Complete EU Law: Text, Cases, and Materials (5th edn)
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9. Human rights in the European Union

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Abstract

Titles in the Complete series combine extracts from a wide range of primary materials with clear explanatory text to provide readers with a complete introductory resource. This chapter begins with a brief history of human rights protection in Europe, including the separate role of the Council of Europe and the ECHR, as well as that of the EU and EU law. It then discusses the development of human rights protection by the EU; the need for human rights protection against the EU and its Member States; the Charter of Fundamental Rights of the EU; the enforcement of human rights in EU law; and the possibility of EU accession to the ECHR.

Keywords: EU law, human rights law, human rights protection, ECHR, Council of Europe, Charter of Fundamental Rights

Key Points

By the end of this chapter, you should be able to:

- explain the historical development of human rights protection under EU law;
- identify the different sources of human rights protection under EU law and evaluate their relative importance;
- identify the types of human rights which are part of EU law;
- understand the different enforcement mechanisms available, and be able to evaluate their strengths and weaknesses;
- distinguish between the EU Charter of Fundamental Rights and the European Convention of Human Rights (ECHR); and
- distinguish between the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).

Introduction

Human rights is an area of law in which the European Union (EU) has been particularly active in recent years, and this chapter will discuss the key jurisprudence and legislation now in place, as well as developments likely to take place over the next few years.

A particular issue in relation to terminology should be noted at the outset. Throughout the legislation, case law, and policy documents, the various authorities involved in the protection of human rights use a variety of terms, including 'human rights', 'fundamental rights', and 'fundamental human rights'. There is no clear or agreed distinction between these terms, and they will be used interchangeably in this chapter.

9.1 A brief history of human rights protection in Europe: the EU and the Council of Europe compared

Given that the roots of what is now the EU lay primarily in a reaction to the horrors of the two world wars (see further 1.1), and that the Preamble to the original EEC Treaty 1957 included the aspiration to preserve and
p. 355 strengthen liberty, it might seem surprising that that Treaty did ↵ not include any reference to fundamental human rights. Instead, the role of protecting human rights against nation states on a Europe-wide basis, in order to avoid a repeat of the abuses which had occurred in the years leading up to and during the Second World War, was taken on by the **Council of Europe** (which is *not* an EU institution); while the EU became responsible for economic integration between European countries as a device to prevent further wars (see further 1.3 on the aims of the EU).

Council of Europe

The Council of Europe is an international organization based in Strasbourg. It was founded in 1949 in order to promote democracy and protect human rights throughout Europe. It currently has 47 member countries, including all of the EU Member States.

The Council's decision-making body is the Committee of Ministers, which is formed of the ministers of foreign affairs from the member countries or their permanent representatives in Strasbourg.

Before considering the role of the EU and EU law in protecting human rights, it is therefore necessary to consider the role of the Council of Europe and its legal instruments.

In 1950, the Council of Europe agreed the text of the **European Convention on Human Rights** (ECHR).

European Convention on Human Rights

The ECHR is an international human rights treaty signed by all of the member countries of the Council of Europe. It provides that those countries, also known as States Parties or Contracting Parties to the ECHR, must secure to everyone within their jurisdiction (not only their own nationals) the rights set out in it.

The rights contained in the ECHR are largely civil and political rights (rather than social, economic, or cultural rights) and include, for example, the right to life, the right to a fair trial, and freedom of expression. The rights contained in the ECHR have not been formally amended since 1950, but they have been supplemented by additional rights contained in Protocols to the ECHR, which have been adopted on an ad hoc basis by the Council of Europe since 1950. Each State Party to the ECHR is free to adopt any such Protocol or not.

The ECHR is enforceable in UK courts as a result of the Human Rights Act 1998 (HRA 1998), which permits victims of alleged human rights abuses for which the UK government is liable under the ECHR to bring their claims before the national courts.

The ECHR also has its own court, the **European Court of Human Rights** (ECtHR), based in Strasbourg. Cases can be brought directly in the ECtHR against one or more of the States Parties by any individual or organization claiming to be a victim of human rights abuses contrary to the ECHR or, more rarely, by another State Party. However, victims must exhaust their remedies before their national courts before bringing a claim before the ECtHR. This means that they must exhaust all possible appeals in their domestic legal system or receive settled legal advice that further appeals would be bound to fail. The ECtHR's judgments do not form part of UK law, but s 2 of the HRA 1998 requires UK courts to 'take into account' such judgments when interpreting rights continued in the ECHR.

European Court of Human Rights

The ECtHR is an international court set up by the Council of Europe to provide judicial enforcement of the ECHR. It has one judge from each of the States Parties (Article 20 ECHR).

It is quite common for confusion to arise over these various 'European' bodies—but it is important to understand that, although they are all 'European' in some sense, the EU and the Council of Europe are two entirely separate organizations, with separate laws (see 3.4 on the different types of EU law) and separate legal systems (see in particular Chapters 2, 3, and 6 on the legal system of the EU).

Thinking Point

What are the differences between the following?

- The Council of Europe and the EU
- The ECHR and EU law
- The ECtHR and the Court of Justice of the European Union (CJEU) (i.e. the General Court and the Court of Justice)

p. 356 ↵ The key distinctions between the legal systems established by EU law and the ECHR are highlighted in Figure 9.1.

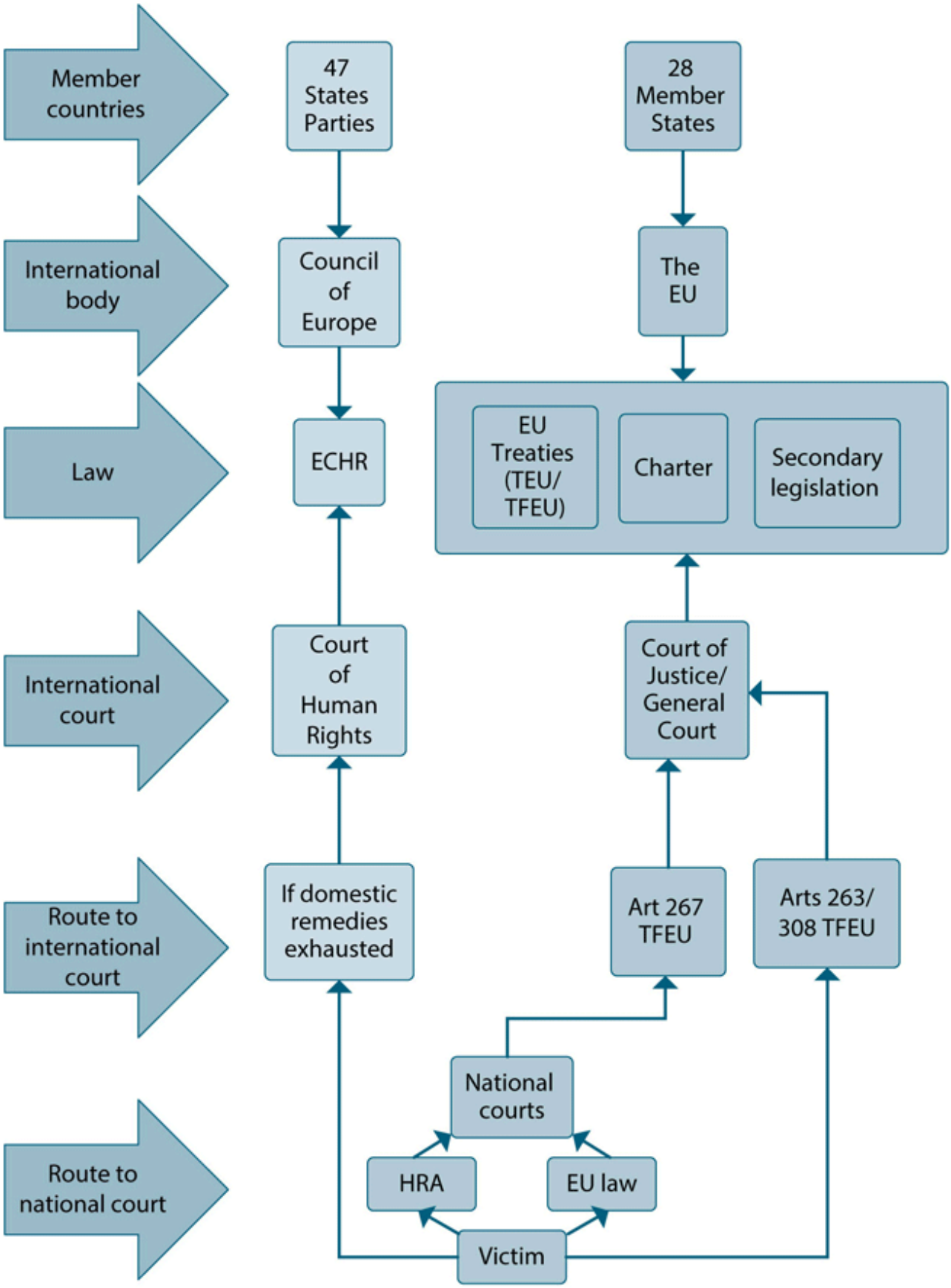

Figure 9.1 EU law and the ECHR compared

Some UK politicians, particularly in the Conservative Party, support the UK's withdrawal from the ECHR. If this were to take place, it is likely that a British Bill of Rights would be enacted to replace it. This would put in place different—and presumably lesser—rights and remove the role of the ECtHR as an enforcement body. However, on 17 May 2016, Michael Gove, then Secretary of State for Justice, wrote to the Chair of the Joint Committee on Human Rights in the House of Commons in the UK Parliament, stating that: 'The Bill of Rights will remain faithful to the principles in the ECHR. Whilst we cannot rule out withdrawal from the ECHR
p. 357 forever, our proposals for a Bill of Rights do not involve leaving.' It is noteworthy ↵ that the all-too-common confusion between the EU and the ECHR apparently extends to UK politicians, as highlighted in a pithy blog post by Professor Mark Elliott, 'Theresa May's case for withdrawal from the ECHR: Politically astute, legally dubious, constitutionally naive' *<https://publiclawforeveryone.com/2016/04/26/theresa-mays-case-for-withdrawal-from-the-echr-politically-astute-legally-dubious-constitutionally-naive/>*, 26 April 2016, available at

A less radical option also supported by some UK politicians, again particularly on the right of the political spectrum, is to repeal the HRA 1998. This would not affect the rights protected, since the UK would still be a party to the ECHR, and indeed this was the position for several decades prior to the enactment of the HRA 1998. However, it would reduce the ability of the UK courts to enforce those rights, and increase the likelihood of cases against the UK government being taken to the ECtHR.

9.2 The development of human rights protection by the EU

9.2.1 The EEC Treaty 1957

As mentioned earlier, the EU's founding Treaty—then known as the EEC Treaty, now the Treaty on the Functioning of the European Union (TFEU) (see further 1.2 and 3.4.1)—made no explicit provision for the protection of human rights, although a very few rights that might be regarded as human rights did appear, such as the right of free movement of workers (Article 48 EEC, now Article 45 TFEU), the freedom to establish a business (Article 52 EEC, now Article 49 TFEU), the freedom to provide services (Article 59 EEC, now Article 56 TFEU) (see further Chapters 11 and 12 on these rights), and the right to equal pay as between men and women (Article 119 EEC, now Article 157 TFEU).

While the complementary roles of the Council of Europe and the EU may explain the absence of human rights protection in EU law against EU Member States, because human rights obligations were imposed on States Parties to the ECHR before the EU existed and these States Parties included all of the Member States of the EU, it cannot account for the lack of protection in EU law against human rights abuses by the EU itself. The following extract, however, suggests the explanation for this omission.

House of Lords Select Committee on the European Union, *EU Charter of Fundamental Rights*, Eighth Report of Session 1999–2000, 16 May 2000

The Founding Treaties

> [...]
>
> 11. ... But the founding Treaties of the three Communities made no mention of fundamental rights.
>
> p. 358
>
> 12. This may not, initially, have been a matter of great concern. The focus on economic, rather than political, integration meant that the Communities were not seen to be operating in areas or through methods which were inherently likely to violate human rights. The Communities were not bound by the ECHR. ... All Member States of the Community became Contracting Parties to the ECHR (although not all initially accepted the right of individual petition and the compulsory jurisdiction of the Strasbourg Court—the UK accepted individual petition in 1966). When questions of fundamental rights did arise, incidentally, in matters involving the Communities, the European Court of Justice (ECJ or the 'Luxembourg Court') applied such rights as an integral part of the 'general principles of Community law'. As the ECHR system developed a case law of increasing complexity, the ECJ came in practice to take into account and apply the details of the Strasbourg Court's case law ...

Unfortunately, as cases brought before the Court of Justice soon showed, the assumption that the EU would not be operating in policy areas or by methods that were likely to violate human rights proved incorrect, as the following sections demonstrate.

9.2.2 The role of the Court of Justice

In the absence of Treaty or, indeed, any legislative protection of human rights against the EU or its Member States as such, the Court of Justice took upon itself the responsibility of developing this protection.

Its first steps were tentative. In Case 29/69 *Stauder v City of Ulm-Sozialamt* [1969] ECR 419, Decision 69/71/EEC of the Commission of the European Communities of 12 February 1969 permitted the sale of butter at reduced prices to consumers who were in receipt of social assistance. The Court of Justice interpreted the Decision as not requiring the name of the consumer to be disclosed to the seller and concluded that, as so interpreted, the Decision contained nothing capable of prejudicing 'the fundamental human rights enshrined in the general principles of [EU] law and protected by the Court' (*Stauder*, at para 7).

9.2.2.1 The sources of human rights drawn upon by the Court of Justice

The Court of Justice gave more detail as to the rationale for protection and the nature of the rights protected in Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125. In that case, Regulation No 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in cereals, OJ 1967 2269/33, provided that applications for import and export licences must be accompanied by a deposit, in order to guarantee that the underlying transactions would take place. The Court of Justice held that the system was justified by the need to have accurate information about the transactions and did not violate the applicant's fundamental rights.

Thinking Point

> While reading the following extract, consider what source(s) of fundamental protection of human rights the Court of Justice drew upon in this case.

Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125

The protection of fundamental rights in the Community legal system

> 4. ... In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht [the German court that made the reference to the Court of Justice], whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system.

In *Internationale Handelsgesellschaft*, the Court of Justice referred to the 'constitutional traditions common to the Member States' as the inspiration for its protection of fundamental rights in EU law. In Case 4-73 *Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491, it drew upon an additional source of fundamental rights.

Thinking Point

> While reading the following extract, consider what source(s) of fundamental protection of human rights the Court drew upon in this case in addition to that referred to in *Internationale Handelsgesellschaft*.

Case 4-73 *Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491

> 13. As the court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures.
>
> In safeguarding these rights, the court is bound to draw inspiration from constitutional traditions common to the member states, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those states.
>
> p. 360 ↵ Similarly, international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law [now EU law].
>
> The submissions of the applicant must be examined in the light of these principles.

In *Nold*, the Court of Justice drew inspiration for its protection of fundamental rights not only from the 'constitutional traditions common to the Member States', as in *Internationale Handelsgesellschaft*, but also from those international human rights treaties to which all Member States were party. However, on the facts of *Nold*, the Court dismissed the applicant's claim for annulment of an EU measure which allegedly restricted its right to the supply of certain goods, and thus its profitability and even its existence, ruling that the fundamental right to property could legitimately be restricted by reference to the objectives of the EU, and that commercial opportunities were not guaranteed.

In Case 36/75 *Rutili v Ministre de l'intérieur* [1975] ECR 1219 (see also 9.2.2.2), the Court of Justice referred for the first time to the most important international human rights treaty signed by the Member States, the ECHR, as a source of human rights for EU law. In that case, the French authorities granted a residence permit to Rutili, who was a national of another Member State. The permit restricted residence to only certain regions of France, on the ground that Rutili was a threat to the interests of national security and public safety (see further 11.3 on the legal justifications for curtailing the right of free movement). On a preliminary reference to the Court of Justice under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure), the Court held that the limitations imposed by EU law on the ability of Member States to restrict the right of free

movement of persons were 'a specific manifestation of the more general principle, enshrined in Arts 8, 9, 10 and 11 [the rights to private and family life, and freedom of religion, expression, and assembly and association] of the [ECHR]' and that derogations from such fundamental rights in the interests of national security or public safety were permissible only if they were strictly 'necessary for the protection of those interests in a democratic society' (*Rutili*, at para 32). Thus restrictions could be imposed on the free movement of a national of a Member State only if that individual's presence or conduct constituted a general and sufficiently serious threat to public policy.

The legitimacy of the two sources of law which the Court of Justice has drawn on as the inspiration for its protection of fundamental human rights has subsequently been enshrined in Article 6(3) TEU.

Article 6(3) TEU

> 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.

p. 361 ↵ However, the 'constitutional traditions common to the Member States' referred to in Article 6(3) TEU are not further defined. Most Member States have constitutions guaranteeing fundamental rights, and their courts have, on occasion, indicated their reluctance to cede supremacy to the EU unless it protects human rights to the standard guaranteed in their national constitutions (see e.g. the German case of *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ('*Solange I*') [1974] 2 CMLR 540). In Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, such concerns surfaced in an apparently innocuous dispute over the interpretation of Council Regulation (EEC) No 1162/76 of 17 May 1976 on measures designed to adjust wine-growing potential to market requirements, OJ 1976 L135/32.

Thinking Point

> While reading the following extract, consider how the Court of Justice addressed the concerns of the German court.

Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727

13. In its order making the reference, the Verwaltungsgericht states that if Regulation No 1162/76 must be interpreted as meaning that it lays down a prohibition of general application, so as to include even land appropriate for wine growing, that provision might have to be considered inapplicable in the Federal Republic of Germany owing to doubts existing with regard to its compatibility with the fundamental rights guaranteed by Articles 14 and 12 of the Grundgesetz concerning, respectively, the right to property and the right freely to pursue trade and professional activities.

14. As the Court declared in its judgment of 17 December 1970, *Internationale Handelsgesellschaft* [1970] ECR 1125, the question of a possible infringement of fundamental rights by a measure of the Community [now Union] institutions can only be judged in the light of Community law [now EU law] itself. The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community.

15. The Court also emphasized in the judgment cited, and later in the judgment of 14 May 1974, *Nold* [1974] ECR 491, that fundamental rights form an integral part of the general principles of the law, the observance of which it ensures; that in safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those States are unacceptable in the Community; and that, similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

p. 362 ↵ [...]

The question of the right to property

17. The right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the first Protocol to the European Convention for the Protection of Human Rights.

[...]

27. It is in this context that Regulation No 1162/76 was adopted. It is apparent from the preamble to that regulation and from the economic circumstances in which it was adopted, a feature of which was the formation as from the 1974 harvest of permanent production surpluses, that that regulation fulfils a double function: on the one hand, it must enable an immediate brake to be put on the continued increase in the surpluses; on the other hand, it must win for the Community institutions the time necessary for the implementation of a structural policy designed to encourage high-quality production, whilst respecting the individual characteristics and needs of the different wine-producing regions of the Community, through the selection of land for grape growing and the selection of grape varieties, and through the regulation of production methods.

[...]

30. Therefore it is necessary to conclude that the restriction imposed upon the use of property by the prohibition on the new planting of vines introduced for a limited period by Regulation No 1162/76 is justified by the objectives of general interest pursued by the Community and does not infringe the substance of the right to property in the form in which it is recognized and protected in the Community legal order.

The question of the freedom to pursue trade or professional activities

31. The applicant in the main action also submits that the prohibition on new plantings imposed by Regulation No 1162/76 infringes her fundamental rights in so far as its effect is to restrict her freedom to pursue her occupation as a wine-grower.

32. As the Court has already stated in its judgment of 14 May 1974, *Nold*, referred to above, although it is true that guarantees are given by the constitutional law of several Member States in respect of the freedom to pursue trade or professional activities, the right thereby guaranteed, far from constituting an unfettered prerogative, must likewise be viewed in the light of the social function of the activities protected thereunder. In this case, it must be observed that the disputed Community measure does not in any way affect access to the occupation of wine-growing, or the freedom to pursue that occupation on land at present devoted to wine-growing. To the extent to which the prohibition on new plantings affects the free pursuit of the occupation of wine-growing, that limitation is no more than the consequence of the restriction upon the exercise of the right to property, so that the two restrictions merge. Thus the restriction upon the free pursuit of the occupation of wine-growing, assuming that it exists, is justified by the same reasons which justify the restriction placed upon the use of property.

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33. Thus it is apparent from the foregoing that consideration of Regulation No 1162/76, in the light of the doubts expressed by the Verwaltungsgericht, has disclosed no factor of such a kind as to affect the validity of that regulation on account of its being contrary to the requirements flowing from the protection of fundamental rights in the Community.

In *Hauer*, the Court of Justice held that the validity of a particular provision of EU law, such as Regulation 1162/76, could only be assessed by reference to EU law itself and not by reference to national law, but ruled that the rights to peaceful enjoyment of property and to pursue an occupation which were recognized by German law were also protected by EU law. However, on the facts, the Court concluded that the restrictions on those rights imposed by the Regulation were justified by the objective of reducing surplus production.

The Court of Justice's approach in cases such as *Hauer* was necessary in order to allay the concerns of national courts and to thereby preserve the supremacy of EU law (see further 3.1), as explained in the following the extract.

House of Lords Select Committee on the European Union, *EU Charter of Fundamental Rights*, Eighth Report of Session 1999–2000, 16 May 2000

The Court of Justice

> 13. The Luxembourg Court's assertion of a fundamental rights jurisdiction has been seen as a necessary expedient to ensure the supremacy of Community law [now EU law]. The objectives of the Community [now Union] could only be achieved by according primacy to Community rules interpreted and applied in a uniform manner in each Member State. The acceptance by Member States of the supremacy of Community law has not been unproblematic, particularly in those Member States where a written list of fundamental rights in the constitution is perceived as essential for the State's democratic legitimacy. The doctrine of the supremacy of Community law therefore carried with it the risk of displacing rights enshrined in national constitutions and safeguarded by the highest constitutional courts. To obviate this risk, the Court stated in the *Internationale Handelsgesellschaft* case that 'respect for fundamental rights forms an integral part of the general principles of Community law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structures and objectives of the Community'. The Court has also found 'inspiration' in 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories'. In practice, a number of constitutional courts have only been prepared to accept the supremacy of Community law on the basis that Community law provides protection for fundamental rights equivalent to that afforded by national constitutions …

p. 364 ↵ In *Re Wünsche Handelsgesellschaft* ('*Solange II*') [1987] 3 CMLR 225, the German courts accepted that a sufficient measure of fundamental rights protection had been established by the EU, and national courts have also found reassurance in the limitation on the transfer of sovereign powers to the EU (see further 3.1) and the corresponding retention of a degree of domestic human rights protection by the national courts and legislative authorities (see the German case of *Brunner and others v The European Union Treaty* [1994] 1 CMLR 57 and the Danish case of *Carlsen and others v Prime Minister Rasmussen* (1999) 3 CMLR 854).

9.2.2.2 The Court of Justice's use of human rights to review the compatibility of national law with EU law

In Case 36/75 *Rutili v Ministre de l'intérieur* [1975] ECR 1219 (for the facts of this case, see 9.2.2.1) the Court of Justice's ruling on the correct interpretation of EU law had potential consequences for the validity of the national measures that implemented that EU law—in other words, the individual decisions taken by the

French authorities restricting Rutili's free movement. However, although the Court interpreted EU law in the light of fundamental rights, it did not use these rights to review the national measures directly.

In Case 5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, however, it did. Wachauf was a tenant farmer who applied for compensation for discontinuing milk production. This was rejected pursuant to German legislation implementing Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector, OJ 1984 L90/13, on the ground that the application was not accompanied by the landlord's written consent. Wachauf challenged this rejection and the German court made a preliminary reference to the Court of Justice under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure) of a number of questions on the interpretation of the Regulation.

Thinking Point

> While reading the following extract, consider what human rights obligation the Court imposed on the Member States, and why.

Case 5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609

17. The Court has consistently held, in particular in its judgment of 13 December 1979 in Case 44/79 *Hauer v Land Rheinland Pfalz* (1979) ECR 3727, that fundamental rights form an integral part of the general principles of the law, the observance of which is ensured by the Court. In safeguarding those rights, the Court has to look to the constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those States may not find acceptance in the Community [now Union]. International treaties concerning the protection of human rights on which the Member States have collaborated or to which they have acceded can also supply guidelines to which regard should be had in the context of Community law [now EU law].

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18. The fundamental rights recognized by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.

19. Having regard to those criteria, it must be observed that Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements.

In *Wachauf*, the Court of Justice ruled that Member States must implement EU law in a way that was consistent with fundamental human rights as far as possible.

In Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719, at para 28, the Court stated, unsurprisingly, that it would not examine the compatibility of national law with fundamental rights where the 'national legislation [lay] outside the scope of [EU] law'. As EU law did not confer the rights of family reunification claimed by the applicant—a Turkish national seeking to join her Turkish husband in Germany—the German immigration rules at issue were not adopted in order to implement EU law and the Court of Justice therefore had no jurisdiction to determine whether they were compatible with the fundamental right to family life.

In contrast, in Case C-260/89 *ERT* [1991] ECR I-2925, at para 42, the Court of Justice held that the national measures at issue in the case—the grant of an exclusive broadcasting licence to ERT—fell 'within the scope' of EU law. Although those national measures did not implement EU law, they nonetheless fell within its scope because they would constitute an illegal prohibition on the freedom to provide services unless they fell within the derogations from that freedom permitted by EU law (see further 11.3).

9.2.2.3 The margin of appreciation permitted to Member States by the Court of Justice

The ECtHR (see 9.1) has long accorded to the States Parties to the ECHR (see 9.1) a 'margin of appreciation'—in other words, a margin of discretion—in making public policy decisions that potentially impact on ECHR rights (see e.g. *Handyside v United Kingdom* Application No 5493/72 (1976) 1 EHRR 737). The extent of the margin permitted by the ECtHR varies according to the policy area in question. For example, it is usually wider
p. 366 in relation to economic ↵ or national security issues, where the ECtHR is more inclined to defer to the choices made by States Parties, and narrower in the area of criminal justice, where the ECtHR considers it appropriate for it to take a more activist role.

The Court of Justice has similarly allowed Member States some individual discretion in their decision-making, stating in Joined Cases 115 & 116/81 *Adoui and Cornuaille v Belgium* [1982] ECR 1665, at para 8 (see also 11.3.1.2), that EU law 'does not impose upon the Member States a uniform scale of values as regards the assessment of conduct which may be considered as contrary to public policy' (see also Case 249/86 *Commission v Germany* [1989] ECR 1263, at para 19). For example, other than requiring that any restrictions on the free movement of goods which are imposed in order to protect public morality must not be discriminatory (Case 34/79 *R v Henn and Darby* [1979] ECR 3795) (see 10.8.11.1), it has generally allowed Member States considerable discretion to determine the requirements of public morality in their countries (Case 121/85 *Conegate Ltd v Commissioners of Customs and Excise* [1986] ECR 1007) (see 10.8.11). However, although Advocate General Stix-Hackl, in Case C-60/00 *Carpenter v SSHD* [2002] ECR I-6279 (see 2.4.1 on Advocate Generals' Opinions), referred explicitly to a 'margin of appreciation' in relation to the States' obligations to respect private and family life (at para 88 of the Opinion), the Court of Justice's jurisprudence on this issue is relatively undeveloped compared to that of the ECtHR. As the ECtHR has recognized, the importance of fundamental human rights may often dictate that States are allowed only a narrow discretion to derogate from those rights. However, whereas the ECtHR has often justified the grant of a wider margin of discretion to States Parties by the fact that there is no European consensus on a particular issue (see e.g. *Evans v UK* Application No 6339/05 (2008) 46 EHRR 34 in relation to IVF treatment), the need to ensure that EU law is applied uniformly across the Member States of the EU may enable the Court of Justice to justify permitting them only a narrow discretion to derogate from fundamental rights under EU law.

9.2.2.4 The rights recognized by the CJEU

The rights recognized by the Court of Justice and the General Court prior to the coming into force of the EU Charter of Fundamental Rights (see 9.4) include:

- the right to human dignity (Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609);

- the right to physical integrity (Joined Cases T-121/89 & 13/90 *X v Commission* [1992] ECR II-2195);
- the right to marry (Case C-249/96 *Grant v South West Trains Ltd* [1998] ECR I-629);
- the right not to be discriminated against (Joined Cases 75 & 117/82 *Razzouk and Beydoun v Commission* [1984] ECR 1509);
- due process rights, such as:
  - the right to a fair hearing (Joined Cases 100–103/80 *Musique Diffusion Française v Commission* [1983] ECR 1825);
  - the right to a legal remedy (Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651);
  - the right not to be convicted of an offence created retrospectively (Joined Cases 74 & 129/95 *X* [1996] ECR I-6639); and
  - the right to good administration (Case 173/82 R *Castille v Commission* [1982] ECR 4047);
- expressive rights, such as:
  - the right to respect for religion and belief (Case 30/75 *Prais v Council* [1976] ECR 589);
  - the right to freedom of expression (Case C-100/88 *Oyowe and Traore v Commission* [1989] ECR 4285); and
  - the right to freedom of assembly (Case C-235/92 P *Montecatini SpA v Commission* [1999] ECR I-4539); and
- economic rights, such as:
  - the right to peaceful enjoyment of property (Case 4/73 *Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491; Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727); and
  - the right to freedom to pursue a trade or profession (Case 234/85 *Staatsanwalt Freiburg v Keller* [1986] ECR 2879).

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Although these rights did not include such crucial human rights as the right to life and the right not to be tortured, these would undoubtedly have been recognized by the Court of Justice had relevant cases been brought before it, and indeed the right to physical integrity has been recognized. As Takis Tridimas explained in *The General Principles of EC Law* (Oxford: Oxford University Press, 1998), at para 6.24, 'which rights are expressly recognised by the Court depends on the accidents of litigation'.

The disadvantage of the ad hoc nature of the development of EU human rights law through the jurisprudence of the CJEU was that it was difficult for individuals or businesses to identify the existence and scope of their human rights when dealing with the EU or a Member State acting within the scope of its EU obligations.

9.2.3 Legislative developments and political statements

Eventually, the EU legislative institutions (see further 2.1, 2.2, and 2.3 on the European Parliament, the Council, and the Commission) began to adopt first political and then legislative measures in the area of human rights. The European Parliament was particularly proactive in urging greater protection of human rights at EU level, as summarized in the following extract.

House of Commons, *Human Rights in the EU: The Charter of Fundamental Rights*, Research Paper 00/32, 20 March 2000

> The European Parliament adopted a Resolution in 1973 'concerning the protection of the fundamental rights of Member States' citizens when Community law is drafted' and another in ↵ 1977 'on the granting of special rights to the citizens of the European Community'. The EP issued a declaration of political principle on the definition of fundamental rights on 10 February 1977, which was subsequently adopted by the Council and Commission. In a 1979 Resolution the EP urged EC accession to the European Convention and envisaged the drafting of a European Charter of Civil Rights. Further Resolutions in 1983 and 1984 emphasised the need to incorporate fundamental human rights in the EC in a constitutional manner and in 1989 the EP proposed the adoption of a declaration of fundamental rights as part of a 'Constitution' for the EU.
>
> At the Copenhagen European Council in 1978 the Heads of State and Government issued the 'Declaration on Democracy' which confirmed their will:
>
> … to ensure that the cherished values of their legal, political and moral order are respected and to safeguard the principles of representative democracy, of the rule of law, of social justice and of respect for human rights.

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However, unfortunately, EU legislative measures were for many years adopted in a piecemeal fashion and, although often providing important rights, did little to address the problems of lack of transparency and accessibility.

The Preamble to the Single European Act 1986 (SEA) (see 1.10) stated that the Member States were 'determined to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the [ECHR] and the European Social Charter, notably freedom, equality and social justice'.

The Treaty on European Union 1992 (TEU 1992) (see 1.13) introduced the predecessor of what is now Article 6 TEU, stating that the EU 'shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of [EU] law'. It also prohibited discrimination on grounds of nationality (now Article 18 TFEU) and introduced a number of rights for EU citizens (see further 11.2 on these rights and on the definition of EU citizens):

- the right of free movement, which had previously been limited to workers (now Articles 20 and 21 TFEU);
- rights to vote and stand in certain elections (now Articles 20 and 22 TFEU);
- the right to diplomatic representation abroad (now Articles 20 and 23 TFEU); and
- the right to petition the European Parliament and to access the European Ombudsman (now Articles 20 and 24 TFEU).

The Treaty of Amsterdam 1997 (see 1.15) further developed what is now Article 6 TEU, amending it to state that the EU was founded on principles which include respect for human rights, and introduced what are now Articles 7 TEU and 354 TFEU, which authorize the Council to take measures against Member States that have infringed the principles laid down in Article 6 TEU. The Treaty of Amsterdam also introduced the right of access to EU documents (now Article 15 TFEU) and empowered the EU to adopt legislation to combat discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation (now Article 19 TFEU).

p. 369 ↵ EU secondary legislation also provided a variety of human rights over this time, including:

- the protection of personal data (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L281/31; see also the Court of Justice's judgment in C-131/12 *Google Spain SL and another v Agencia Española de Protección de Datos (AEPD) and another* [2014] 3 WLR 659) (see further 9.5.3);
- the protection of certain workers' rights (for example Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ 1994 L254/64, Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ 1989 L183/1, and Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, OJ 1992 L348/1); and
- the prohibition of discrimination in employment on grounds of religious belief, disability, age, or sexual orientation (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L303/16) ('the Framework Directive'). In C-157/15 *Achbita and another v G4S Secure Solutions NV* ECLI:EU:C:2017203, the Court of Justice held that an employer's ban on religious or political symbols worn by an employee could constitute indirect discrimination contrary to the Framework Directive, but that it could be justified by the employer's policy of neutrality in its relations with customers. In contrast, in C-188/15 *Bougnaoui and another v Micropole SA* ECLI:EU:C:2017:204 the Court held that such a policy could not be justified by the employer's wish to take account of the desire of a customer not to have a service provided by an employee wearing religious dress.

Perhaps the most significant development in EU human rights legislation is the EU Charter of Fundamental Rights (see further 9.4). The Charter was proclaimed in 2000 and, although not initially legally binding, it was drafted 'as if' it were (Communication from the Commission on the Legal Nature of the Charter of Fundamental Rights of the EU, COM (2000) 644 final, points 7 and 8; see also Declaration 23 annexed to the Treaty of Nice 2001—see 1.17), with the expectation that it would become so in future. This expectation was realized in 2009 with the entry into force of the Treaty of Lisbon (see further 1.18), which made the Charter legally binding, but also made a number of changes to its Preamble and to its General Provisions concerning its scope and application. The legal effect of the Charter is now set out in Article 6(1) TEU: it has 'the same legal value as the Treaties'.

The Charter addresses the problem of the lack of transparency of EU human rights by effectively codifying the rights already recognized by the Court of Justice in the EU Treaties and in EU secondary legislation. However, a number of questions about the scope and impact of the Charter remain, and it is discussed in greater detail at 9.4.

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9.2.4 Other developments

The EU Agency for Fundamental Rights (FRA) was established in 2007 (see Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ 2007 L53/1) in order to help safeguard the rights and freedoms in the Charter by collecting and disseminating data on the state of fundamental human rights in the EU Member States and strengthening cooperation between fundamental rights bodies. The European Institute for Gender Equality (EIGE) was also established by the EU in 2007 (see Regulation (EC) No 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality, OJ 2006 L403/9) in order to contribute to the promotion of gender equality in EU policies and related national policies by collecting and disseminating data on gender equality issues.

The next major development in EU human rights law may be the accession of the EU to the ECHR. As discussed at 9.1, all EU Member States are also States Parties to the ECHR and so the ECHR can be enforced directly against any of them. However, the Treaty of Lisbon (see 1.18) provided for the accession of the EU itself to the ECHR, so that the ECHR will become enforceable against the EU and its institutions. Negotiations on the detail of accession, between the EU and the Council of Europe (see 9.1), which oversees the ECHR, were thought to have been concluded with a draft Accession Agreement in 2013, but the Court of Justice ruled in *Opinion 2/2013 pursuant to Article 218(11) TFEU* EU:C:2014:2454 that the Agreement was incompatible with EU law, and so further negotiations are required before accession can take place. EU accession to the ECHR is discussed in greater detail at 9.6.

9.3 The need for human rights protection against the EU and its Member States

While it may not initially have been expected that the EU's competences and procedures would be likely to bring it into conflict with human rights (see further 9.1 and 9.2.1), this is exactly what has happened. The EU has competence in policy areas ranging from employment law, to police cooperation, to foreign affairs, in respect of half a billion people and across a geographical area of 4 million km^2. It is therefore inevitable that its activities will have a substantial impact on those living or trading in the Member States of the EU, both directly and through the acts of the Member States when they are required to implement EU law, and this impact can frequently have negative effects on human rights. For example, economic sanctions imposed by the EU pursuant to the Common Foreign and Security Policy (CFSP) (Title V TEU) have given rise to allegations of breaches of the rights to property and to pursue a trade or profession (see Case C-317/00 P(R) *'Invest' Import und Export GmbH and another v Commission* [2000] ECR I-9541). Another example is the Member States' power under EU law to deport asylum seekers to another Member State, making the asylum seekers

vulnerable to breaches of human rights by those States (see *MSS v Belgium and Greece* Application No 20696/09
p. 371 (2011) 53 EHRR 2, discussed at 9.5.2). The EU has also increased its competence to act in ↵ the area of criminal justice, and the introduction of a **European arrest warrant (EAW)** (see Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L190/1) has led to complaints from individuals who allege that their arrest was based on an unfair trial (see e.g. *Kostecki v Poland* Application No 14932/09, ECtHR, 4 June 2013, unreported) or resulted in them being unlawfully deprived of their liberty (see e.g. *Pianese v Italy and Netherlands* Application No 14929/08, ECtHR, 27 September 2011, unreported) or exposed to the risk of being subjected to inhuman or degrading treatment (C-404/15 & C-659/15 PPU *Aranyosi and Căldăru* EU:C:2016:198). In recent years, the EU has also legislated in relation to security at airports, including provision for body scanners (see Commission Regulation (EC) No 272/2009 of 2 April 2009 supplementing the common basic standards on civil aviation security laid down in the Annex to Regulation (EC) No 300/2008 of the European Parliament and of the Council, OJ 2009 L91/7, as amended by Commission Regulation (EU) No 1141/2011 of 10 November 2011 amending Regulation (EC) No 272/2009 supplementing the common basic standards on civil aviation security as regards the use of security scanners at EU airports, OJ 2011 L293/22), a measure which has implications for the right to privacy.

European arrest warrant (EAW)

An EAW is a request by a judicial authority in one EU Member State to arrest a person in another Member State and surrender them for prosecution, or to execute a custodial sentence issued in the requesting State. The system is based on the principle of mutual recognition of judicial decisions and is operational in all EU countries. The governing legislation is Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L190/1.

EU law has also extended into the realm of family law, where, if human rights are not observed, the consequences can be particularly serious. In Case C-578/08 *Chakroun* [2010] ECR I-1839, the Court of Justice noted that the Family Reunification Directive (Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 L251/12) afforded no margin of appreciation (see 9.2.2) to a Member State to refuse to authorize the entry and residence of a family member of a non-EU national where that non-national was already lawfully resident in that State. It held that the Directive must be interpreted in the light of the right to respect for family life in the Charter, and thus precluded national rules which prevented reunification merely because the relationship arose after the lawful resident's entry into the Member State or because they failed to meet a minimum income requirement. In Case C-403/09 PPU *Detiček* [2009] ECR I-12193, the Court of Justice held that Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, OJ 2003 L338/1, could not be interpreted as permitting a custody award made by the courts of one Member State to be overturned by those of another if this would breach the child's fundamental right to maintain on a regular basis a personal relationship and direct contact with both parents (as provided for by Article 24(3) of the Charter).

The EU's own procedures, which can result in substantial adverse consequences for individuals and businesses, may involve breaches of human rights. Infringements of the rights of the defence—access to the courts, right to a fair hearing, and so on—are often alleged in relation to competition law proceedings by the EU (see, for example, Joined Cases 46/87 & 227/88 *Hoechst AG v Commission* [1989] ECR 2859). In Case C-407/08 P *Knauf Gips v Commission* [2010] ECR I-6371, the Court of Justice held that the General Court (see 2.4.2) had infringed the applicant's rights to an effective remedy and of access to an impartial tribunal (as provided for by Article 47 of the Charter). The General Court had done this by barring the applicant from challenging
p. 372 matters of fact or law merely because it had failed to bring such a ↵ challenge during the administrative procedure which had led to the Commission's adoption of a Decision finding it in breach of EU competition law and imposing a fine (see Chapter 13 on the enforcement of competition law).

EU human rights law can also be invoked by individuals or businesses in order to restrict the competing human rights of others. In Case C-70/10 *Scarlet Extended SA v Société Belge des Auteurs, Compositeurs et Éditeurs SCRL (SABAM)* [2012] ECDR 4 the Court of Justice held that drawing a fair balance between composers' rights to protection of their intellectual property (under Article 17 of the Charter), the freedom of an internet service provider (ISP) to conduct a business (under Article 16), and the rights of the ISP's customers to protection of their personal data (under Article 8) and to receive and impart information (under Article 11), required a number of Directives on the protection of intellectual property rights to be interpreted as prohibiting a national law that required the ISP to install a filtering system to prevent the sharing of music files. In Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659 the applicant sought to use EU law on the free movement of goods (see Chapter 10) so as to restrict the freedom of association and the freedom of expression of an environmental association whose demonstration blocked a motorway. On the facts, the Court of Justice upheld the national authorities' decision not to ban the demonstration, but cases such as these highlight the potential for EU law to be used to restrict human rights, as well as to protect them.

The key arguments which favour the protection of human rights by EU law are that it is necessary in order to protect against the risk of human rights abuses by the EU and to protect against the risk of abuses by Member States when implementing EU law. However, there are a number of other arguments in favour of EU law protection of human rights. First, as discussed at 9.2.2, adequate human rights protection by the EU is a precondition for the renunciation by the national courts of some Member States of their own jurisdiction over fundamental rights where EU law is at issue. Second, a failure to protect human rights against the EU itself would reduce the legitimacy of Article 49 TEU, which provides that any State wishing to join the EU must respect, inter alia, the values set out in Article 2 TEU (see 1.3), which include respect for human rights. Third, the EU's attempts to promote human rights in countries outside the region would similarly lack credibility if it did not itself comply with a high standard of human rights protection.

9.4 The Charter of Fundamental Rights of the EU

9.4.1 The Charter rights

The rights contained in the Charter are not generally new to EU law; most have already been recognized in the Treaties, in secondary legislation, or by the Court of Justice (see 9.2.2), and indeed the Preamble to the Charter itself provides that it only 'reaffirms' existing rights.

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Charter of Fundamental Rights of the European Union

Preamble

The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognises the rights, freedoms and principles set out hereafter.

However, their inclusion in the Charter makes them more transparent and accessible, and in some cases their scope has been made more generous, for example the right to marry provided for in Article 9 of the Charter, which is not confined to opposite-sex relationships.

The Charter is divided into Titles. Of those which contain substantive rights, Titles I (Dignity), II (Freedoms), and VI (Justice) largely reflect the same civil and political rights that are contained in the ECHR, but Title II also includes, for example, the right to data protection, the right to work, and the freedom to conduct a business, none of which appear in the ECHR. The content of Title III (Equality) is self-explanatory. Title IV (Solidarity) provides employment rights. Title V (Citizens' Rights) largely replicates rights found in the TFEU,
p. 374 such as the ↵ right of free movement and the right to vote and stand in elections (see Chapter 11), but also includes the right to good administration. Most of the rights in Title V are absent from the ECHR, although Article 3 of Protocol 1 to the ECHR provides certain electoral rights, and Article 3 of Protocol 4 to the ECHR provides the right of free movement within a State and the right to leave.

Title V is unusual for its restriction on the beneficiaries of the rights contained in it to EU citizens (see further 11.2.1 on the definition of EU citizens). Other Charter rights and EU human rights law more generally are not so restricted (and indeed the ECHR applies to all those within the 'jurisdiction' of the States Parties (Article 1 ECHR) whether they are citizens of those States or not).

9.4.2 The legal effect of the Charter

The legal effect of the Charter is set out in Article 6(1) TEU; it has 'the same legal value as the Treaties'.

Article 6 TEU

> 1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
>
> The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
>
> The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
>
> [...]

Thus, in Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL and others v Conseil des Ministres* [2011] ECR I-773, the Court of Justice ruled that Article 5(2) of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of

goods and services, OJ 2004 L373/37, which permitted Member States to maintain national legislation allowing insurers to charge different premiums to men and women where gender was a determining factor in assessing risk, was incompatible with the rights in Articles 21 and 23 of the Charter to non-discrimination and equality of treatment between men and women, and must therefore be annulled.

However, Article 6(1) TEU (see earlier in this section) also states that the Charter does not 'extend in any way' EU competences. This was confirmed by the Court of Justice in Case C-466/11 *Currà v Germany* EU:C:2012:465, in which it held that compensation claims brought under international law by citizens of one Member State against another Member State in respect of events during the Second World War did not fall within the scope
p. 375 of EU law and that it ↵ therefore had no jurisdiction (see also 6.4.4). Neither Article 17 of the Charter (the right to property) nor Article 47 of the Charter (the right to an effective remedy and to a fair trial) could, in themselves, be relied on to form the basis of a new power which the EU did not otherwise have.

Article 51(2) of the Charter itself confirms that it does not extend the scope of EU law beyond the powers of the EU.

Charter of Fundamental Rights of the European Union

Article 51

Field of application

> […]
>
> 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

The Preamble to the Charter states that the Charter will be interpreted 'with due regard to the Explanations', which were provided by the drafters of the Charter, and therefore the Explanation relating to Article 51(2) must also be taken into account when determining the meaning of the Protocol. (The earlier part of the Explanation on Article 51 is extracted at 9.4.3.)

Explanations relating to the Charter of Fundamental Rights, OJ 2007 C303/02

Explanation on Article 51—Field of application

> [...]
>
> Paragraph 2, together with the second sentence of paragraph 1, confirms that the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Union. Explicit mention is made here of the logical consequences of the principle of subsidiarity and of the fact that the Union only has those powers which have been conferred upon it. The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaties. Consequently, an obligation, pursuant to the second sentence of paragraph 1, for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers.
>
> Paragraph 2 also confirms that the Charter may not have the effect of extending the field of application of Union law beyond the powers of the Union as established in the Treaties. The Court of Justice has already established this rule with respect to the fundamental rights recognised as part of Union law (judgment of 17 February 1998, C-249/96 *Grant* [1998] ECR I-621, paragraph 45 of the grounds). In accordance with this rule, it goes without saying that the reference to the Charter in Article 6 of the Treaty on European Union cannot be understood as extending by itself the range of Member State action considered to be 'implementation of Union law' (within the meaning of paragraph 1 and the above-mentioned case-law).

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9.4.3 The application of the Charter to Member States

Charter of Fundamental Rights of the European Union

Article 51

Field of application

> 1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

Review Question

> Who or what is legally bound by the Charter?
>
> *Answer*: Article 51(1) of the Charter provides that it applies to the EU and its institutions, and to the Member States but 'only when they are implementing Union law'.

The determination of whether a Member State, when allegedly acting in violation of human rights, is 'implementing' EU law will often be difficult.

The Court of Justice has taken an expansive approach to the question of which national measures fall within the scope of EU law generally. For example, in Case C-117/01 *KB v National Health Service Pensions Agency and the Secretary of State for Health* [2004] ECR I-541 and Case C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR I-3585, both of which concerned UK law which prevented transgender persons from registering their change of sex, the Court of Justice held that although civil status was not a matter of EU law, equal treatment on grounds of sex was. It ruled that the UK's refusal to recognize a change of gender constituted discrimination because it prevented a trans man from marrying a woman and because it prevented that woman from inheriting pension rights as a widow, and because it prevented a trans woman from retiring at the lower retirement age then applicable to women. In Case C-555/07 *Kücüdeveci* [2010] ECR I-365 (see also 4.1.4), the Court of Justice held that a German law which laid down minimum periods for notice of dismissal by reference to an employee's length of service, was within the scope of EU discrimination law because it governed the conditions of dismissal and those conditions had been brought within the scope of EU law on the expiry of the deadline for the transposition of Council Directive 2000/78/EC of 27 November 2000

establishing a general framework for equal treatment in employment and occupation, OJ 2000 L303/16, including the conditions governing dismissal (see further 3.4.2 on the obligation to transpose Directives into national law). (The Court concluded that the provision was discriminatory because it excluded employment before the age of 25, and was thus prohibited by EU law.) However, even the Court's expansive approach has its
p. 377 limits. In Case C-328/04 *Vajnai* [2005] ECR I-8577, the Court of Justice held that a Hungarian prohibition ↵ on the wearing of symbols associated with totalitarian regimes, such as a swastika or hammer and sickle, was outside the scope of EU law and therefore the question of whether it was compatible with EU human rights law did not arise. The Court of Justice has also ruled that it has no jurisdiction to review national measures which were adopted before the Member State in question joined the EU (see e.g. Case C-302/04 *Ynos kft v Varga* [2006] ECR I-371).

Turning to the specific question of which national measures fall within the scope of EU law for the purposes of Article 51 of the Charter, the Explanation relating to Article 51(1) provides some limited guidance on this issue. (The latter part of the Explanation on Article 51 is extracted at 9.4.2.)

Explanations relating to the Charter of Fundamental Rights, OJ 2007 C303/02

Explanation on Article 51—Field of application

> The aim of Article 51 is to determine the scope of the Charter. It seeks to establish clearly that the Charter applies primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity. This provision was drafted in keeping with Article 6(2) of the Treaty on European Union, which required the Union to respect fundamental rights, and with the mandate issued by the Cologne European Council. The term 'institutions' is enshrined in the Treaties. The expression 'bodies, offices and agencies' is commonly used in the Treaties to refer to all the authorities set up by the Treaties or by secondary legislation (see, e.g., Articles 15 or 16 of the Treaty on the Functioning of the European Union).
>
> As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493). The Court of Justice confirmed this case-law in the following terms: 'In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules …' (judgment of 13 April 2000, Case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds). Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law.
>
> […]

Although this Explanation provides some clarification as to which bodies within the Member States are included in the reference to 'the Member States' in Article 51 of the Charter, it provides little assistance on when a Member State will be regarded as 'implementing' EU law for the purposes of the application of the Charter. A claim brought in the national courts for breach of human rights might therefore have to be formulated both on the basis of the ECHR (explained at 9.1) and also, in case the human rights violation
p. 378 committed by a Member State is ↵ held to result from its action in 'implementing' EU law, on the basis of EU law. Of course, some claims may appropriately be based on the ECHR even if the violation results from measures implementing EU law (see e.g. *Matthews v United Kingdom* Application No 24833/94 (1999) 28 EHRR 361, discussed at 9.5.2.2). However, it will not be possible to base a claim on the ECHR if the right violated is granted only by EU law and not by the ECHR, and the question of whether the Member State has acted in the 'implementation' of EU law may then determine whether the victim is able to bring any claim at all.

In Case 36/75 *Rutili v Ministre de l'intérieur* [1975] ECR 1219 (see also 9.2.2.2) the Court of Justice held that even national measures which derogate from EU law are within the scope of EU law for the purpose of determining its jurisdiction to give a preliminary ruling under Article 267 TFEU (see further Chapter 6 on the preliminary ruling procedure). It subsequently stated explicitly that such derogating measures, whether provided for by the Treaties (Case C-260/89 *ERT* [1991] ECR I-2925) or in its own jurisprudence (Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertreibs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689), will be assessed for their compliance with fundamental human rights.

In C-198/13 *Hernández and others v Reino de España and others* EU:C:2014:2055, the Court of Justice laid down a number of general principles on when a Member State should be considered to be implementing EU law for the purposes of Article 51 of the Charter.

Thinking Point

> When reading the following extract, make a note of these principles.

C-198/13 *Hernández and others v Reino de España and others* EU:C:2014:2055

34. In this regard, it should be borne in mind that the concept of 'implementing Union law', as referred to in Article 51 of the Charter, presupposes a degree of connection between the measure of EU law and the national measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other (see, to that effect, the judgments delivered prior to the entry into force of the Charter in Case 149/77 *Defrenne* EU:C:1978:130, paragraphs 29 to 32; Case C-299/95 *Kremzow* EU:C:1997:254, paragraphs 16 and 17; Case C-144/04 *Mangold* EU:C:2005:709, paragraph 75; and [C-206/13] *Siragusa* EU:C:2014:126, paragraph 24).

35. In particular, the Court has found that fundamental European-Union rights could not be applied in relation to national legislation because the provisions of EU law in the area concerned did not impose any specific obligation on Member States with regard to the situation at issue in the main proceedings (see Case C-144/95 *Maurin* EU:C:1996:235, paragraphs 11 and 12, and [C-206/13] *Siragusa* EU:C:2014:126, paragraphs 26 and 27).

36. In the same vein, the Court has already held that Article 13 EC (now Article 19 TFEU) could not, as such, bring within the scope of EU law, for the purposes of the application of fundamental rights as general principles of EU law, a national measure which does not come within the framework of the measures adopted on the basis of that article (see, to that effect, Case C-427/06 *Bartsch* EU:C:2008:517, paragraph 18; Case C-555/07 *Kücükdeveci* EU:C:2010:21, paragraph 25; and Case C-147/08 *Römer* EU:C:2011:286, paragraph 61). Consequently, the mere fact that a national measure comes within an area in which the European Union has powers cannot bring it within the scope of EU law, and, therefore, cannot render the Charter applicable (see, to that effect, Joined Cases C-483/09 and C-1/10 *Gueye and Salmerón Sánchez* EU:C:2011:583, paragraphs 55, 69 and 70, and Case C-370/12 *Pringle* EU:C:2012:756, paragraphs 104, 105, 180 and 181).

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37. In accordance with the Court's settled case-law, in order to determine whether a national measure involves the implementation of EU law for the purposes of Article 51(1) of the Charter, it is necessary to determine, inter alia, whether that national legislation is intended to implement a provision of EU law; the nature of the legislation at issue and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or rules which are capable of affecting it (see [C-309/96] *Annibaldi* EU:C:1997:631, paragraphs 21 to 23; Case C-40/11 *Iida* EU:C:2012:691, paragraph 79; Case C-87/12 *Ymeraga and Others* EU:C:2013:291, paragraph 41; and [C-206/13] *Siragusa* EU:C:2014:126, paragraph 25).

The Court in *Hernández* held that, in assessing whether a national measure implemented EU law, it was necessary to consider whether it was intended to implement EU law, whether it pursued other objectives, and whether there were EU rules which could affect it.

Some assistance on what will and will not constitute implementing measures for the purposes of Article 51 of the Charter can also be gleaned from the application of this requirement to the facts of some of the cases that have so far arisen. For example, in Joined Cases C-411 & 493/10 *NS v Secretary of State for the Home Department* [2012] 2 CMLR 9 the Court of Justice ruled that the decision of a Member State which was not responsible under Regulation 343/2003 (the Dublin II Regulation, discussed further at 9.5.2.2) for examining an asylum application, but which nonetheless chose to do so pursuant to an exception in that Regulation, had implemented EU law for the purpose of Article 51 of the Charter. In C-650/13 *Delvigne v Commune de Lesparre-Médoc and another* EU:C:2015:648, the Court of Justice held that French legislation which provided for EU citizens who had been convicted of a criminal offence to be excluded from the right to vote in elections to the European Parliament (see 2.1 on the Parliament) must be considered to be implementing the EU's 1976 Act concerning the election of members of the European Parliament (MEPs), annexed to EU Decision 76/787/ECSC, EEC, EURATOM of the representatives of the Member States meeting in the council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage, OJ 1976 L278/1, and thus to be implementing EU law within the meaning of Article 51 of the Charter. In C-419/14 *WebMindLicenses Kft v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság* EU:C:2015:832, the Court held that an adjustment of VAT by the Hungarian tax authorities after they had found the applicant to have committed an
p. 380 abuse of rights aimed at circumventing Hungarian tax law constituted implementation of the ↵ VAT Directive (Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ 2006 L347/1) and Article 325 TFEU on combating fraud, and therefore constituted implementation of EU law for the purposes of Article 51 of the Charter.

In Case C-617/10 *Åklagaren v Åkerberg Fransson* [2013] 2 CMLR 36, tax penalties had been imposed on Åkerberg Fransson, and criminal proceedings were then brought against him for providing false information to the Swedish tax authorities. He claimed that this was in breach of Article 50 of the Charter, which prohibited the trial or punishment of a person for an offence for which they had already been finally acquitted or convicted. The Swedish court made a preliminary reference to the Court of Justice under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure), but the Swedish government claimed that the reference was inadmissible because neither the national legislation on the basis of which the tax penalties were ordered to be paid, nor that upon which the criminal proceedings were founded, arose from the implementation of EU law. However, the Court of Justice noted that the tax penalties and criminal proceedings were connected in part to Åkerberg Fransson's breaches of his obligations to declare VAT, and held that those penalties and proceedings constituted implementation of the VAT Directive 2006/112, which obliged Member States to take all legislative and administrative measures appropriate to ensure collection of VAT due on their territory and prevent evasion, and of Article 325 TFEU, which obliged them to counter fraud affecting the financial interests of the EU (including VAT revenue, since this formed part of the EU's own resources). In response to the Swedish government's argument that its measures had not been adopted in order to implement EU law, the Court made the following clear statement.

Case C-617/10 *Åklagaren v Åkerberg Fransson* [2013] 2 CMLR 36

> 28. The fact that the national legislation upon which those tax penalties and criminal proceedings are founded has not been adopted to transpose Directive 2006/112 cannot call that conclusion into question, since its application is designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union.

The Court of Justice therefore concluded that the reference in *Åkerberg Fransson* was admissible and the Charter applicable, although it held that Article 50 had not in fact been breached so long as the tax penalty was not criminal in nature. The UK's Supreme Court took the view that 'the rubric, "implementing EU law" is to be interpreted broadly and, in effect, means whenever a member state is acting "within the material scope of EU law"' (*Rugby Football Union v Consolidated Information Services Ltd (formerly Viagogo Ltd) (in liquidation)* [2012] UKSC 55, [2013] 1 CMLR 56, at para 28).

However, a tenuous link between the Member State's action and EU law, as in *Åkerberg Fransson*, will not always be sufficient for that action to amount to implementing EU law. For example, in C-333/13 *Dano v Jobcentre Leipzig* EU:C:2014:2358, the Court of Justice held that the conditions laid down by German law for the
p. 381 grant of special non-contributory cash ↵ benefits and the extent of such benefits did not constitute implementation of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ 2004 L166/1, or of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L258/77. The Court therefore had no jurisdiction to rule on whether that German law was compatible with the Charter. In C-446/12 *Willems v Burgemeester van Amsterdam* EU:C:2015:238, the applicants were denied passports or an identity card because they refused to provide their digital fingerprints on the ground that this breached their right to privacy under the Charter. The Court of Justice held that the Dutch law requiring fingerprint data did not constitute implementation of Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States, OJ 2004 L385/1, because the Regulation did not require a Member State to guarantee in its national legislation that biometric data would not be stored or used by it for purposes other than those specified in the Regulation, and did not apply to identity cards at all. The Court therefore held that there was no need to examine whether the Dutch law complied with the Charter.

9.4.4 The scope and interpretation of the Charter

The key provision here is Article 52 of the Charter.

Charter of Fundamental Rights of the European Union

Article 52

Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
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.

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5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.
6. Full account shall be taken of national laws and practices as specified in this Charter.
7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

Review Question

Summarize the rules set out in Article 52 of the Charter as to:

(1) the interpretation of the Charter generally;

(2) the interpretation of Charter rights that are also contained in other documents; and

(3) the conditions applicable to derogations from Charter rights.

Answer: As to question (1), Article 52(7) of the Charter expressly provides that the accompanying Explanations are to be 'given due regard' by the national and EU courts when interpreting the Charter.

As to question (2), Charter rights which are also laid down in the EU Treaties, the ECHR, or the constitutional traditions of the Member States are to be given an interpretation that is consistent with that other source. Thus, for example, the exceptions to the right to life set out in Article 2 ECHR, although not included in Article 2 of the Charter which also provides for the right to life, are to be implied into it.

As to question (3), any limitation on Charter rights and freedoms must:

- be provided for by law;
- respect the essence of the rights and freedoms; and
- be proportionate to the aim of the limitation.

Although Article 52(3) provides that Charter rights derived from the ECHR must be interpreted consistently with the ECHR itself, it does not expressly require this interpretation to be consistent with the ECHR as it has been interpreted by the ECtHR. This could have been a significant omission, as pre-Charter case law indicated that there was potential for the Court of Justice and the ECtHR to differ in their interpretation of human rights. For example, the Court of Justice ruled in Case C-159/90 *Society for the Protection of Unborn Children (Ireland) Ltd v Grogan* [1991] ECR I-4685 that a national law prohibiting the distribution of information about abortion clinics in another Member State did not constitute a restriction on the freedom to provide services because the information was not distributed by or on behalf of the service provider. In contrast, in *Open Door Counselling and Dublin Well Woman v Ireland* Application No 14234/88 (1993) 15 EHRR 244, the ECtHR declared the same prohibition to be in breach of the right to free expression.

However, the Preamble to the Charter states that '[t]he Charter reaffirms … the rights as they result, in particular, from … the caselaw of the … European Court of Human Rights', and in Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft* [2010] ECR I-13849, at para 35 (see also 4.3.2), which concerned the
p. 383 right to legal aid in Article 47 of ↵ the Charter, the Court of Justice noted that the Explanation on Article 52(3) of the Charter required that 'the meaning and scope of the [Charter] 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 European Court of Human Rights'.

Explanations relating to the Charter of Fundamental Rights, OJ 2007 C303/02

Explanation on Article 52—Scope and interpretation of rights and principles

> [...]
>
> Paragraph 3 is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. This means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR, which are thus made applicable for the rights covered by this paragraph, without thereby adversely affecting the autonomy of Union law and of that of the Court of Justice of the European Union.
>
> The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union. The last sentence of the paragraph is designed to allow the Union to guarantee more extensive protection. In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.
>
> [...]

On this basis, the Court of Justice in *DEB Deutsche* proceeded to conduct a detailed review of the ECtHR's interpretation of the right to a fair trial in Article 6 ECHR, starting with the judgment of the latter Court expressly referred to in the Explanation on Article 47, *Airey v Ireland* Application No 6289/73 (1979) 2 EHRR 305. The Court of Justice concluded from the interpretation of Article 6 ECHR by the Court of Human Rights in *Airey* that the principle of effective judicial protection enshrined in Article 47 of the Charter could be relied on by legal as well as natural persons, and could require exemptions to be granted from the requirement to pay the costs of the proceedings in advance. Similarly, in C-199/11 *Europese Gemeenschap v Otis NV and others* [2013] 4 CMLR 4, at para 71, the Court of Justice recognized the principle of equality of arms—a principle first adopted by the ECtHR in *Neumeister v Austria* Application No 1936/63 (1968) 1 EHRR 9. This principle requires that each party must be afforded a reasonable opportunity to present their case, including their evidence, under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent.

The Explanation on Article 52 provides, by way of summary, two lists comparing the meaning and scope of
p. 384 the Charter Articles with those of the ECHR. The first list, set out at Table 9.1, ↵ compares rights which appear in both the Charter and the ECHR, and which are stated by the Explanation to have not only *the same*

meaning, but also *the same scope*.

Table 9.1 Charter Articles and ECHR Articles/Protocols with the same meaning and scope

Right	Charter Article	ECHR (or Protocol) Article
Right to life	Article 2	Article 2
Prohibition of torture/inhuman or degrading treatment	Article 4	Article 3
Prohibition of slavery	Article 5(1) and (2)	Article 4
Right to liberty	Article 6	Article 5
Right to respect for private and family life	Article 7	Article 8
Freedom of thought and religion	Article 10(1)	Article 9
Freedom of expression	Article 11	Article 10
Right to peaceful enjoyment of property	Article 17	Protocol 1, Article 1
Prohibition of collective expulsions of foreign nationals	Article 19(1)	Protocol 4, Article 4
Article 3 ECHR	Article 19(2)	Article 3 (as interpreted by the ECtHR in a particular series of cases)
Presumption of innocence and rights of the defence	Article 48	Article 6(2) and (3)
Right not to be convicted of an offence retrospectively or to be given a heavier penalty	Article 49(1) and (2)	Article 7

Thus, for example, in C-199–201/12 *Minister voor Immigratie en Asiel v X, Y and Z* [2014] 2 CMLR 16, the Court of Justice held that although the criminalization of homosexual acts did not constitute persecution within the meaning of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ 2004 L304/12, the sanction of a term of imprisonment did, because it was disproportionate or discriminatory, contrary to Article 9(2)(c) of the Directive. In so ruling, the Court noted that '[s]uch a sanction infringes article 8 [ECHR], to which Article 7 of the Charter corresponds' (*X, Y and Z*, at para 54). Similarly, when ruling in Joined Cases C-71 & 99/11 *Germany v Y* and *Germany v Z* [2013] 1 CMLR 5 that the risk of persecution within the meaning of the Directive should be assessed without taking account of the possibility that the applicants could avoid that risk by abstaining from their religious practices, the Court of Justice noted, at para 56, that '[t]he right to religious freedom enshrined in art. 101(1) of the Charter corresponds to the right guaranteed by art. 9 of the ECHR'.

The second list in the Explanation on Article 52, set out at Table 9.2, compares rights that appear in the Charter and the ECHR, and which are stated by the Explanation to have the *same meaning*, but a *different scope*, the Charter rights having a *wider scope*.

Table 9.2 Charter Articles with the same meaning as ECHR Articles/Protocols, but a wider scope

Right	Scope of Charter right	Charter Article	ECHR Article
Right to marry and found a family	May be extended to various forms of marriage if established by national legislation	Article 9	Article 12
Freedom of association and assembly	Applies to political parties at EU level	Article 12(1)	Article 11
Right to education	Includes vocational and continuing training	Article 14	Protocol 1, Article 2
Fair trial rights	Not limited to the determination of civil rights or criminal charges	Article 47(2) and (3)	Article 6(1)
Right not to be tried twice for the same offence	Applies at EU level between the courts of the Member States	Article 50	Protocol 7, Article 4
Political activity of aliens	Restrictions permissible only on non-EU nationals	Articles 11, 12, and 21	Articles 10, 11, 14, and 16

Although the Explanation on Article 52 of the Charter does not contain a third list indicating which rights in
p. 385 the Charter have a *narrower scope* than the corresponding rights in the ECHR, ↵ there are nonetheless some rights in this category. For example, the voting rights granted by Articles 39 and 40 of the Charter (see further 11.2.3 on these rights) are restricted to EU citizens (see further 11.2.1 on the definition of EU citizens), and to European Parliamentary and local elections, and do not bestow a right to vote as such, but only to do so 'under the same conditions as nationals' of the Member State where the election takes place. By contrast, Article 3 of Protocol 1 to the ECHR—at issue in *Matthews v United Kingdom* Application No 24833/94 (1999) 28 EHRR 361 (see further 9.5.2)—provides for the wider right to free elections by secret ballot. Thus, whereas the ECtHR has held that a complete ban on convicted prisoners voting breaches Article 3 of Protocol 1 to the ECHR (for example in *Hirst v UK (No 2)* Application No 74025/01 (2006) 42 EHRR 41), the UK's Supreme Court held that the same ban does not breach EU law (*R (on the application of Chester) v Secretary of State for Justice* and *McGeoch (AP) v The Lord President of the Council and another (Scotland)* [2013] UKSC 63, [2014] 1 CMLR 45).

The Charter also contains a number of rights which are not explicitly included in the ECHR, such as the protection of personal data (Article 8), the freedom to choose an occupation (Article 15), and the rights of children (Article 24) and the elderly (Article 25). However, it should be noted that some rights which do not appear in the text of the ECHR (including the protection of personal data, for example) have been implied or interpreted into it by the ECtHR.

A further difficulty which arises when interpreting the Charter is that Article 52 of the Charter draws a distinction between 'rights' and 'principles'. This distinction is not particularly clear from the substantive provisions of the Charter because although most rights are expressed as such, those which are not expressed to be rights are also not explicitly stated to be principles. For example, Article 13 of the Charter simply provides that '[t]he arts and scientific research shall be free of constraint'. The only express statement that any particular substantive entitlements may be principles appears in the heading to Article 49, which is 'Principles
p. 386 of ↵ legality and proportionality of criminal offences and penalties'. However, the 'principles' set out in the text of Article 49 are expressed in mandatory terms similarly to the equivalent rights in Article 7 ECHR. Unfortunately, the Court of Justice has so far provided little clarification of this issue. In C-356/12 *Glatzel v Freistaat Bayern* EU:C:2014:350, the applicant alleged that the requirements of Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (Recast), OJ 2006 L/403/18 in relation to i.e. on physical fitness to drive a motor vehicle breached Article 20 of the Charter which provides for equality before the law, Article 21 of the Charter which prohibits discrimination on grounds of disability, and Article 26 of the Charter which requires the EU to respect and recognize the right of persons with disabilities to benefit from integration measures. The Court of Justice emphasized that Article 26 (but apparently not Articles 20 or 21) was a principle, but did not clearly explain the grounds on which it reached that conclusion.

The distinction between rights and principles is potentially of considerable significance. As a matter of EU law generally, rights are fully justiciable (see, for e.g., Case 6/60 *Humblet* EU:C:1960:48, pp 571–2 and Case 199/82 *San Giorgio*:EU:C:1983:318, para 12). In contrast, Article 52(5) provides that principles can only have judicial effect through the interpretation or judicial review of any implementing acts adopted by the EU or its Member States. In *Glatzel*, at para 78, the Court of Justice held that the principle of integration of persons with disabilities in Article 26 of the Charter could not by itself confer a right on individuals which they could invoke, and could only be fully effective if it was given more specific expression in EU or national law. It has

been argued (see P Craig and G de Búrca, *EU Law: Text, Cases, and Materials*, 7th edn (Oxford: Oxford University Press, 2020), p 448) that this reflects a distinction between negative (i.e. requiring the State to refrain from interference) civil and political rights, and positive (i.e. obliging the State to act) social and economic rights, and this suggested distinction may be of assistance when interpreting the Charter provisions.

Further guidance on Article 52(5) is provided by the related Explanation.

Explanations relating to the Charter of Fundamental Rights, OJ 2007 C303/02

Explanation on Article 52—Scope and interpretation of rights and principles

> […]
>
> Paragraph 5 clarifies the distinction between 'rights' and 'principles' set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51(1)). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities. This is consistent both with case-law of the Court of Justice (cf. notably case-law on the 'precautionary principle' in Article 191(2) of the Treaty on the Functioning of the European Union: judgment of the CFI of ↵ 11 September 2002, Case T-13/99 *Pfizer v Council*, with numerous references to earlier case-law; and a series of judgments on Article 33 (ex-39) on the principles of agricultural law, e.g. judgment of the Court of Justice in Case 265/85 *Van den Berg* [1987] ECR 1155: scrutiny of the principle of market stabilisation and of reasonable expectations) and with the approach of the Member States' constitutional systems to 'principles', particularly in the field of social law. For illustration, examples for principles, recognised in the Charter include e.g. Articles 25, 26 and 37. In some cases, an Article of the Charter may contain both elements of a right and of a principle, e.g. Articles 23, 33 and 34.

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Article 53 of the Charter is sometimes described as a minimum standard or non-regression clause, and provides that the Charter cannot be used to restrict human rights which are otherwise protected by EU law, international law and agreements (including the ECHR), and domestic law. It performs a broadly equivalent role to Article 53 ECHR, which provides that the ECHR cannot be used to limit any human rights which are protected by the domestic law of an ECHR State Party or protected by an agreement to which an ECHR State Party is a party.

Charter of Fundamental Rights of the European Union

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.

The impact of Article 53 of the Charter was clarified by the Court of Justice in Case C-399/11 *Melloni* [2013] 2 CMLR 43. In that case, the Italian authorities had issued a European arrest warrant (EAW) for the enforcement of a prison sentence imposed on Melloni following trial in his absence. The Court of Justice held that Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L190/1, did not permit a Member State to make execution of an EAW against a person who had been absent from the trial at which they had been convicted conditional on their conviction being subject to review, in circumstances in which they had been notified of the trial. As so interpreted, Article 4a(1) did not breach Articles 47 (the right to a fair trial) or 48 (the rights of the defence) of the Charter because these were not absolute rights; an accused could waive their rights provided that they did so freely and unequivocally, that safeguards were in place, and that it did not infringe any important public interest. Although Article 53 of the Charter permitted national authorities and courts to apply national standards of protection of fundamental rights, this was on condition that the level of
p. 388 protection of the Charter, as interpreted by the Court of Justice, and the primacy, unity, and ↵ effectiveness of EU law, were not thereby compromised. Permitting a State to use Article 53 to make enforcement of an EAW conditional on the reviewability of the underlying judgment, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by that State's constitution, would compromise the effectiveness of the Framework Decision and the uniformity of the standard of protection.

9.5 The enforcement of human rights in EU law

Rights, of course, are only meaningful if they can be enforced.

9.5.1 Actions for enforcement against the EU

An action against the EU institutions for breach of fundamental rights may be brought in the CJEU, either for annulment of the measure which resulted in the violation of rights (under Article 263 TFEU—see Chapter 7) or for damages (under Article 340 TFEU—see Chapter 8). It may not be brought in the national courts or, until and unless the EU accedes to the ECHR (see 9.6), before the ECtHR.

One problem with bringing a claim in the CJEU is that such claims are subject to considerable restrictions. In particular, the admissibility requirements which must be satisfied by an individual or business seeking to bring a claim under Article 263 TFEU before the EU General Court (see further 7.7–7.8) can prevent potential applicants from having their claims heard regardless of the substantive merits of that claim, and are much more demanding than the admissibility requirements in Articles 34 and 35 ECHR which must be satisfied in order for a case to be heard by the ECtHR. Additionally, although there are no admissibility restrictions on the bringing of a claim under Article 340 TFEU before the General Court, the substantive requirement that the breach of law be sufficiently serious (see further 8.4.2) significantly reduces the number of possible claims and, in any event, such an action can only result in the award of damages and not in the annulment of the EU measure that breached the applicant's human rights.

Examples of human rights claims against the EU that succeeded, at least in part, despite these obstacles include Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351 and Case T-228/02 *Organisation des Modjahedines du peuple d'Iran v Council* [2006] ECR II-4665. In these cases, the Court of Justice and the General Court, respectively, ruled that a number of EU Regulations should be annulled for breach of human rights, including the right to a fair hearing, the obligation to state reasons, the right to effective judicial protection, and the right to respect for property, even though those Regulations had been designed to give effect to UN resolutions freezing the assets of suspected terrorists and terrorist organizations. However, the claim for damages in *Organisation des Modjahedines* was dismissed as inadmissible because 'the application lacks even the most basic detail' (para 180 of the judgment).

p. 389 ↵ A further problem with bringing a claim against the EU in the EU Courts arises where the alleged breach of human rights arises not from EU secondary legislation, but from a Treaty, because Treaties are not subject to review either under Article 263 TFEU (see further Chapter 7) or under Article 267 TFEU (see further Chapter 6). A limited solution exists in the form of a claim against the EU Member States (but not the EU itself) before the ECtHR, which has been prepared to hold Member States liable for breaches of the ECHR which are caused by their compliance with their EU Treaty obligations (see e.g. *Matthews v United Kingdom* Application No 24833/94 (1999) 28 EHRR 361, discussed at 9.5.2.2). The EU is not a party to the ECHR (see 9.1) and therefore cannot be held liable under it although, if the planned accession by the EU to the ECHR (see 9.6) takes place, this would permit the ECtHR to hear claims brought against the EU itself directly, including those resulting from provisions of the EU Treaties.

EU law (but again not the EU itself) may also be challenged, although only indirectly, in the national courts, either by challenging national law that implements EU law or, where a claim has been brought against an individual on the basis of EU law or national law which implements that EU law, by the individual then asserting by way of defence that the EU law infringes their human rights. For example, in Joined Cases C-92 & 93/09 *Volker und Markus Schecke GbR v and Hartmut Eifert Land Hessen* [2010] ECR I-11063 (see also 9.5.3), the

Court of Justice upheld claims by applicants who had challenged in their national courts the implementation by the German authorities of EU Regulations requiring publication of the details of beneficiaries of certain agricultural funds and the amounts received by them, on the grounds that this breached their rights to respect for their private life (Article 7 of the Charter) and protection of their personal data (Article 8 of the Charter).

However, there are also a number of difficulties with attempting to use EU law in the national courts. First, as Advocate General Jacobs in Case C-50/00 *UPA v Council* [2002] ECR I-6677 (see 2.4.1 on Advocate Generals' Opinions) and the General Court in Case T-177/01 *Jégo-Quéré et Cie SA v Commission* [2002] 2 CMLR 44 (see 6.6 and 7.9.1) noted, an individual should not be required to breach the law in order to gain access to justice where there are no domestic implementing measures for them to challenge. Second, EU acts can only be annulled by the Court of Justice and not by national courts (Case 314/86 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199—see 6.6), and an applicant before a national court has no right to insist on a reference to the Court of Justice being made, or to decide which EU measures are referred or on what grounds their legality is questioned (see further Chapter 6 on the preliminary reference procedure). Finally, an action in the national courts with a reference to the Court of Justice during the course of the proceedings is likely to take much longer than a direct challenge in the CJEU.

Of course, these difficulties apply to the enforcement of all EU rights, not only human rights, but, given the fundamental importance of human rights, such difficulties could have a particularly serious impact on potential applicants.

9.5.2 Actions for enforcement against Member States

If a Member State has acted *within* the scope of EU law (see further 9.4.3), a claim by a victim against that
p. 390 Member State for a violation of EU human rights law must initially be brought before ↵ its national courts. Such proceedings are governed by national rules on the judicial review of government action, which may themselves impose restrictions on the bringing of an action. However, once an action is brought, the supremacy of EU law (see 3.1), the doctrines of direct and indirect effect, and the rules on the remedies available for breach of EU law (see further Chapter 4) may all support the enforcement of the victim's rights before the national court. The Commission (see 2.3) may also take enforcement proceedings against the Member State under Article 258 TFEU for its breach of EU law (see 2.3.2 and 7.1). In relation to Article 258 TFEU, it should be noted that although Article 35(2) ECHR prevents the ECtHR from hearing a case which 'has already been submitted to another procedure of international investigation or settlement', the ECtHR has held that the investigation of an individual complaint by the Commission under Article 258 TFEU does not constitute such a procedure (*Karoussiotis v Portugal* Application No 23205/08, ECtHR, 1 February 2011, unreported). An applicant who has submitted a complaint to the Commission may therefore still have their case heard by the ECtHR.

If a Member State has acted *beyond* the scope of EU law, an applicant may still be able to bring a claim against it under the ECHR. Again, the claim must initially be pursued in the national courts because Article 35(1) ECHR only permits a case to be brought before the ECtHR if the applicant has exhausted their domestic remedies in the national courts (see 9.1).

At international level, however, it might be argued that the positions are reversed, since it is easier to bring a claim before the ECtHR than before the EU Courts.

Although both types of claim must be commenced initially in the national courts, if the case is to be pursued beyond those courts, it will be necessary to determine which law (EU law or the ECHR) applies and thus whether the appropriate court for further action is the Court of Justice in Luxembourg (EU law) or the ECtHR in Strasbourg (the ECHR).

9.5.2.1 The possibility of actions in the CJEU

It is not possible for a victim of a breach of EU human rights law to bring a claim against an EU Member State directly in either the Court of Justice or the General Court (see further 2.4 on these courts). It is possible for a victim to bring a claim in the national courts and, in the course of these proceedings, to request that a preliminary reference be made by the national court to the Court of Justice (see further Chapter 6), but there are a significant number of obstacles to this, as discussed at 9.5.1.

In contrast, victims of a violation of the ECHR have direct access to the ECtHR.

9.5.2.2 The possibility of actions in the ECtHR

A victim who considers that a Member State has breached the ECHR when acting within the scope of EU law may bring a claim against that Member State in the ECtHR, providing that the claimant has exhausted their domestic remedies in the national courts (see 9.1).

The ECtHR has been prepared to examine such claims on the basis that the transfer of powers to an international organization such as the EU is compatible with the obligations of a State Party to the ECHR *only if* fundamental rights continue to be protected (see e.g. *Matthews v United Kingdom* Application No 24833/94 (1999) 28 EHRR 361, at para 32, and *Bosphorus v Ireland* Application No 45036/98 (2006) 42 EHRR 1, at para 55).

p. 391 ↵ In one of its earliest judgments on this point, *Cantoni v France* Application No 17862/91, ECtHR, 11 November 1996, unreported, the ECtHR ruled that the fact that a national measure was adopted in order to comply with an EU Directive, and indeed replicated that Directive almost exactly, did not affect the State's obligation to ensure that the measure complied with the ECHR (although it found no breach on the facts). In its landmark ruling in *Matthews v United Kingdom*, it held the UK liable for its breach of its obligations under Protocol 1 to the ECHR to hold free elections despite the fact that the breach—exclusion of Gibraltar from direct elections to the European Parliament (see 2.1.1) - resulted from the UK acting pursuant to an EU Act of 1976 annexed to an EU Decision, a measure which was equivalent to an EU Treaty.

Thinking Point

> While reading the following extract, consider why the ECtHR was prepared to hold the UK liable for breaches of the ECHR caused by its compliance with its EU Treaty obligations.

Matthews v United Kingdom Application No 24833/94 (1999) 28 EHRR 361

> 34. In the present case, the alleged violation of the Convention flows from an annex to the 1976 Act, entered into by the United Kingdom, together with the extension to the European Parliament's competences brought about by the Maastricht Treaty. The Council Decision and the 1976 Act, and the Maastricht Treaty, with its changes to the EEC Treaty, all constituted international instruments which were freely entered into by the United Kingdom. Indeed, the 1976 Act cannot be challenged before the European Court of Justice for the very reason that it is not a 'normal' act of the Community [now Union], but is a treaty within the Community legal order. The Maastricht Treaty, too, is not an act of the Community, but a treaty by which a revision of the EEC Treaty was brought about. The United Kingdom, together with all the other parties to the Maastricht Treaty, is responsible *ratione materiae* under Article 1 of the Convention and, in particular, under Article 3 of Protocol No. 1, for the consequences of that Treaty.
>
> 35. In determining to what extent the United Kingdom is responsible for 'securing' the rights in Article 3 of Protocol No. 1 in respect of elections to the European Parliament in Gibraltar, the Court recalls that the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective. It is uncontested that legislation emanating from the legislative process of the European Community affects the population of Gibraltar in the same way as legislation which enters the domestic legal order exclusively via the House of Assembly. To this extent, there is no difference between European and domestic legislation, and no reason why the United Kingdom should not be required to 'secure' the rights in Article 3 of Protocol No. 1 in respect of European legislation, in the same way as those rights are required to be 'secured' in respect of purely domestic legislation. In particular, the suggestion that the United Kingdom may not have effective control over the state of affairs complained of cannot affect the position, as the United Kingdom's responsibility derives from its having entered into treaty commitments subsequent to the applicability of Article 3 of Protocol No. 1 to Gibraltar, namely the Maastricht Treaty taken together with its obligations under the Council Decision and the 1976 Act. Further, the Court notes that on acceding to the E.C. Treaty, the United Kingdom chose, by virtue of Article 227(4) of the Treaty, to have substantial areas of E.C. legislation applied to Gibraltar.

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In *Matthews*, the ECtHR held that since the provisions of an EU Treaty could not be challenged before the Court of Justice (see 9.5.1), the Member States remained responsible for any breaches of human rights that resulted from those Treaty provisions.

In *Bosphorus*, the ECtHR held that the position in relation to the ECHR would be different where EU law left no discretion to Member States, so that a Member State was doing no more than implementing the legal obligations that flowed from its EU membership. In *Matthews*, the UK had not been *obliged* by EU law to exclude Gibraltar from European Parliamentary elections. In contrast, in *Bosphorus* the Irish authorities had no discretion. In that case, the applicant company had leased two aircraft from the national airline of the former Yugoslavia. Pursuant to United Nations (UN) sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) (the FYR) designed to address the armed conflict and human rights violations taking place in the FYR, the UN Security Council adopted a resolution that States should impound aircraft whose owners operated from the FYR, and Ireland impounded one of the applicant's aircraft when it landed in Dublin. The applicant argued that this was a breach of its right to peacefully enjoy its possessions and its freedom to pursue a commercial activity, and it brought judicial review proceedings in the Irish courts, which made a preliminary reference to the Court of Justice (see further Chapter 6 on the preliminary reference procedure). The Court of Justice held that these rights were not absolute, and that their infringement here was justified by the aim of restoring peace and security. The applicant then brought a claim before the ECtHR.

Thinking Point

> While reading the following extract, consider how the ECtHR reconciled the obligations of States Parties under the ECHR with their freedom to transfer their powers to international organizations such as the EU.

Bosphorus v Ireland Application No 45036/98 [2005] ECHR 440

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152. The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue cooperation in certain fields of activity (see *M. & Co.*, p. 144, and *Matthews*, § 32, both cited above). Moreover, even as the holder of such transferred sovereign power, that organisation is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party (see *Confédération française démocratique du travail v. European Communities*, no. 8030/77, Commission decision of 10 July 1978, DR 13, p. 231; *Dufay v. European Communities*, no. 13539/88, Commission decision of 19 January 1989, unreported; and *M. & Co.*, p. 144, and *Matthews*, § 32, both cited above).

153. On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's 'jurisdiction' from scrutiny under the Convention (see *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports* 1998-I, pp. 17–18, § 29).

154. In reconciling both these positions and thereby establishing the extent to which a State's action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards (see *M. & Co*., p. 145, and *Waite and Kennedy*, § 67, both cited above). The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (see *mutatis mutandis*, *Matthews*, cited above, §§ 29 and 32–34, and *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, § 47, ECHR 2001-VIII).

155. In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see *M. & Co.*, cited above, p. 145, an approach with which the parties and the European Commission agreed). By 'equivalent' the Court means 'comparable'; any requirement that the organisation's

> protection be 'identical' could run counter to the interest of international cooperation pursued ... However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.
>
> 156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.
>
> However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was
>
> p. 394 manifestly deficient. ↵ In such cases, the interest of international cooperation would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights (see *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, Series A no. 310, pp. 27–28, § 75).
>
> 157. It remains the case that a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations ...

The ECtHR in *Bosphorus* held that so long as EU law provided protection of human rights which was equivalent to the ECHR, it would presume action by an EU Member State to be in compliance with that State's obligations under the ECHR if it was doing no more than implementing its legal obligations as a member of the EU.

The ECtHR then went on to examine whether EU law did provide such protection.

Thinking Point

> While reading the following extract, consider why the ECtHR held that EU law did provide protection equivalent to the ECHR. Do you agree with the ECtHR?

Bosphorus v Ireland Application No 45036/98 [2005] ECHR 440

(b) Whether there was a presumption of Convention compliance at the relevant

time

159. The Court has described above (see paragraphs 73–81) the fundamental rights guarantees of the European Community [now Union] which apply to member States, Community institutions and natural and legal persons ('individuals'). While the founding treaties of the European Communities did not initially contain express provisions for the protection of fundamental rights, the ECJ subsequently recognised that such rights were enshrined in the general principles of Community law [now EU law] protected by it, and that the Convention had a 'special significance' as a source of such rights. Respect for fundamental rights has become 'a condition of the legality of Community acts' (see paragraphs 73–75 above, together with the opinion of the Advocate General in the present case, paragraphs 45–50 above) and in carrying out this assessment the ECJ refers extensively to Convention provisions and to this Court's jurisprudence. At the relevant time, these jurisprudential developments had been reflected in certain treaty amendments (notably those aspects of the Single European Act of 1986 and of the Treaty on European Union referred to in paragraphs 77–78 above).

    This evolution has continued. The Treaty of Amsterdam of 1997 is referred to in paragraph 79 above. Although not fully binding, the provisions of the Charter of Fundamental Rights of the European Union were substantially inspired by those of the Convention, and ↵ the Charter recognises the Convention as establishing the minimum human rights standards. Article I-9 of the later Treaty establishing a Constitution for Europe (not in force) provides for the Charter to become primary law of the European Union and for the Union to accede to the Convention (see paragraphs 80–81 above).

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160. However, the effectiveness of such substantive guarantees of fundamental rights depends on the mechanisms of control in place to ensure their observance.

161. The Court has referred (see paragraphs 86–90 above) to the jurisdiction of the ECJ in, *inter alia*, annulment actions (Article 173, now Article 230, of the EC Treaty [now Article 263 TFEU]), in actions against Community institutions for failure to perform Treaty obligations (Article 175, now Article 232 [now Article 265 TFEU]), to hear related pleas of illegality under Article 184 (now Article 241 [now Article 277 TFEU]) and in cases against member States for failure to fulfil Treaty obligations (Articles 169, 170, and 171, now Articles 226, 227, and 228 [now Articles 258–260 TFEU]).

162. It is true that access of individuals to the ECJ under these provisions is limited: they have no *locus standi* under Articles 169 and 170; their right to initiate actions under Articles 173 and 175 is restricted as is, consequently, their right under Article 184; and they have no right to bring an action against another individual.

163. It nevertheless remains the case that actions initiated before the ECJ by the Community institutions or a member State constitute important control of compliance with Community norms to the indirect benefit of individuals.

Individuals can also bring an action for damages before the ECJ in respect of the non-contractual liability of the institutions (see paragraph 88 above).

164. Moreover, it is essentially through the national courts that the Community system provides a remedy to individuals against a member State or another individual for a breach of Community law (see paragraphs 85 and 91 above). Certain EC Treaty provisions envisaged a complementary role for the national courts in the Community control mechanisms from the outset, notably Article 189 (the notion of direct applicability, now Article 249 [now Article 288 TFEU]) and Article 177 (the preliminary reference procedure, now Article 234 [now Article 267 TFEU]). It was the development by the ECJ of important notions such as the supremacy of Community law, direct effect, indirect effect and State liability (see paragraphs 92–95 above) which greatly enlarged the role of the domestic courts in the enforcement of Community law and its fundamental rights guarantees.

The ECJ maintains its control on the application by national courts of Community law, including its fundamental rights guarantees, through the procedure for which Article 177 of the EC Treaty provides in the manner described in paragraphs 96 to 99 above. While the ECJ's role is limited to replying to the interpretative or validity question referred by the domestic court, the reply will often be determinative of the domestic proceedings (as, indeed, it was in the present case—see paragraph 147 above) and detailed guidelines on the timing and content of a preliminary reference have been laid down by the EC Treaty provision and developed by the ECJ in its case-law. The parties to the domestic proceedings have the right to put their case to the ECJ during the Article 177 process. ↵ It is further noted that national courts operate in legal systems into which the Convention has been incorporated, albeit to differing degrees.

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165. In such circumstances, the Court finds that the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, 'equivalent' (within the meaning of paragraph 155 above) to that of the Convention system. Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented legal obligations flowing from its membership of the European Community (see paragraph 156 above).

The ECtHR in *Bosphorus* examined the EU legal system in detail, including the approach of the Court of Justice to human rights, the EU Charter (see 9.4), and the various actions available against Member States under the TFEU. It concluded that EU law did indeed offer protection of human rights which was equivalent to that of the ECHR. It was therefore to be presumed that Ireland had complied with the ECHR, and this presumption had not been rebutted on the facts.

In contrast, the ECtHR did not apply the presumption of equivalent protection in *MSS v Belgium and Greece* Application No 20696/09 (2011) 53 EHRR 2. In that case, the applicant asylum seeker had entered the EU illegally through Greece, but claimed asylum in Belgium. Under the **Dublin Regulation** the Member State of

first entry into the EU by an asylum seeker had primary responsibility for considering his asylum application, and Belgium accordingly transferred him to Greece.

Note

> The **Dublin Regulation** establishes the criteria and mechanism for determining which Member State is responsible for examining an asylum claim that has been lodged in one of the Member States. The current Dublin Regulation is Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (the 'Dublin III Regulation'), OJ 2013 L180/31. This replaced Council Regulation (EC) No 343/2003 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 II Regulation'), OJ 2003 L50/1, which itself replaced the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (the 'Dublin Convention'), OJ 1997 C254/1.

Thinking Point

> While reading the following extract, consider why the ECtHR did not apply the presumption of equivalent protection in this case.

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MSS v Belgium and Greece Application No 30696/09 [2011] ECHR 108

> 338. The Court notes the reference to the *Bosphorus* judgment by the Government of the Netherlands in their observations lodged as third-party interveners …
>
> The Court reiterated in that case that the Convention did not prevent the Contracting Parties from transferring sovereign powers to an international organisation for the purposes of cooperation in certain fields of activity (see *Bosphorus*, cited above, § 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 (*ibid*., § 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. However, a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it exercised State discretion (*ibid*., §§ 155–57).
>
> The Court found that the protection of fundamental rights afforded by Community law was equivalent to that provided by the Convention system (*ibid*., § 165). In reaching that conclusion it attached great importance to the role and powers of the ECJ—now the CJEU—in the matter, considering in practice that the effectiveness of the substantive guarantees of fundamental rights depended on the mechanisms of control set in place to ensure their observance (*ibid*., § 160) …
>
> 339. The Court notes that Article 3 § 2 of the Dublin Regulation provides that, by derogation from the general rule set forth in Article 3 § 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation. This is the so-called 'sovereignty' clause. In such a case the State concerned becomes the Member State responsible for the purposes of the Regulation and takes on the obligations associated with that responsibility.
>
> 340. The Court concludes that, under the 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. Accordingly, the presumption of equivalent protection does not apply in this case.

The ECtHR in *MSS* noted that the Dublin Regulation allowed a Member State the discretion to examine an asylum claim even if it was not the responsible State, and so Belgium could have refrained from transferring the applicant and examined his asylum claim itself if it considered that Greece was not complying with the

ECHR. The transfer therefore did not fall strictly within Belgium's international obligations and so the presumption that protection of fundamental rights in EU law was equivalent to the ECHR was not applicable.
p. 398 On the facts, the Court of Justice held that the applicant's treatment in Greece constituted inhuman treatment ↵ contrary to Article 3 ECHR. The behaviour of Belgium in exposing him to the risk of such ill-treatment also breached Article 3, since numerous reports on the deficiencies of the Greek asylum system were available to the Belgian authorities and the UN had directly requested them to suspend transfers to Greece.

The ECtHR also declined to apply the presumption of equivalent protection in *Michaud v France* Application No 47848/08 (2014) 59 EHRR 9, in response to a claim that EU Directives on money laundering breached Article 8 ECHR on the protection of correspondence. It held that the two conditions laid down in *Bosphorus* for the application of the presumption—the absence of any margin of discretion on the part of the domestic authorities, and the deployment of the full potential of the supervisory mechanism provided by EU law—were not satisfied. First, *Michaud* involved the implementation of Directives, over which the French authorities had a degree of discretion. Second, the control mechanism under EU law was not fully utilized; the French courts themselves had not examined the ECHR rights at issue and had not made a reference to the Court of Justice even though that Court had not yet had an opportunity to consider the particular question in the context of any previous case.

In contrast, in *Povse v Austria* Application No 3890/11 [2014] 1 FLR 944, the ECtHR held that the presumption of equivalent protection was applicable on the facts of the case because the Austrian courts, which had enforced an Italian court order for the return of a child to Italy where her father was living, pursuant to Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, OJ 2003 L338/1, had no discretion under the Regulation to refuse to enforce the Italian court order. Austria was therefore doing no more than fulfilling the strict obligations flowing from its membership of the EU. The Court concluded that, on the facts, the presumption of equivalent protection, and thus the presumption of ECHR compatibility, had not been rebutted. Indeed, it noted that the Court of Justice, which had given a preliminary ruling in the same matter (in C-211/10 PPU *Povse v Alpago* [2010] ECR I-6673, discussed at 6.11.4.3), had made it clear that under the Regulation it was for the Italian courts to protect the rights of the parties.

Similarly, in *Avotiņs v Latvia* Application No 150207/07, ECtHR, 23 May 2016, unreported, the ECtHR noted that the Latvian court had no margin of discretion in giving effect to rights in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the 'Brussels I Regulation'), OJ 2001 L12/1, which was directly applicable (see 4.1 on the meaning of direct applicability), and the relevant provisions of the Directive were precise and had been subject to extensive examination by the Court of Justice. Although the Latvian court had not made a preliminary reference, this was not essential where no genuine and serious issue arose with regard to the protection of fundamental rights by EU law or where the Court of Justice had already stated precisely how the applicable provisions of EU law should be interpreted in a manner compatible with fundamental rights. On the facts, the applicant had not advanced any argument as to the interpretation of the Regulation and its compatibility with fundamental rights, and had not requested a reference, and the Court of Justice had developed a considerable body of case law on the relevant provisions of the Regulation.

p. 399 ↵ If a preliminary reference is made by a national court to the Court of Justice in the course of national proceedings (see further Chapter 6 on the preliminary reference procedure), then the reference procedure will form part of the Member State's actions, for which it can be held liable before the ECtHR. In *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA v Netherlands* Application No 13645/05 (2009) 48 EHRR SE18, the ECtHR held that the presumption of equivalent protection applied not only to actions taken by a State Party in compliance with legal obligations flowing from its membership of an international organization, but also to the procedures followed within such an international organization and hence to the preliminary reference procedure.

9.5.3 Actions for enforcement against individuals or businesses

Although human rights are often thought of as primarily protecting individuals and businesses against the State—and, in the EU context, against the EU institutions—they can be infringed by other individuals or businesses, against whom claims can therefore be brought in the domestic courts. One of the leading examples in recent years is the so-called right to be forgotten, which has been most famously enforced not against a State or the EU, but against a business. The Court of Justice had previously held, in Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen v Bundesanstalt für Landwirtschaft und Ernährung* [2010] ECR I-11063 (discussed at 9.5.1), that although the rights to respect for private life and protection of personal data under Articles 7 and 8 of the Charter—in that case, to prevent disclosure of the amount of EU funds that the claimants had received—were not absolute rights and could be restricted in the interests of, inter alia, making the EU's actions transparent, such limitations could apply only insofar as was strictly necessary. In C-131/12 *Google Inc v Agencia Española de Protección de Datos, Mario Consteja González* EU:C:2014:317, the Court upheld the claimant's rights under Articles 7 and 8 of the Charter against an internet search engine operator, by interpreting Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L281/31—as requiring it to remove data at the request of the data subject. The Court emphasized that, as a general rule, the rights in Articles 7 and 8 overrode the economic interest of the search engine operator and the interest of the general public in having access to that information unless there were 'particular reasons, such as the role played by the data subject in public life' (*Google Inc*, at para 97), which meant that the interference with the data subject's fundamental rights under Articles 7 and 8 was justified by the public interest in having access to that information. Directive 95/46 has now been replaced by the General Data Protection Regulation (GDPR, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, OJ 2016 L119/1. Regulation 17 of the GDPR now expressly provides for 'the right to be forgotten', subject to restrictions that are 'necessary' in order to exercise the freedom of expression, comply with EU or Member State law, or exercise legal claims, or for public health reasons, archiving purposes in the public interest, scientific or historical research purposes or statistical purposes.

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9.6 Accession to the ECHR

The possibility of EU accession to the ECHR was first mooted several decades ago, but in 1994 the Court of Justice ruled that the European Community (now the EU—see Chapter 1, Introduction) lacked competence to accede to the ECHR (Opinion 2/94 pursuant to Article 228(6) of the EC Treaty [1996] ECR I-1759).

Thinking Point

> While reading the following extract, consider why the Court of Justice reached the conclusion that the EU lacked competence to accede to the ECHR.

Opinion 2/94 pursuant to Article 228(6) of the EC Treaty [1996] ECR I-1759

> 32. It should first be noted that the importance of respect for human rights has been emphasized in various declarations of the Member States and of the Community institutions (cited in point III.5 of the first part of this Opinion). Reference is also made to respect for human rights in the preamble to the Single European Act and in the preamble to, and in Article F(2), the fifth indent of Article J.1(2) and Article K.2(1) of, the Treaty on European Union. Article F provides that the Union is to respect fundamental rights, as guaranteed, in particular, by the Convention. Article 130u(2) of the EU Treaty provides that Community policy in the area of development cooperation is to contribute to the objective of respecting human rights and fundamental freedoms.
>
> 33. Furthermore, it is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the Court has stated that the Convention has special significance (see, in particular, the judgment in Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41).
>
> 34. Respect for human rights is therefore a condition of the lawfulness of Community acts. Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.
>
> 35. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment.
>
> 36. It must therefore be held that, as Community law [now EU law] now stands, the Community has no competence to accede to the Convention.

p. 401 ↵ The Court of Justice concluded that the EU's accession to the ECHR would be of constitutional significance and thus exceed the powers granted to the EU by the Member States.

However, the introduction of the EU Charter in 2000 (see 9.4) gave rise to the risk of two competing systems of human rights protection in Europe. The President of the ECtHR (endorsed both by the Committee of Ministers of the Council of Europe (see 9.1) and its Parliamentary Assembly) warned that 'the [ECtHR]'s main

concern … is to avoid a situation in which there are alternative, competing and potentially conflicting systems of human rights protection both within the Union and in the greater Europe. The duplication of protection systems runs the risk of weakening the overall protection offered and undermining legal certainty in this field' (Reply from the Committee of Ministers to Parliamentary Assembly Recommendation 1439 (2000) on the Charter of Fundamental Rights of the European Union, Adopted at the 711th meeting of the Ministers' Deputies, 31 May 2000).

The solution adopted by the Treaty of Lisbon (see further 1.18) in 2009 was to amend the TEU (see further 1.3) to provide the EU with the necessary competence to accede to the ECHR. Indeed, Article 6(2) TEU not only empowers, but actually obliges, the EU to accede to the ECHR.

Article 6(2) TEU

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

A draft Accession Agreement between the EU and the Council of Europe (see 9.1 on the Council of Europe) was concluded in 2013, setting out the details of EU accession to the ECHR, including the relationship between the CJEU and the ECtHR.

The key provisions of the draft Accession Agreement included the following.

- The EU would be a State Party to the ECHR and, as such, could be the respondent to an application before the ECtHR brought either by a victim or another State Party and could itself bring a claim against another State Party.
- The ECtHR would include one judge from the EU, in addition to (as at present) one judge from each of the other States Parties.
- The terms 'national law' and 'domestic' in the ECHR would be interpreted as applying equally to the internal legal order of the EU.
- Terms in the ECHR such as 'national security', 'economic well-being of the country', and 'life of the nation', in proceedings brought against the EU or to which the EU was a co-respondent, would be interpreted as applying to Member States of the EU, individually or collectively.
- Article 15 ECHR, which permits States Parties to derogate from certain of the ECHR rights where there is a threat to 'the life of the nation', would be interpreted as permitting the EU to take derogating measures in support of action taken by one of its Member States which asserts the existence of such circumstances.

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- The EU would not become a member of the Council of Europe, but it would be able to participate and vote in certain meetings of the Council of Europe's Committee of Ministers that relate to the ECHR and its Protocols.

- A delegation of the European Parliament would be able to participate and vote in sittings of the Parliamentary Assembly of the Council of Europe whenever it exercises its functions in relation to the election of judges to the ECtHR.
- The co-respondent procedure (see later) would be introduced (as Article 36(4) ECHR).

The co-respondent procedure would be as follows.

- Where an application was brought in the ECtHR against one or more Member States of the EU, the EU could be joined as co-respondent if the compatibility of EU law with the ECHR was at issue.
- Where an application was brought in the ECtHR against the EU, its Member States would be joined as co-respondents if the compatibility of a provision of the TEU or the TFEU with the ECHR was at issue.
- Where an application was brought in the ECtHR against the EU and one or more of its Member States, the status of any respondent could be changed to that of a co-respondent if either of the two preceding conditions was satisfied.
- The co-respondent procedure could be invoked either if the ECtHR so decided after a request by the proposed co-respondent or if the proposed co-respondent accepted an invitation by the ECtHR.
- The admissibility of the application, including the requirement of exhaustion of domestic remedies (see 9.1), would be examined only in relation to the claim against the respondent, without regard to the co-respondent.
- If the EU was a co-respondent and the Court of Justice had not yet assessed the compatibility with the ECHR of the EU law at issue, for example because the case had progressed through the national courts without those courts making a preliminary reference to the Court of Justice under Article 267 TFEU (see further Chapter 6 on the preliminary reference procedure), 'sufficient' time must be allowed for the Court of Justice to make such an assessment and thereafter for the parties to make observations on its assessment to the ECtHR.
- If the ECtHR found a violation, the respondent and the co-respondent would be jointly liable unless, on the basis of reasons given by them and having sought the applicant's views, the Court decided that only one of them was liable.

The reason for the introduction of the co-respondent procedure was that the accession of the EU to the ECHR would give rise to the possibility of a scenario in which the State Party to the ECHR which enacted the legal measures that resulted in a violation of the ECHR was not the same State Party which implemented the measure. This is because measures enacted by the EU may be implemented by Member States, and EU Treaties agreed upon by the Member States may be implemented by EU institutions. In such situations, in the absence of the co-respondent procedure the application could be dismissed as inadmissible because the particular respondent was responsible only for the legal basis of the act or omission that gave rise to the alleged violation and not for the act or omission itself.

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However, Article 218 TFEU provides that the opinion of the Court of Justice may be sought (by a Member State, the European Parliament, the Council, or the Commission) on the compatibility with the EU Treaties of an agreement between the EU and an international organization or a third country, and the Commission (see 2.3)

made just such a request in relation to the compatibility of the draft Accession Agreement. The Court of Justice's *Opinion 2/13 pursuant to Article 218(11) TFEU* EU:C:2014:2454 was that the Agreement was not compatible with EU law. It gave the following reasons.

(1) The Agreement would be liable to adversely affect 'the specific characteristics of EU law and its autonomy'.

In this respect, the Court noted, first, that the Agreement failed to limit Article 53 ECHR, which gives States Parties to the ECHR power to lay down higher standards of protection than those given by the ECHR, whereas Article 53 of the Charter, as interpreted by the Court of Justice in Case C-399/11 *Melloni* [2013] 2 CMLR 43 (see 9.4.4), which provides similarly for Charter rights, was limited in that EU Member States could not give more protection to fundamental rights than that permitted by EU legislation.

In fact, Article 53 ECHR only provides that the ECHR itself does not prevent higher domestic standards; if these are prevented by EU legislation, this does not conflict with Article 53 ECHR (so long as the minimum ECHR standards are met). Further, Article 52(3) of the Charter states that Charter rights corresponding to those of the ECHR should be applied in accordance with the ECHR, which means that EU Member States could not give less protection than the minimum provided by the ECHR.

The Court noted, secondly, that the Agreement failed to allow for the application of mutual trust between EU Member States, which is a fundamental principle of EU law, because the Agreement would enable an EU Member State to check compliance by another Member State with the ECHR.

Thirdly, the Court noted that the Agreement failed to ensure the compatibility of Protocol No 16 to the ECHR—which allows the highest national courts to request advisory opinions from the ECtHR—with the Court of Justice's preliminary reference procedure (see further Chapter 6 on this procedure).

In fact, Protocol 16 does not exempt national courts from their obligations under Article 267 TFEU and so there is no incompatibility.

(2) The Agreement would be liable to affect Article 344 TFEU, which states that Member States may not submit a dispute over the interpretation or application of the EU Treaties to any method of settlement other than those provided by the EU Treaties, and this would be contrary to Protocol No 8 EU, which states that the Accession Agreement must not affect Article 344 TFEU.

In fact, since Article 55 ECHR vests exclusive jurisdiction over ECHR disputes in the ECtHR, it was necessary for the Agreement to contain a derogation from this so that ↵ disputes between EU Member States about the ECHR could be brought before the Court of Justice. It therefore seems unnecessary to state that if such a dispute were taken to the ECtHR this would be inadmissible.

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(3) The co-respondent mechanism was contrary to the EU law.

First, the Court of Justice considered that it would require the ECtHR to ascertain whether a party should become a co-respondent and whether the presumption of joint responsibility for a violation should be departed from, both of which would be liable to interfere with the division of powers between the EU and its Member States.

In fact, the decision as to whether a party should become a co-respondent would not affect the division of powers as a matter of EU law.

The Council (see further 2.3 on the Council) subsequently proposed an amendment to the Agreement, so that where an application to the ECtHR is made against one or more Member States or the EU, the Member State(s) or the EU will have an unconditional right to become co-respondent(s) to the proceedings and to be informed of any applications notified to the other (Presidency of the Council of the European Union, *Technical Written Contribution from the Commission Services*, EU Council Meeting Document DS 1216/15, 14 April 2015).

The Court considered, secondly, that the mechanism failed to preclude a Member State from being held liable jointly with the EU in relation to a provision of the ECHR in respect of which that Member State had entered a reservation under Article 57 ECHR.

In fact, such reservations are rare and given that the issue would arise only where a Member State was a party to proceedings, that State could draw it to the attention of the ECtHR, which would presumably not then give a ruling finding that State jointly liable.

The Council subsequently proposed an amendment to the Agreement to exclude the ECtHR's (draft) power to depart from the rule of joint responsibility in co-respondent proceedings, except where the co-respondent has entered a formal reservation to the relevant ECHR right under Article 57 ECHR (see EU Council Meeting Document DS 1216/15).

(4) The procedure set out in the Agreement to ensure the prior involvement of the Court of Justice would require the ECtHR to examine whether the CJEU had given a ruling on the same question of law, whereas this should properly be for the EU to assess; and the Explanatory Report accompanying the Agreement suggested that the procedure could be invoked only in relation to the interpretation of the Treaties and the validity of secondary legislation, thus adversely affecting the Court of Justice's power to provide an interpretation of EU secondary legislation.

In fact, the EU would already be involved in the proceedings, and thus able to assess whether the CJEU had given a ruling on the same issue and inform the ECtHR accordingly; and the Accession Agreement does not limit the prior involvement procedure in the way suggested by the Explanatory Report.

The Council subsequently proposed an amendment to the Agreement, so that where the EU is a co-
p. 405 respondent its right to initiate the prior involvement procedure is ↵ unlimited (see EU Council Meeting Document DS 1216/15). The Council also proposes to amend the Explanatory Report so that it is clear that the procedure applies where the interpretation as well as the validity of EU secondary legislation is at issue.

(5) Under the Agreement, the ECtHR would exclusively be empowered to rule on the compatibility with the ECHR of certain EU acts performed within the context of the Common Foreign and Security Policy (CFSP) (see further 1.13, 1.15, 1.17, and 1.18), which the Court of Justice itself, because of restrictions imposed on its jurisdiction in this area by EU law (see further 6.1.2), could not review for compliance with human rights.

> In fact, giving the ECtHR power to review acts and omissions on the part of the EU is the whole point of EU accession to the ECHR. Insofar as the objection is that the ECtHR would have exclusive review powers, the problem lies in the restricted nature of the Court of Justice's powers in this area—something that the EU might be well advised to rectify in order to give it the opportunity to address such matters before its own courts first.

While some of these criticisms could be addressed relatively easily, others are more fundamental. The prospect of EU accession to the ECHR in the short-to-medium term has therefore seemingly receded. However, the Commission (see further 2.2 on the Commission) has stated that it will 'pursue the work towards the accession of the EU to the [ECHR], taking full account of the Opinion of the Court of Justice' (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Commission Work Programme 2016: No Time for Business as Usual*, COM (2015) 610 final, 27 October 2015). Similarly, regular meetings of the Council of Europe's Steering Committee for Human Rights (CDDH) ad hoc negotiation group (also known as the '47 + 1' group because it consists of representatives of the 47 States Parties to the ECHR plus a representative of the EU) continue to take place (see further 9.1 on the Council of Europe).

If and when these criticisms are addressed, Article 218 TFEU provides that the EU Council must act unanimously on the agreement for accession to the ECHR. Adoption of an accession agreement by the EU and the Council of Europe would have the effect of amending the ECHR and including the EU as a Party to the ECHR (and to Protocols 1 and 6, Protocols which all EU Member States have also ratified, while EU accession to other ECHR Protocols, which not all Member States have ratified, would require separate accession instruments). Judgments of the ECtHR would become binding on the EU's institutions, including on the Court of Justice.

9.7 The impact of Brexit

When the UK left the EU (see further Chapter 16 and 3.1), EU human rights law ceased to apply to it except insofar as the UK's Withdrawal Act retains it as part of UK law (see further 16.2.2). In particular, s 5(4) of the Withdrawal Act explicitly excludes the Charter from those EU laws that the UK will retain after it leaves the EU.

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European Union (Withdrawal) Act 2018, s 5(4)

> The Charter of Fundamental Rights is not part of domestic law on or after [the expiry of the transition period].

However, s 5(5) of the 2018 Act states that the disapplication of the Charter in s 5(4) is not intended to deprive retained EU law of any fundamental rights or principles that exist irrespective of the Charter.

European Union (Withdrawal) Act 2018, s 5(5)

> Subsection (4) does not affect the retention in domestic law on or after [the expiry of the transition period] in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).

Unfortunately, it is not entirely clear which Charter rights also exist as rights or general principles and indeed it may be difficult to separate the two, given that they have developed symbiotically since the introduction of the Charter.

Regardless of the application or otherwise of human rights contained in the Charter or other parts of EU law, the ECHR (as explained at 9.1) will continue to apply to the UK as this applies by virtue of the EU's status as a State Party to the ECHR.

One particular problem which has already arisen post-Brexit is whether the right to data protection in the UK is sufficient to satisfy EU standards and thus allow the continued free flow of personal data from EU Member States to the UK. The free flow of data is important to businesses, including not only technical firms but all those involved in trade in goods and services, and to law enforcement agencies. The Commission has adopted two data adequacy decisions regarding transfers of personal data to the UK, declaring UK data protection standards to be 'essentially equivalent' to those applicable under EU law. However, under EU law the Commission could only adopt such decisions after receiving an Opinion from the European Data Protection Board (EDPD) and Member State approval; and the EDPB's Opinions on both draft decisions raised a number of concerns. These concerns related to transfers of data by UK authorities to third countries, oversight of the UK's criminal law enforcement agencies and the bulk interception of personal data by security and intelligence agencies, and the exemptions from protection which the UK allows in the relation to immigration control.

9.8 Conclusions

Although it is likely that most complaints of human rights violations will continue to be made against the national authorities via the ECHR, rather than against the EU or against the national authorities via EU law, it
p. 407 is also likely that the right of redress against EU institutions ↵ will become increasingly important to individuals and business based or trading in the EU, particularly as the EU expands its competences in areas such as asylum, immigration, and closer police and judicial cooperation.

While the range of rights protected under EU law looks impressive, their real value can be assessed only by reference to their enforceability. There are a number of unresolved questions over how the Charter will be interpreted, in particular its relationship to the ECHR as interpreted by the ECtHR, and its application to the

Member States. It also remains to be seen when EU accession to the ECHR will occur, and how it will work in substantive and procedural terms.

Summary

- The European Union (EU) is a different and entirely separate organization from the Council of Europe, which oversees the European Convention on Human Rights (ECHR).
- EU law, including the Charter of Fundamental Rights of the European Union, is a separate body of law from the ECHR.
- The key source of EU human rights is now the Charter, but this is supplemented by provisions of the EU Treaties, the jurisprudence of the CJEU, and secondary legislation.
- The accession of the EU to the ECHR would make the ECHR enforceable against the EU and ensure that there are no gaps in the ECHR protection guaranteed by Member States, but the adverse Opinion given by the Court of Justice makes accession unlikely in the immediate future.

Brexit

- Brexit means that EU human rights will cease to apply in the UK.

Further Reading

Articles

S Aidinlis, 'The Right to be Forgotten as a Fundamental Right in the UK after Brexit' (2020) 25(2) Communications Law 67

Considers whether Brexit will reduce digital rights, by reference to the example of the right to be forgotten.

J Bowers, 'Religious Dress: Human Rights & Discrimination' (2021) 171(7916) NLJ 11 (Part 1) and (2021) 171(7917) 11 (Part 2)

Discusses the Court's jurisprudence on freedom of religion, and the right not to be discriminated against, in the employment context.

J Callawaert, 'The European Convention on Human Rights and European Union Law: A Long Way to Harmony' (2009) 6 EHRLR 768

Comments on the relationship between the jurisprudence of the European Court of Human Rights (ECtHR) and that of the Court of Justice.

M Cartabia, 'Europe and Rights: Taking Dialogue Seriously' (2009) 5(1) ECL Rev 5

Analyses the role of the Court of Justice in protecting human rights.

P de Albuquerque and H-S Lim, 'The Cross-fertilisation between the Court of Justice of the European Union and the European Court of Human Rights: Reframing the Discussion on Brexit' (2018) 6 EHRLR 567

p. 408 ↵ Discusses the potential impact of Brexit on the relationship between the UK and the ECHR, particularly given the influence of the jurisprudence of the ECtHR on that of the Court of Justice.

G de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 168

Evaluates the Court of Justice's approach when applying the Charter.

B de Witte and Š Imanović, 'Opinion 2/13 on accession to the ECHR: defending the EU legal order against a foreign human rights court' (2015) 40(5) EL Rev 683

Critiques the Court of Justice's ruling in Opinion 2/2013 that the proposed terms of the EU's accession to the ECHR are incompatible with EU law.

C Dupré, '"Human dignity is inviolable. It must be respected and protected": retaining the EU Charter of Fundamental Rights after Brexit' (2018) 2 EHRLR 101

Explores the importance of the Charter and the implications of it no longer applying in the UK as a result of Brexit.

J Krommendijk, 'Principled Silence or Mere Silence on Principles? The Role of the EU Charter's Principles in the Caselaw of the Court of Justice' (2015) 11(2) ECLR 321

Discusses the distinction drawn by the EU Courts between rights and principles in the EU Charter.

T Lock, 'Human Rights Law in the UK after Brexit' (2017) PL Nov Supp (Brexit Special Extra Issue 2017) 117

Assesses the possible impact of Brexit on human rights protection in the UK, according to the terms of the UK's withdrawal from the EU and the possible future UK–EU relationship.

T Lock, 'Rights and Principles in the EU Charter of Fundamental Rights' (2019) 56(5) CMLR 1201

Analyses the distinction between rights and principles in the Charter, an issue of post-Brexit relevance to the UK given the provisions of s 5 of the UK's Withdrawal Act.

T Lock, 'The Future of EU Human Rights Law: Is Accession to the ECHR Still Desirable?' (2020) 7(2) JICL 427

Argues that the status quo is preferable to EU accession to the ECHR because the ECtHR's competence would be reduced by accession.

N Mole, 'The Complex and Evolving Relationship between the European Charter and the European Convention on Human Rights' (2012) 4 EHRLR 363

Highlights key cases on the relationship between EU law and the ECHR.

S Vessel and N Peart, 'Will the fundamental rights enshrined in the EU Charter survive Brexit?' (2018) 2 EHRLR 134

Considers whether disapplication of the Charter in the UK post-Brexit is possible in the light of the requirements of international law and how the UK can retain the general principles of EU law without the Charter.

A Weiss, 'EU Accession to the European Convention on Human Rights Process: The State of Play and the Added Value for Victims of Human Rights Violations in Europe' (2012) 4 EHRLR 391

Considers the potential advantages of EU accession to the ECHR.

Books

C Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights* (Cheltenham: Edward Elgar, 2018)

Examines the relationship between the EU Charter and the general principles of EU law, an issue of post-Brexit relevance to the UK given the provisions of s 5 of the UK's Withdrawal Act.

M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (London: Bloomsbury, 2020)

Examines the use of the Charter by national courts.

S Douglas-Scott and N Hatzis eds, *Research Handbook on EU Law and Human Rights* (Cheltenham: Edward Elgar, 2017)

Examines the development of fundamental rights protection in the jurisprudence of the CJEU.

p. 409 ↵ **V Kosta, N Skoutaris, and VP Tzevelekos**, ***The EU Accession to the ECHR*** **(Oxford: Hart, 2014)**

Examines a comprehensive range of issues arising from the accession of the EU to the ECHR, including the role of the Court of Justice and the co-respondent mechanism.

J Nergelius and E Kristoffersson (eds), *Human Rights in Contemporary European Law* (Oxford: Hart, 2014)

Contains chapters by different authors on a variety of current issues, including key cases, the EU's human rights strategy in a number of areas, and EU accession to the ECHR.

S Peers, T Hervey, J Kenner, and A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (2nd edn, Oxford: Hart, 2021)

Examines in detail each provision of the EU Charter, including substantive rights and provisions governing its interpretation and application, Protocol No 30, and the draft Accession Agreement.

M Varju, *European Union Human Rights Law: The Dynamics of Interpretation and Context* (Cheltenham: Edward Elgar, 2014)

Provides a detailed analysis of various aspects of the jurisprudence on EU human rights law.

Book chapters

P Craig and G de Búrca, 'Human Rights in the EU', in *EU Law: Text, Cases, and Materials*, 7th edn (Oxford: Oxford University Press, 2020), ch 12

Provides detailed analysis of the history and current status of human rights protection in the EU.

S Douglas Scott, 'The Relationship between the EU and the ECHR Five Years on from the Treaty of Lisbon', in S de Vries, U Bernitz, and S Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Oxford: Hart, 2013), ch 2

Contains a particularly useful analysis of the development of the relationship and interaction between EU law and the ECHR.

Reports

House of Commons and House of Lords Joint Committee on Human Rights, ***The Human Rights Implications of Brexit***, **Fifth Report of Session 2016–17, HL Paper 88/HC 695, 19 December 2016**

Examines the possible impact of Brexit on human rights protection in the UK.

Question

Critically analyse the protection of human rights by the EU.

Visit the online resources for an outline answer to this question *<https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-9-guidance-on-answering-assessment-questions?options=showName>*, **and additional self-test questions** *<https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-9-self-test-questions?options=showName>* **with feedback.**

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