1993).

• It creates the European Union.

• This encompasses 3 separate strands (so-called pillars): the European Communities,

• a common foreign and security policy, and cooperation between EU governments on justice and home affairs.

• Common foreign and security policy (2nd pillar) aims to *inter alia*:

• - safeguard the EU’s common values, fundamental interests and independence;

• - develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.
Maastricht Treaty, Article F § 2:

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

Article 6 of the Treaty on the EU - 3 sources of Fundamental Rights (presentation of Judge Edith Zeller):

• 1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...], which shall have the same legal value as the Treaties. <…>.

• 2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms <…>.

• 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.
EU Charter of Fundamental Rights (CFR):

- The Charter brings together the fundamental rights of everyone living in the EU.
- It sets out the full range of civil, political, economic and social rights based on:
  - the fundamental rights and freedoms recognised by the European Convention on Human Rights
  - the constitutional traditions of the EU Member States,
  - the Council of Europe's Social Charter, [...]
  - other international conventions to which the EU or its Member States are parties.
- The Charter became legally binding on EU Member States when the Treaty of Lisbon entered into force on 1 December 2009.
CFR and ECHR:

• Although containing overlapping human rights provisions, the two operate within separate legal frameworks:
  
• The Charter of Fundamental Rights was drafted by the EU and is interpreted by the Court of Justice of the European Union (CJEU).
  
• The European Convention on Human Rights, on the other hand, was drafted by the Council of Europe and is interpreted by the European Court of Human Rights (ECtHR).
  
• The Charter can be seen as the overarching framework for human rights in the EU, of which the European Convention on Human Rights forms only one part, albeit an important one.
EU Charter of Fundamental Rights (CFR):

• Article 52

• Scope and interpretation of rights and principles

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
EU Charter of Fundamental Rights (CFR):

- Article 53
- Level of protection
- Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.
Fundamental Rights in FRC and ECHR:

• 1. **SOME FR are the same in both documents** – the right to Life, the right to respect for family and private life, prohibition of torture, inhuman and degrading treatment, non-discrimination, freedom of assembly and associations, prohibition of slavery, etc.;

• 2. **Some FR in the FRC – of broader content than in the ECHR** – the right to marry and to found a family, the right to education, freedom of thoughts and religion, etc.;

• 3. **Some FR of the FRC are not enshrined in the ECHR** – the right to asylum, the rights of the elderly, different social and economic rights;

• 4. **Some FR of the FRC do not exist separately in the text of the ECHR, but they are protected in the case law** – Art. 3 of the Charter (The right to integrity of the person), Art. 8 (protection of personal data) – are protected under Art. 8 of the ECHR as interpreted by the ECtHR.
Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR): co-operation v. conflict:

• Very important to keep the same standards of interpretation and application of the same fundamental rights;
• Art. 59 § 2 of the Convention – The European Union may accede to this Convention; the same – Art. 6 § 2 of the TEU).
• **BUT** - On 18 December 2014, the Court of Justice of the European Union delivered its Opinion 2/13, concluding that
• the agreement on the accession of the European Union to the European Convention on Human Rights is not compatible with Article 6(2) of the Treaty on European Union [...].
Co-operation between different International Organizations:

• Another body - Universal level – United Nations (UN), 193 Member States:

• The Charter of the United Nations (signed on 26 June 1945 in San Francisco):

  • Art. 103 of the Charter – sets a clear priority of international obligations of States under the UN Charter:

    • In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement,

    • their obligations under the present Charter shall prevail.
Beginning of cooperation and/or conflict/ECHR/UN Charter:

• **Council of Europe level (regional) v. United Nations (universal level):**

• **European Court of Human Rights:**

• **Case of Behrami and Behrami v. France and Saramati v. France, Germany and Norway** (dec.) [GC] (Appl. No 71412/01).

• Decision 02/05/2007 [Grand Chamber (17 judges)]

• Article 35-3; Inadmissible *Ratione personae.*

• Applications concerning acts performed by KFOR and UNMIK in Kosovo (special bodies of the UN) under the aegis of the UN: **INADMISSIBLE**

• Changes in the case law of the ECtHR – see *Al-Dulimi and Montana Management* [GC], No. 5809/08, 21/06/2016, Viol. of Art. 6 (Access to a court - Sanctions imposed on applicants on basis of UN Security Council resolution without judicial scrutiny); *Al-Jedda v. the UK* [GC], No. 27021/08, 07/07/2011 - Territorial jurisdiction in respect of UK in relation to detention of Iraqi national by British Armed Forces in Iraq, Viol. of Article 5-1), etc.
Another example – case of **CONNOLLY v. 15 Member States of the European Union** (No 73274/01, Decision on the inadmissibility of 09/12/2008)

- Complaints against Germany, Austria, Denmark, Spain, Belgium, Finland, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, United Kingdom and Sweden – **ALL EU Member States**.

- Complaint under Art. 6 § 1 of the ECHR – not *fair* proceedings before the European Union bodies including the Court of Justice of the EU.

- Art. 6 § 1 taken with Art. 13 – no possibility to obtain the opinion of the Advocate General and to reopen the case.

- **ECtHR**: **EU Member States ARE NOT RESPONSIBLE for the acts of the European Union acting in the name of that Organization.**
Co-operation v. conflict/the same scope of the same fundamental rights:

*Hoechst case 46/87, CJEU and the ECtHR in the case Niemietz v. Germany (No. 13710/88, judgment of 16/12/1992):*

*Niemietz v. Germany* (ECtHR) - Search of a lawyer's office in course of criminal proceedings against a third party: violation of Art. 8 of the Convention (respect for home and correspondence);

ECtHR - interpreting "private life" and "home" as including certain professional or business activities or premises is consonant with object and purpose of Article 8 and would not unduly hamper the Contracting States.

*Hoechst case* (CJEU) – Different (opposite conclusion, see next slide).
Judgments of 21 September 1989 in Joined cases 46/87 and 227/88 Hoechst v. Commission [1989], CJEU:

1. The fundamental right to the inviolability of the home - the existence of such a right must be recognized in the Community legal order as a principle common to the laws of the Member States in regard to the private dwellings of natural persons,

2. The same is not true in regard to undertakings, because there are divergences in regard to the nature and degree of protection afforded to business premises.

3. The protective scope of Art. 8 of the Convention is concerned with the development of man’s personal freedom and may not therefore be extended to business premises. Furthermore, there is no case-law of the European Court of Human Rights on that subject.

Later on the CJEU has mildened its position – in case *Roquette Freres, C-94/00* – Judgment of the Court of 22 October 2002.

Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities.

Reference for a preliminary ruling: Cour de cassation - France.

*Competition Law* - Protection against arbitrary or disproportionate intervention by public authorities in the private activities of a legal person - Scope of the review which a competent national court is required to carry out for the purposes of authorising coercive measures against undertakings - Commission's duty to provide information, etc...
For the purposes of determining the scope of that principle in relation to the protection of business premises, regard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in Hoechst.

According to that case-law,

- the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover such premises

- (judgment 16/04/2002 in Colas Est and Others v. Prance, No 37971/97 § 41; also Niemietz v. Germany, § 31).
Obligations of national courts:

• Although the national court with jurisdiction to authorise coercive measures must take into account the particular context in which its jurisdiction has been invoked,

• those requirements cannot prevent or absolve it from performing its obligation to ensure, in the specific circumstances of each individual case, that the coercive measure envisaged is not arbitrary or disproportionate to the subject-matter of the investigation ordered

Co-operation v. Conflict:

- **Orkem case, 374/87, CJEU** and **Funke v. France, ECtHR**: DIFFERENT approaches:

  - **ECtHR**— Funke v. France, No. 10828, 25/02/1993 - Violation of Article 6 § 1 of the ECHR *(fair trial)* (as regards the conviction of the applicant for refusing to disclose the documents asked for by the customs).

  - The customs thus attempted to compel him to provide himself the evidence of offences he had allegedly committed – *the special features of customs law could not justify such an infringement of the right* of anyone "charged with a criminal offence"

  - to remain silent and not to contribute to incriminating himself.
Orkem v. Commission of the European Communities, judgment of 18/10/1989, Case 374/87:

• Competition - Commission's investigative powers - Rights of the defence.

• In general, the laws of the Member States grant the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings.

• A comparative analysis of national law does not therefore indicate the existence of such a principle, common to the laws of the Member States, which may be relied upon by legal persons in relation to infringements in the economic sphere, in particular infringements of competition law.
Presumption of the “Equivalent protection”

Some specific cases of the ECtHR:
Case of Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi c. Irlande, [GC], No 45036/98, judgment of 30/06/2005.

• Art. 1 § 2 of Prot. No. 1 of the Convention (Control of the use of property/Protection of property)

• Impounding of leased aircraft in pursuance of United Nations sanctions regime and EC Council Regulation.

• In May 1993 an aircraft leased by “Bosphorus Airways”, an airline charter company registered in Turkey, from Yugoslav Airlines (“JAT”) was seized by the Irish authorities.

• It had been in Ireland for maintenance by TEAM Aer Lingus, a company owned by the Irish State.
Facts of the case:

• The aircraft was seized under EC Council Regulation 990/93
• which, in turn,
• had implemented the United Nations (UN) sanctions regime against the Federal Republic of Yugoslavia (Serbia and Montenegro).
• when the sanctions regime against FRY (Serbia and Montenegro) had been relaxed, the Irish authorities returned the aircraft directly to JAT.
• The applicant consequently lost approximately three years of its four-year lease of the aircraft, which was the only one ever seized under the relevant EC Council and UN regulations.
A preliminary reference by the Supreme Court of Ireland to the ECJ on 12 February 1995:

• the following question:
  • “Is Article 8 of [Regulation (EEC) no. 990/93] to be construed as applying to an aircraft [...]”

• 52. On 30 July 1996 the ECJ ruled that Regulation (EEC) no. 990/93 applied to the type of aircraft referred to in the Supreme Court’s question to it.

• The applicant company's second argument - the application of Regulation (EEC) no. 990/93 would infringe its right to peaceful enjoyment of its possessions and its freedom to pursue a commercial activity - the CJEU stated that the provisions of this Regulation contribute in particular to the implementation at Community level of the sanctions against the [FRY] adopted, by several resolutions of the Security Council of the United Nations. ...

• the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the [FRY], cannot be regarded as inappropriate or disproportionate.
Arguments of the European Court of Human Rights:

- **Basic principle** - The protection of fundamental rights by European Communities (EU) law could have been considered to be “equivalent” to that of the Convention system.

- Consequently, a presumption arose that Ireland had not departed from the requirements of the Convention when it had implemented legal obligations flowing from its membership of the EC.

- Such a presumption could be rebutted if it was considered that the protection of Convention rights was manifestly deficient.

- *It could not be said* that the protection of Bosphorus Airways’ Convention rights had been manifestly deficient.

- **Therefore**, the impoundment of the aircraft *did not give rise to a violation of Art.1 of Prot. No. 1 (Protection of property).*
Principle of the „Equivalent protection“:

• MAIN legal principle developed by the European Court of Human Rights as regards the level of protection of fundamental rights in both systems:

• Protection of fundamental rights by EU law equivalent to that of the Convention system, unless the presumption to that effect was rebutted.
Another case in the ECtHR - *M.S.S. v. Belgium and Greece [GC]*, Appl. No 30696/09, Judgment of 21/01/2011

- Article 3 (Degrading treatment)
- Expulsion case:
  - **Conditions of detention and subsistence of asylum-seeker expelled under the Dublin Regulation** (Council Regulation No. 343/2003/EC of 18 February 2003 establishing the criteria and mechanisms for determining the member State responsible for examining an asylum application lodged in one of the member States by a third-country national (“the Dublin Regulation”) applies to the member States of the European Union and to Iceland, Norway and Switzerland) *(EU Law)*: VIOLATION.

- Article 13 (Effective remedy)
  - **Deficiencies in the asylum procedure in Greece and risk of expulsion without any serious examination of merits of asylum application or access to effective remedy**: VIOLATION.
Cooperation or conflict between the European Convention on Human Rights and the European Union Law:

• Facts of the case:

• The applicant, an Afghan national, entered the European Union via Greece. In February 2009 he arrived in Belgium and applied for asylum.

• In accordance with the Dublin Regulation (directly applicable, obligatory EU law), Greece was responsible for the examination of his asylum application; the Aliens Office asked the Greek authorities to take responsibility for the asylum application

• In May 2009 the Aliens Office ordered the applicant to leave Belgium for Greece.
ECtHR - in the case of M.S.S. v. Belgium and Greece:

• The Court - the Convention did not prevent the Contracting Parties from transferring sovereign powers to an international organisation (Bosphorus case, § 152).

• The States nevertheless remain responsible under the Convention for all actions and omissions of their bodies under their domestic law or under their international legal obligations (§ 153).

• State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights in a manner which can be considered at least equivalent to that for which the Convention provides.
Arguments by the ECtHR:

• (a) **Conditions of detention in Greece:**
  • The difficulties caused by the increasing numbers of migrants and asylum-seekers from States around the external borders of the European Union did not absolve the States of their obligations in respect of Art. 3.

• (b) **Living conditions in Greece:**
  • In spite of the obligations incumbent on the Greek authorities under their own legislation and the European Union’s Reception Directive, the applicant had lived for months in the most abject poverty, with no food and nowhere to live or to wash.

  • He also lived in constant fear of being attacked and robbed, with no prospect of his situation improving.
Effective remedies in Greece:

• a violation of Art. 13 taken in conjunction with Art. 3:
  • the deficiencies in the Greek authorities’ examination of the applicant’s asylum application and
  • the risk he faced of being removed directly or indirectly back to his country of origin,
  • without any serious examination of the merits of his application and
  • without having had access to an effective remedy.

• Legal question - ECHR against the obligations of the States under the EU law?
M.S.S. v. Belgium and Greece case:

• The Court concludes that, under the Dublin Regulation, the Belgian authorities could have refrained from transferring the applicant if they had considered that the receiving country, namely Greece, was not fulfilling its obligations under the Convention.

• Consequently, the Court considers that the impugned measure taken by the Belgian authorities did not strictly fall within Belgium’s international legal obligations.

• Conclusion - Accordingly, the presumption of equivalent protection does not apply in this case.
**M.S.S. v. Belgium and Greece [GC]**:

- **The principle of „equivalent protection“ developed in the Bosphorus case was not applicable** in this case:
- **Such a presumption was rebutted (...)**;
- **It was considered by the ECtHR that the protection of Convention rights was manifestly deficient**
- **when**
- **implementing the requirements of the EU law.**
Follow-up case: “Milder” position of the ECtHR towards the EU law/ *Tarakhel v. Switzerland*, no. 29217/12, 4 November 2014:

• – also a Dublin transfer of a family with children by Switzerland to Italy – complaints under Articles 3, 13 and 8 of the ECHR.

• **Position of the ECtHR** – it would be a violation of Article 3 of the Convention **if** the applicants

• were to be returned to Italy without the Swiss authorities having first obtained individual guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and

• that the family would be kept together.

• **Conditional violation established** (*IF...*).
Avotiņš v. Latvia [GC], No. 17502/07, Judgment of 23 May 2016 [GC]/coming back to the «equivalent protection»:

- ECtHR - Civil proceedings/Article 6-1/Fair hearing/Equality of arms
- Enforcement in Latvia of judgment delivered in Cyprus in the debtor’s absence: no violation

- The applicant – enforcement of the Cypriot judgment in Latvia was clearly defective breaching his defence rights under Art. 6 § 1.

- The summons to appear before the court in Cyprus had not been duly served on him in good time, he had been unable to defend his case - consequently, the Latvian courts should have refused to enforce the Cypriot judgment.
Presumption of equivalent protection (Bosphorus presumption):

- The application of the presumption of equivalent protection in the legal system of the European Union was subject to two conditions:
  - 1) the absence of any *margin of manoeuvre* on the part of the domestic authorities,
  - 2) the deployment of the full potential of the supervisory mechanism provided for by European Union law.
Presumption of equivalent protection (Bosphorus presumption):

• With regard to the first condition - the Senate of the Supreme Court of Latvia acted within the limits contained in a Regulation (Brussels I), which was directly applicable in the Member States; the refusal of recognition or enforcement of a foreign judgment was very limited.

• The interpretation given by the Court of Justice - this provision did not confer any discretion on the court from which the declaration of enforceability was sought.

• The Strasbourg Court - the Senate of the Latvian Supreme Court had not enjoyed any margin of manoeuvre in this case.
Presumption of equivalent protection (Bosphorus presumption):

• **Second condition** - the Senate of the Supreme Court had not requested a preliminary ruling from the CJEU.

• **ECtHR** - this condition had to be applied without excessive formalism...

• The applicant had not advanced any specific argument concerning the interpretation of the Regulation and its compatibility with fundamental rights such as to warrant a finding that a preliminary ruling should have been requested.
Presumption of equivalent protection (Bosphorus presumption):

• Hence, the fact that the matter had not been referred for a preliminary ruling was not a decisive factor in the present case.

• The second condition for application of the Bosphorus presumption should therefore be considered to be satisfied.

• Conclusion - the presumption of equivalent protection was applicable in the present case, as the Senate of the Supreme Court of Latvia had done no more

• than implement Latvia’s legal obligations arising out of its membership of the European Union.
Co-operation between different International Organizations/bodies (including judicial):

• Co-operation is always possible/Co-operation should prevail over conflicting jurisprudences on the interpretation and application of the same FR;

• Legal possibility – the presumption of the Equivalent protection of Fundamental Rights in both systems – the ECHR and the EU law – should further be applied;

• Another possibility – to consider and apply all international obligations of the States (under different instruments) together; no court can function in the vacuum...