ECHR and the CJEU

Competing, overlapping, or Supplementary Competences?

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Article

ABSTRACT

It is certainly true that the juridical system on the protection of human rights in Europe is rather complex. This is for two main reasons; firstly, the Charter serves as a clear legal basis for the CJEU to rule on fundamental rights issues and, second-ly, the EU's intensive legislative activity in criminal matters has produced a great amount of cases that most often impinge upon sensitive human rights issues. This has necessarily re-sulted in the CJEU dwelling on what has so far been an ex-clusive domain of the ECtHR and national courts. Against this background, the current article highlights issues with respect to the sharing of competence over fundamental rights by the two courts.

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I. The Relationship Betweenthe Two European Courts

In general, the two European Courts have developed aharmonious and co-operative relationship.[1] Their relationship is not framed in an institutionalised context but is rather informal and structured "on a two-fold basis consisting of [an ambivalent] presumption of equivalent human rights protection and of an abstract legal commitment on the part of the CJEU to follow the jurisprudence of the ECtHR."[2]

Since the judgements in *Bosphorus*[3] and in*M. & Co v Germany,*[4] the ECtHR has developed and maintained the "presumption of equivalent protection"as a necessary compromise to hear cases involving EU law as it lacks the legal basis to do so and as a matter of comity towards the CJEU's jurisdiction.[5] The presumption serves to exclude EU measures from scrutiny, save in exceptional cases where it is rebutted[6] or where Member States enjoy a discretion in the implementation of EU law.[7]

Fundamental rights, as guaranteed by the ECHR, constitute general principles of the EU's law, although the ECHR has not yet been formally incorporated into EU law.[8] The Recital of the Charter "reaffirms the rights as they result...from the ECHR and from...the case-law of the ECtHR"and its wording almost verbatim resembles that of the ECHR**.** More importantly, under the "conformity" clause[9] of Arti. 52(3) CFR, the CJEU is committed to abide by the ECHR standards and to follow the jurisprudence of the ECtHR in the interpretation of any corresponding Charter rights.[10] The CJEU has consistently applied the jurisprudence of the ECtHR[11], and so far seems to confirmthe above reading of Art. 52(3) CFR.[12]

II. Variable Perceptions on Fundamental Rights Protection

Relevant caselaw on criminal matters however, reveals an insistence of the Luxembourg Court in deviating from Strasbourg caselaw in order to preserve the autonomy and effectiveness of EU legislative measures, even over human rights standards set by the ECtHR.[13] Its approach in based on what the CJEU has emphatically and repeatedly stressed as "the particular characteristics of EU law," which necessitate a differentiated interpretation and application of fundamental rights within the framework of EU law than in relation to rights flowing from the ECHR and other sources.[14] Hence, according to the CJEU, the ECtHR should not be able "to call into question the CJEU's findings in relation to the scope ratione materiae of EU law," which could naturally include the interpretation of fundamental rights.[15]

Indeed, the ambit and interpretation of many individual CFR rights vary significantly from their ECHR equivalents. An example includes *ne bis in idem* under EU law,[16] which, in contrast its Convention equivalent,[17] is not taken to include "punitive" administrative proceedings.[18]

More importantly, mutual trust in the area of freedom, security and justice establishes an almost irrefutable presumption of fundamental rights compliance in order to bolster integration by precluding Member States from checking each other's compliance with fundamental rights.[19] For example, the CJEU has established that violations of fair trial guarantees could not be invoked as grounds for denying execution of the EAW,[20] while the ECtHR is following a different apporach in similar cases in which a violation of Art. 6 ECHR amounts to a "flagrant denial of justice."[21] In simple terms, mutual trust presupposes that, once the appropriate standard of fundamental rights protection has been set by the relevant EU secondary measure and the Charter, no other favourable derogations are permissible in favour of higher human rights standards, be it those defined by the ECtHR or by other international instruments, as this would run contrary to the primacy

and effectiveness of EU law.[22] Following this syllogism, in the *Melloni* case[23], the CJEU managed to render the safeguard clause of Art. 53 CFR devoid of any meaningful substance.[24]

Additionally, Art. 52(1) CFR is another potential source of variable geometry in fundamental rights protection, since its literal interpretation renders redundant any distinction between "absolute" and "qualified" rights in the Charter and permits the EU legislator to impose restrictions on both types of rights to promote an "objective of the EU"[25] in favour of "security" and "efficiency" requirements.[26] Thus, Art. 52(1) CFR could well justify additional derogations or restrictions of fundamental rights than those considered legitimate by the Strasbourg jurisprudence as "necessary" in a democratic society,[27] notwithstanding that the ECtHR so far has been accepting derogations of fundamental rights for the benefit of European integration.[28]

III. Clash of Competences

In the field of criminal matters, most tensions between the two Courts in the exercise of their competencescould arisein cases when an act or omission on the part of a Member State linked to a provision of EU secondary law allegedly infringes a fundamental right secured by both the Charter and the Convention.

In particular, the most striking overlaps and conflicts would arise in the context of the preliminary ruling procedure under EU law, which is described as "the keystone of the [EU] judicial system."[29]This procedure is the main avenue for the CJEU to address fundamental rights issues, given the lack of a remedy empowering individuals to resort directly to the CJEU for violations of fundamental rights and given the limited protection offered by all other available remedies.[30] Both remedies under the ECHR, that is, the individual action available to any person, NGO, or group of individuals for violations of their rights,[31] but also the "preliminary-like" mechanism provided for by Protocol 16 of the ECHR (which would allow highest courts and tribunals to refer questions to the ECtHR for advisory opinions),[32] could cause friction with the preliminary ruling procedure before the CJEU. This is particularly so in criminal matters, given their sensitivity regarding fundamental rights.

The main problem lies in the plausible scenario of a case being brought to the ECtHR even if the CJEU had not had the opportunity to examine the validity or the plausible interpretations of the EU act at issue in the light of the applicable fundamental right. Although, in principle, national courts of the last instance are obliged to refer a question regarding the interpretation of EU law to the CJEU, Art. 267 TFEU, which basically relies on voluntary cooperation between national judges and the CJEU,[33] allows for the above scenario to occur. This is as a preliminary reference to the CJEU could not be regarded as a "domestic remedy"that the applicant should have exhausted.[34] In such a case, however,

"if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law."[35]

It is, however, not assuredthat conflicts will be eliminated beforehand if national courts refer a preliminary question; even in such a case, the ruling of the CJEU would certainly not be binding for the ECtHR, which could result in a different outcome.[36] *The ECtHR could thus, disregard the "particular traits" of EU law, thereby damaging its effectiveness and autonomy.*

The outcome of all these scenarios would be puzzling in most regards. The lack of a prior ruling by the CJEU would preclude it from aligning EU law requirements of effectiveness and autnomy with fundamental rights guarantees in a manner that would alleviate the ECtHR from establishing a violation. It is also possible that, in the absence of a ruling by the CJEU, the ECtHR could deliver a judgement on the merits and not find a violationjustifying Member State action that may be contrary to higher and more elaborate EU law standards.

In addition, a Member State found liable for violation of ECHR rights would be obliged to apply individual or general measures to redress the violation, contrary to EU law obligations.[37] This could occur even in cases in which the CJEU has already issued a judgement under the preliminary ruling procedure. Arts. 53 CFR and ECHR would also create further confusion, since Art. 53 ECHR essentially reserves the power of the states to lay down higher standards of fundamental rights protection, contrary to what the CJEU has ruled with regard to Art. 53 CFR.[38]

The procedure of Protocol No. 16 could also circumvent the preliminary ruling procedure, as the national court may – intentionally or unintentionally – choose not to refer a question to the CJEU but instead resort directly to the ECtHR[39]for an advisory opinion. In such a case, it is highly possible that the ECtHR, by abiding to its own standards, would issue a decision calling for lower safeguards than those provided for by existing EU law, which the national court may be inclined to follow.It is also possible that the ECtHR may request higher standards of human rights protection by disregarding "the particular characteristics of EU law"that call for a differentiated intepretation. Again, the different operation of Art. 53 CFR compared to Art. 53 ECHR may further exacerbatethe situation. It may well be true that an opinion sought under Protocol 16 is not binding on the referring highest court.[40] This, however, does not suffice to eliminate any friction, since such an opinion would certainly have an impact on national procedures. Given that the procedure under Protocol 16 does not relieve the referring court from its obligation to refer a preliminary question according to Art. 267 (3) TFEU, the referring court could find itself in the awkward position of having to decide to which European Court to refer the question, or it could even refer it to both Courts simultaneously! This obscure prospect will definitely not add to legal certainty and will most definetely damage the protection of fundamental rights accross Europe.

Another clash of the courts' competences could well also occur in inter-party cases regarding the application of the ECHR within the context of EU law.[41] It is true that such cases are quite rare or even inexistent, but it is still opento the EU Member States to submit an application to the ECtHR concerning an alleged violation of the ECHR by a Member State in its application of EU law.[42] According to the CJEU, this possibility may undermine the requirements of the TFEU and its exclusive competence, since, according to its reading of Art. 344 TFEU, it has exclusive jurisdiction over any dispute between the Member States on matters of EU law, which may also touch upon issues of ECHR.[43]That Member States could resort to the ECtHR by disregarding the competence of the CJEU on the basis of Art. 344 TFEU could not of course be ruled out, since Art. 344 TFEU is at odds with Art. 55 ECHR. Art. 35(2)(b) ECHR may in such an instance provide for a solution as it may render inadmissible an application to the ECtHR to the extent the matter has already been brought to the CJEU according to Art. 344 TFEU. Nevertheless, this does prevent the opposite scenario from occurring, as such a "lis pedens" rule is not found in the TFEU and thus, the CJEU would most defintely not relinquish itself from its jurisdiction to hear the case, even after the matter has already been brought to the ECtHR.

IV. Competing, Overlapping, or Supplementary Competences?

It has been firmly established that, most notably in criminal matters, there is now a vast area where the competences of the two Courts may "overlap," as it is feasible for both to rule on similar issues or even on the same case. This applies to cases in which individuals are involved but also to inter-state disputes. The competences of the two Courts can also surely be described as "competing," given that the CJEU, by invoking the "specific characteristics" of EU law, is challenging the binding force of the jurisprudence of the Strasbourg Court and appears to claim a predominant role in the interpretation of ECHR rights that have been encapsulated and mirrored within the Charter.[44]

Nevertheless, as contradictory as it may be, the overlapping and competing competences of the two Courts could well be also be characterised as "supplementary" if individuals are to be placed at the epicentre of this antagonism as its beneficiaries. Both the Charter and the ECHR provide for only partial legal fundamental rights protection, since the available legal remedies cover limited cases in practice. Although the ECtHR may receive individual applicationsfor violations of human rights,[45]individuals cannot force a reference to be made to the CJEU. The reluctance then of national courts to refer preliminary questions, but also practical problems associated with remedies at national orders affecting the admissibility of individual applications,[46]to the ECtHR should be taken into consideration in this calculation.

Hence, resorting to the ECtHR can function as a remedy against the lack of prior involvement of the CJEU in case of an unjustified denial of national courts to submit a preliminary reference, as this is considered a violation of fair trial guarantees[47] and would rebut the presumption of equivalence.[48] It could thus even serve to rectify the non-conformity of national courts to a prior judgement of the CJEU,[49] since a final judgement by the ECtHR would oblige contracting parties to take all individual measures necessary to redress the violation,[50] either in the form of actual restitution, such as the reopening of proceedings, or by awarding just satisfaction.[51] Also, the competence of the ECtHR to rule onthe interpretation of a judgement or the failure of a state to conform with a judgement[52] may provide for an opportunity to eliminate possible contradictory judgements by both courts at a latter stage.

Furthermore, while the ECtHR examines national "proceedings as a whole," the CJEU has the competence to deal in a generic manner only with the particular legal issues referred to it.[53] Therefore, the use of the preliminary ruling procedure, which can be triggered at the very first stages of national proceedings– even before the trial stage, could prevent a violation of fundamental rights from occurring and thus could relieve an individual from having to resort to the ECtHR after exhausting all national legal remedies. Although judgements issued by the ECtHR neitherdirectly affect the validity of national acts, nor of course the validity of EU law, the CJEU can declare invalid Union legislation under the preliminary ruling procedure.[54] As such, the generic nature of the CJEU's judgements issued under this procedure inevitably benefit all affected individuals throughout the EU. This could certainly apply to ECtHR judgements as well becausecontracting parties are obliged to adopt "general measures"(such as changes in legislation, administrative or judicial practices)to avert further similar violations.As the ECtHR rules on the facts of a particular case, however, it is not certain that this will occur in most cases. It can, however, establish and rectify a violation stemming from the particular facts of a case, which the CJEU would be unable to do, because of the generic nature of the preliminary ruling procedure and its judgements.

Last but not least, the judicial dialogue between the two Courts, which is the fruit of their concurring competences, could definitely enhance fundamental rights protection across Europe. The CJEU judgement in *NS,* which complemented the judgement of the ECtHR in *MSS v Belgium and Greece,*[55] is a prime example.

Currently, however, in cases where Member States act as an executive organ of the EU, the violation would be attributable solely to the EU and thuslie beyond the power of scrutiny of the ECtHR.[56] Therefore, both the EU and its organs largely remain outside any control of fundamental rights compliance. The supplementary competences of both European Courts are actually inadequate to provide for a safe net of fundamental rights protection. Thus, the current architecture needs a thorough redesigning and restructuring. This is particularly true for the area of freedom, security and justice where the weaknesses of the current system are immensely prominent.[57]

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