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Dear Readers,

The main concern of the European Court of Human Rights is of course to succeed in its mission to protect fundamental rights in Europe.

Criminal law, substantive or procedural, is a domain where the need to protect society, whether at the level of the individual state or that of the organisation of European integration – at the quasi-federal level of the Union – must necessarily be confronted and associated with the need to protect fundamental rights.

Such is the imperative arising from the irreversible choices made by European States in acceding to the European Convention on Human Rights – and for 28 of them, to the European Union. Being a party to the Convention presupposes that the contracting state puts pluralistic democracy into practice, upholding the rule of law and respecting human rights. The Union too is built upon values of democracy and human rights protection; its action must now also be compliant, under the supervision of the Court of Justice, with the requirements of the European Charter of Fundamental Rights.

Criminal law is thus a particularly important area of intervention for the European Court of Human Rights, which has developed a wealth of case law. This holds particularly true for Article 7 of the Convention, on the rule that criminal matters must be strictly defined by law, and for Article 4 of Protocol No. 7, on the *ne bis in idem* principle. As regards procedural aspects, under Article 6 of the Convention, it has developed key principles concerning questions such as fair proceedings, the importance of an independent tribunal and impartial judges, the right to be presumed innocent, and various restrictions on defence rights covered by paragraph 3 of Article 6.

The European Union's action in criminal matters has developed considerably over the past few years, and it is now for the Union to decide, among other things, on the choices of criminal policy underlying the criminalisation of relevant conduct when it comes to protecting the interests of the Union. This gives rise to concerns in the context of the never-ending reflection on the Union's "democratic deficit." One cannot but pay tribute to the sensitivity of the Court of Justice, which immediately assumed its responsibilities in this area, even before the entry into force of the Lisbon Treaty in 2009 and the full incorporation of what used to be called the "third pillar" of the Union's competence. Let us not forget that the Luxembourg Court, in its fundamental *Pupino* judgment, had already – prior to Lisbon – also laid down a duty of consistent interpretation in relation to "third pillar" measures.

What then is the responsibility of the European Court of Human Rights, the Strasbourg Court, *vis-à-vis* the criminal law competence of the Union?

For the time being, acts emanating from the Union's institutions and organs fall outside the Court's examination. Any application against the Union would be declared incompatible *ratione personae* with the Convention, the Union not being a party to that instrument.

In relation to measures adopted by the Union's institutions and organs, however, the Court has developed a body of case law, established mainly in 2005 with the *Bosphorus v. Ireland* case, of which the key points had already been heralded in its *M. v. Germany* decision of 1990.

According to that case law, while it is true that the assignment of a contracting state's competence to an international organisation such as the EU does not release the Court from its duty to supervise Convention observance – in so far as the Union has its own judicial organ, the Court of Justice of the European Union, which protects human rights in a manner that is equivalent to the protection provided by our Court –, the latter need not intervene unless it finds such protection to be *manifestly deficient* in a given case.

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The Strasbourg Court therefore has a duty to continue protecting fundamental rights in accordance with its mission. The doctrine of equivalent protection was significantly clarified by the 2012 judgment in *Michaud v. France*, which ruled out the application of the *Bosphorus* presumption that the Luxembourg Court had not had the opportunity to examine the relevant question.

Since the Lisbon Treaty entered into force in December 2009, there have been great expectations as to the possibility of the European Union's accession to the European Convention on Human Rights – a development which, apart from its symbolic value, would eliminate any risk of conflicting case law between the two European courts.

Now, after opinion 2/13 of the Luxembourg Court, that has become a more distant prospect. What can be done about this? Can any solutions be found to break the deadlock? I believe that the answer to this question rests with the negotiators, or even with the political leaders, rather than with the judicial bodies.

For my part, I remain convinced that the two European courts should continue to act in the spirit of the 2011 declaration made by their two Presidents at that time, Presidents Costa and Skouris, and thus persevere in developing harmonious case law, avoiding any conflict, and listening to each other.

It goes without saying that the need for the case law of the two Courts to be harmonious is of particular importance when it comes to an area that is as sensitive for human rights as that of criminal law.

About eucrim

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