FIDE 2012
Questionnaire General Topic 1

Protection of Fundamental Rights post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions

Leonard F.M. Besselink

This questionnaire is intended to elicit reports from Member States and European institutions on the protection of fundamental rights in the EU, in such a manner that it provides us with rich materials of a comparative (and comparable) nature in order to be able to discuss the interaction between the EU Charter of Fundamental Rights, the ECHR and national constitutional rights.

The focus in the fourteen questions below is on general issues which arise as a consequence of the multiple sources of fundamental rights protection in the European Union.[1]

By choosing the topic of fundamental rights, it is the express wish and hope of the organizers of the FIDE 2012 to have a topic of a wide appeal not only for EU lawyers but also for lawyers working in the field of fundamental rights and constitutional and public law in the Member States.
In order to keep the number of questions lower than usual, the questions have been formulated in general terms.

These general issues play out differently with regard to different fundamental rights. The explanations to the questions below only give few examples as to specific rights. *Rapporteurs* are encouraged to elaborate on specific other fundamental rights which are of special significance for these general issues from the point of view of their country (or EU institution). We suggest in particular to consider issues concerning access to justice, and anti-discrimination legislation.
Elaboration of further relevant points alluded to in the explanations below is most welcome.
Rapporteurs are kindly requested, whenever appropriate, to include in their reports information on the position taken on legal issues by

- courts in their case law in the relevant jurisdiction,
- the executives and parliaments in the Member State described
- the academic and professional literature in the relevant Member State.

General introduction

One of the determinants of the constitutional nature of the process of European integration is the protection of fundamental rights, in as much as such protection has been considered fundamental to the exercise of public power in democratic polities based on the rule of law.

Also, the issue of fundamental rights protection shows the constitutional interdependence between the EU legal order and its institutions, the EU Member State legal orders and the legal orders of other international public entities, in particular the order created by the ECHR within the Council of Europe. This is clear from the fact that the EU Bill of Rights as contained in the Charter of Fundamental Rights, the European Convention of Human Rights, as well as national

[1] Although the choice was made to exclude the human rights policy in external relations from consideration, as this constitutes too large a topic in its own right, it should be clear that this does *not* exclude topics concerning fundamental rights protection within the EU legal order as a consequence of obligations towards the international legal order, as is at stake in the *Kadi* judgments. So, the *Kadi* cases, both *Kadi I* and *Kadi II* are entirely *within* the remit of this FIDE panel.

constitutions are all sources of fundamental rights protection in the EU legal order. Thus, the EU legal order comprises sources that have their origin outside the EU (viz. the Council of Europe and the Member States).

At the same time, the ECHR takes a prominent legal position in many Member States, more prominent than other (human rights) treaties (sometimes formally, sometimes in practical terms), while the EU Charter as part of EU law applicable in the Member States must take the precedence proper to EU law. Thus, the constitutional orders of Member States comprise sources of fundamental rights protection which *stricto sensu* find their origin outside the national constitutional order.

Studying and debating issues of fundamental rights protection is therefore taking stock of the present stage of European integration. It is taking stock of the relations between the EU and the Member States' legal orders and the division of competence between them.

1. Nature and scope of the rights protected

The codification of EU fundamental rights in the Charter and accession to the ECHR is intended to reduce possible gaps in fundamental rights protection.

Question

1. Are there any remaining (potential or actual) *gaps* in the substantive scope and level of protection of fundamental rights? And can (potential) gaps in one fundamental rights source be filled by reference to other fundamental rights sources?

Explanation:
Answering this question involves a comparison of the content and level of protection provided by fundamental rights in the context of the EU Charter, the ECHR (and Protocols) and in particular the (bills of rights of) national constitutions, which may contain (relatively) 'unique' constitutional rights provisions[2]. The emphasis should remain on the resulting gaps, were the respective rights clauses to apply in the context of EU law.

Actual or potential gaps in one source (for instance a national bill of rights) could be filled by reference to other sources (for instance the ECHR) and now also the EU Charter if a case involves matters within the scope of EU law. Whether this is possible and actually happens, depends on the status of each of these sources separately and in relation to each other. There may be differences in this regard between Member States.

There are two sides to the issue of different levels of protection to be distinguished: controversy over a *reduction* in protection, as well as problems with imposed *increase* in protection.
If a fundamental right at one level were to provide (significantly) *less* protection than those at another level, the application of the first with precedence over the second would (significantly) reduce the level of protection. This could result from the precedence of EU law, if the scope of fundamental rights protected in EU law were to be less than that in the national legal order. This may spill over into reservations as to EU primacy.

[2] These may concern, for instance, the scope of the right to marriage, the right to life, church-state relationships, equality of private and public education, the right to one's lawful court (*ius de non evocando*).

In this regard, it is important to know *which national constitutional rights are considered to be part of the constitutional identity*,[3] and which of these are not (or not clearly) found among the fundamental rights protected in EU law (the Treaties, the Charter or ECHR).

The other side of the coin is that it may not necessarily be considered altogether acceptable that the introduction of fundamental rights sources results in *more* protection, as this restricts the possibility for public authorities to act in the public interest. This was originally the objection from the point of view of EU law against legal subjects invoking fundamental rights (originally mainly national constitutional sources): it would limit the effectiveness of EU law. Nowadays, objections may come from national authorities who find their scope of action in the general interest unduly restricted by European courts' interpretations of fundamental rights. For instance, in the UK it is a serious topic of discussion to 'repatriate human rights' and 'bringing them home' from Strasbourg, with as an alternative to withdraw from the jurisdiction of the European Court of Human Rights.[4] In turn, this may reflect on the EU's adoption of the ECHR and the ECJ's jurisdiction in interpreting and enforcing the ECHR.

It would be interesting to know whether similar objections exist in other Member States.

An important aspect to the question formulated here is whether and to what extent courts in different countries use a *dynamic approach* to the sources of fundamental rights protection, in the sense that they have referred to a combination of national constitutional rights, ECHR and Charter rights as well as other human rights treaties, both in cases within and outside the scope of EU law.

> An example of the interpretation of ECHR rights in light of other human rights treaties, even ones to which a respondent state is not a party is ECtHR, *Demir and Baykara v. Turkey*, in which Article 11 ECHR was interpreted in light of – among many other texts – Article 28 of the EU Charter of Fundamental Rights, in order to find a right to collective bargaining in Article 11 ECHR.[5] A rare example of interpretation of EU law in light of national case law is in *Kadi II* at first instance.

An area of potential (or actual) differences is in the field of social, economic and cultural rights. A number of these are incorporated as 'fundamental' in the EU Charter, but may not be incorporated in national constitutions, or in instruments to which all Member States are a party, particularly the 'solidarity rights' – as may be the case with several other types of rights mentioned in the Charter.

At the moment of drafting this *questionnaire* there is no certainty as to the scope of the EU accession to the ECHR, as the negotiating mandate is kept secret even on the point to what part of the ECHR *acquis* the EU is to accede, in particular to which Protocols[6]. It is uncertain, therefore, whether and how this relates to some of the question at issue. Please expand as appropriate in your reports.

---

3 Cf Article 4(2) TEU: 'The Union shall respect the [Member States'] national identities, inherent in their fundamental structures, political and constitutional'; cf. ECJ, Case C-208/09, 22 December 2010, *Ilonka (Fürstin von) Sayn-Wittgenstein v Landeshauptmann von Wien*.

4 Michael Pinto-Duschinsky, Bringing Rights Back Home: Making human rights compatible with parliamentary democracy in the UK, Foreword by The Rt Hon Lord Hoffmann. [London] Policy Exchange 2011; also accessible through the conservative think tank <www.policyexchange.org.uk>.

5 (Application no. 34503/97), Grand Chamber, 12 November 2008.

6 Beyond a document published by the Council and lamenting some Member States' representatives' ignoring specific points quoted from the negotiating mandate, in Council Document 11394/10, 22 June 2010 (summing up negotiating directives 1e, 6, 7, 8 and 10b. Also, Statewatch published Directive 11 and a Commission memo on the details of the reference mechanism from the ECtHR to the ECJ to rule on the validity of the EU act in question, Council Document DS 1930/10 of 22 December 2010, <www.statewatch.org/news/2011/feb/eu-accession-echr-com-ds-1930-10.pdf>.

In the context of this question it may be useful to know the status and role of other human rights treaties than the ECHR, either those of the Council of Europe (e.g. (revised) European Social Charter; the Data protection Convention, etc.), the UN (ICCPR and the International Conventions on Rights of the Child, CEDAW, International Convention on race, etc.) or specialized regimes (e.g. ILO Conventions), depending on their status in the respective national legal orders, to which Member States are a party, particularly if these have ever played either a primary or a subsidiary role in the practice or case law concerning cases within the scope of EU law. This may depend on the status of such treaties in the respective Member State jurisdictions in comparison to the status of EU law, the ECHR and national constitutional rights. In EU law, such treaties are at least potentially a source of protection under Article 6(3) TEU.

Question:

2 What is the role of general legal principles: can they function as sources of fundamental rights protection?
(Note: The distinction between 'rights' and 'principles' within the EU Charter is addressed in section 3, below.)

Explanation:
An example may be the right to good administration the scope of which as regards the EU and its institutions, bodies and agencies is determined in Article 41 of the Charter. A similar right as regards national authorities may not exist as a fundamental right in some Member States, but this is sometimes compensated by the existence of legally recognized unwritten general (or more specific) legal principles of proper administration.

Relevant general legal principles might either be of constitutional importance and have substantive meaning such as to function in a manner which is like that of a codified fundamental right; alternatively they may be principles which are in a sense procedural in nature, e.g. due process, fairness, a fair hearing, *audiatur et altera pars*, which may not themselves have constitutional rank but which can contribute to more protection of rights than would be available without them.

Substantive general principles of law with fundamental rights value included most fundamental rights before the Lisbon Treaty entered into force.[7] These have still been retained post-Lisbon in Article 6 (3) EU,[8] and presumably they can play a supplementary role in the further development of rights to be protected at EU level.

A specific example of a substantive general principle in the legal order of Member States (in some States equivalent to a fundamental right), is the general principle of equality or equal treatment. The principle as applied in EU law is controversial, in particular as regards its scope, operation and status (see the *Mangold* case law and its progeny). Information on whether and why this is so in Member States is welcome.

An example of a case in which general principles are applied that are said not to belong to the category of 'fundamental rights', yet in the end provide similar protection in practice, are the 1989 *Hoechst* cases.[9] There the scope of the right to privacy of the home was not considered to extend to certain business premises, so could not be relied on, but instead procedural guarantees

7 Some were, of course, contained in the Treaties.

8 '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.'

9 ECJ, Joined cases 46/87 and 227/88, 21 September 1989, *Hoechst AG v Commission of the European Communities*.

derived from common legal principles (legal basis, proportionality etc.) did provide a solution which in that case was equivalent to reliance on privacy.[10]

It would be interesting to know whether such contrivances occur also in national contexts, and whether the use of legal principles equivalent to fundamental rights is object of similar controversies as in EU law contexts.

2. Horizontal effect and collision of rights

Questions

3 To what extent is 'horizontal effect' of fundamental rights accepted in the Member States? How is the case law of the ECJ in this respect received?

4 How do Member States within their respective jurisdictions and EU institutions deal with cases of the collision of rights, both as regards
a. collisions between classic rights (e.g. non-discrimination and freedom of expression or religion etc.), and
b. collisions between on the one hand classic rights and socio-economic and cultural rights on the other (e.g. free movement rights and freedom of expression, religion)
c. collisions between socio-economic and cultural rights inter se (e.g. right to strike and free movement)?

5 How does, or should, the balancing take place in the context of the multiplicity of EU, ECHR and national legal orders ('multilevel' legal order)?

6 What role does the legislature have in granting horizontal effect to fundamental rights? What is its role in ordering and prioritizing rights which might collide? In particular, what is the influence of the non-discrimination Directives on the exercise of other fundamental rights in the Member States?

Explanation:
Under various circumstances, several fundamental rights can collude, but also collide.
Collisions classically occur if a degree of horizontal effect is given to fundamental rights (e.g. between privacy and freedom of expression).

The issue of horizontal effect has been problematic in many jurisdictions, as it is said to turn fundamental rights against individual freedom. In national law, one way of mitigating the controversy is drawing the distinction between 'direct' and 'indirect' horizontal effect (a classic is BVerG *Lüth*[11]), a distinction which may be more difficult to make in EU law.

In EU law horizontal effect is given to some of the economic freedoms, which the Charter includes in its catalogue of fundamental rights; from which horizontal effect of relevant other fundamental rights may also derive.

As in Member States, the issue of horizontal effect takes prominence in connection with the right to non-discrimination and equal treatment in EU law as well. Legislatures are attributed an important role in regulating this horizontal effect. But also courts, at least in some Member States, take on a role with regard to this fundamental right as well.

[10] Loc. cit. paragraphs 19-20.

[11] 7 BVerfG 198, 1958; an English translation is in Donald Kommers, Constitutional Jurisprudence of the Federal Republic of Germany, 1997, 361-369.

In the ECJ case law, however, the right to non-discrimination and equal treatment has been given horizontal effect by construing it as a general principle of primary EU law (*Mangold* and *Kücükdeveci*). This has proven to be controversial in relation to the legislative instruments on non-discrimination (the non-discrimination Directives), as well as to the role national courts have in assessing claims between private parties.

In EU law, collisions occur also outside the context of horizontal effect, due to the long-standing qualification of the economic free movement rights as 'fundamental' in the ECJ case law.
The problem of collision of rights is traditionally resolved by 'balancing' the rights in light of the particular circumstances. This leads sometimes to a presumption of relative 'ranking' of rights. E.g. cases of 'political speech' or 'public persons' are indicators for the priority of free speech over privacy.

In EU law the categorization of free movement rights as 'fundamental' has prevented 'classic' fundamental rights such as freedom of expression and assembly from generally having priority over economic rights. Classic fundamental rights have in EU law often been construed as restrictions to the economic free movement rights, while a canon of interpretation is that exceptions to free movement rights must be interpreted strictly.

The same is the case with the right to industrial action – which in most Member States has of old been recognized as fundamental – and free movement rights.

It is useful to know whether this corresponds to national approaches to collision of fundamental rights outside the scope of EU law, and with the approach national courts take to cases within the scope of EU law.

A complication arises in the context of the multiplicity of legal orders ('multilevel' legal order) if at the level of a national court adjudicating a case the weight attributed to the respective colliding rights is different from the weight attributed by a European court. The classic example is the *Von Hannove*r saga, in which the ECtHR systematically attributes less weight to free speech than the *Bundesverfassungsgericht does*.[12]

Another example of problems concerning fundamental rights collision is the situation in which a European court is adjudicating only one aspect of the case as it occurs before a national court, which has to deal with all aspects.

A particular example is illustrated in the *Görgülü* cases at the ECtHR and the *Bundesverfassungsgericht*,[13] in which one party in the conflict stood in Strasbourg, but the other parties' rights had to be considered and decided in the domestic courts.[14]

The more central issue of limited jurisdiction is that the ECJ typically only assesses aspects concerning the interpretation of EU law and cannot interpret and apply national law. This means that the balancing of conflicting rights can at least sometimes more appropriately take place in the domestic courts. This has been acknowledged on several occasions in the case law of the ECJ

[12] BVerfG, 1 BvR 653/96, 15 December 1999; ECtHR, 24 June 2004, Application no. 59320/00, *Von Hannover v. Germany*; BVerfG, 1 BvR 1602/07, 26 Feb 2008; against the latter decision plaintiffs filed complaints at the ECtHR on 22 August 2008 and 15 Dec 2008, appl. No. 40660/08, 60641/0, 8772/10.

[13] ECtHR, Görgülü v. Germany, Application no. 74969/01, 26 February 2004 and BVerfG 14 October 2004.

[14] Perhaps this is a variation on the type of problem in *Von Hannover*.

involving fundamental rights.[15] Since the Charter acquired treaty status, the ECJ seems to leave many assessments as to the concrete infringement to the national court.[16]

The relationship and tension between rights can be influenced by the legislature, which can regulate the exercise of rights in a particular context, thus in a sense 'ranking' them in relation to an object of legislation which touches on private parties' rights and freedoms. In EU law (as in national law) this is particularly topical as concerns the 'non-discrimination Directives'.[17]

As is the case in a number of Member States, legislative measures to regulate compliance of private actors with principles of equality and non-discrimination have consequences for classic freedom rights, such as freedom of religion and association (e.g. the stereotype questions whether a women's club be forced to employ a man; can a school founded on a denominational identity which disapproves of engaging in homosexual acts be forced to appoint practising homosexuals). It would be interesting to receive information how these matters have played out in Member States.

3. Consequences of the entry into force of the EU Charter of Fundamental Rights

Question

7 Is the Charter perceived as being a mere continuation and consolidation of the previous (i.e. pre-Lisbon) sources of EU fundamental rights protection; or does the Charter provide added protection (or rights) as compared to the pre-Lisbon situation, if one looks at the case law in various jurisdictions since its entry into force?

8 Has the distinction made in the Charter, especially in its official Explanations Relating to the Charter of Fundamental Rights (OJ 2007/C 303/02), between 'rights and freedoms' and 'principles' been reflected in the practice of courts and legislatures in the respective jurisdictions, as well as in the doctrine?

Explanation:
The EU Charter has developed from a mere articulation of the fundamental rights protected as general principles of EU law (i.e. of the common constitutional traditions of Member States, the human rights treaties to which they are a party and those already in the founding Treaties), via an aid in interpretation towards a binding text determining legal rights. It would be interesting to know in what manner courts and legislatures (and other public entities) have used the Charter before and after it acquired status as primary EU law.

Under question 8 we welcome information and views as to the meaning and possible effects of the Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.[18]

---

[15] E.g. ECJ, Case C-368/95, 26 June 1997, *Familia Press*; ECJ Case C 438/05, 11 December 2007, *ITF v. Viking Lines*; *sed contra* e.g. ECJ, Case C-112/00, 12 June 2006, *Schmidberger*.

[16] E.g. ECJ, Case C-279/09, 22 December 2010, *DEB*. In quite a different context ECJ Case C-400/10 PPU, 5 October 2010, *J.McB*. and ECJ Case C-491/10 PPU, *Aguirre Zarraga v. Pelz*.

[17] Directives 2000/43/EC, 2000/78/EC and 2004/113/EC; see also, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final - CNS 2008/0140, which extends horizontal effect to equal treatment beyond the labour market.

[18] At the time of the drafting of this questionnaire there is a case pending before the ECJ, Case C-411/10 *NS*, OJ C 274, 2010 which raises the issue in relation to the 'Dublin II Regulation' 343/2003; this

The EU Charter distinguishes the legal effect of 'principles' from those of 'rights and freedoms' (see Article 52(5) as well as Article 51(1) second sentence), while the official Explanations designate specified provisions in the Charter as 'principles'. 'Principles' shall be 'observed', require legislative and executive implementation and are judicially cognisable only in the interpretation and adjudication of the lawfulness of implementing measures. This concerns Article 26 (integration of persons with disabilities) and Articles 34 to 38 of the Charter (social security and social assistance; health care; access to services of general economic interest; environmental protection; consumer protection).[19]

The distinction raises issues on the legal nature of these 'principles' and the division of powers between courts and legislatures/executives. It possibly also raises issues between EU and Member States: the Charter 'principles' may perhaps be either *more* justiciable, in as much as non-directly effective fundamental rights norms cannot in all jurisdictions function as judicial standard for implementing measures; but they may perhaps be *less* justiciable than indicated in Article 52 (5) of the Charter, if larger legal effect is given to rights in that area.

4. Consequences of the accession of the EU to the ECHR

At the time this questionnaire is being drafted, no certainty exists as to the precise outcome of the negotiations for EU accession to the ECHR. Some issues may lose their significance, or others may arise, which have not been foreseen. Please expand in your reports on relevant issues not covered by the questions below.

Question:

9 Does EU accession to the ECHR overall add to the protection of fundamental rights of citizens; does it outweigh the procedural complications to which it may give rise, for instance when the EU is co-respondent, and more especially when a prior involvement of the ECJ in a case pending at the ECtHR would become possible?

Explanation:
Since the *Connolly* judgment[20], the standard of fundamental rights review as applied by the ECJ complies with that of the European Court of Human Rights (ECtHR) in Strasbourg. In that judgment, the ECJ abandoned an autonomous approach to ECHR rights in which the requirements for the restriction of these rights and the relevant case law of the ECtHR were largely ignored. Also, Article 52(3) Charter imposes the duty to comply with the minimum standard of the ECHR.

As a consequence, accession may in this respect not add very much as far as the overall scope of protected rights is concerned.

Nevertheless, after accession, the institutions are now to apply the ECHR rights as such, without the theoretical detour of the 'general principles of EU law'. Moreover, these acts can become in

---

case also raises important questions concerning the relation between Art. 3 ECHR, the Charter and general principles of EU law; as well as on the scope of EU law (and EU fundamental rights protection) in cases in which a Member State decides to avail itself autonomously of the power to deal with an asylum application under Art. 3 (2) of Dublin II Regulation.

[19] Presumably, the use of the term 'principles' in the Explanations of Article 3 (right to integrity of the person) and 14 (the rights to education) are trivial and not intended to render these rights 'principles' in the sense of Article 51(2) of the Charter.

[20] ECJ, Case C-274/99 P, 6 March 2001, [2001] ECR I-1611.

principle object of complaints brought to the ECtHR (except for the restrictive approach which the Strasbourg court has taken towards Member State action in compliance with EU law in *Bosphorus*, which is the topic of the next question).

On the other hand, a number of procedural complications could be considered disadvantageous to the effective protection of ECHR rights in EU law. Thus, there may be complications with regard to the fact that an act can either be attributed to the EU or a Member State or both, which creates its own uncertainties as to whom to consider respondent party and who decides on this, and the issue of the burden of proof in this regard – all these things in light of the division of powers between EU and Member States, which would seem to be a matter internal to the EU. Also, a special procedure is considered, to the effect of providing in appropriate cases an opportunity for the ECJ to express its judgment as to the lawfulness or validity of an EU measure under EU law.[21] One of the consequences is a further procedural delay, and a burden on the applicant, who is envisaged not to have the right to refer the matter to the ECJ or to object to this, even though he has exhausted domestic remedies in the sense of Article 35(1) ECHR. This not only affects the position of a plaintiff but may also affect the position of a Member State that is co-respondent.

Question

10 The ECtHR *Bosphorus* ruling exempts Member State action covered by EU law from scrutiny on the rebuttable assumption of an overall conformity of EU measures with the ECHR.
- Is this 'double standard' of review of Member State action, depending on whether it is determined autonomously or on the basis of EU law, justified and acceptable to all Member States?
- Have national courts followed the *Bosphorus* ruling in their case law when parties invoked the ECHR?[22]
- Does the *Bosphorus* presumption have the overall effect of shifting the ultimate authority concerning the question whether ECHR rights have been infringed from Strasbourg to Luxembourg?
- Will the *Bosphorus* presumption be tenable, also in light of the purposes of accession to the ECHR?

Explanation:
In *Bosphorus*, the ECtHR judged that Member States' action which is no more than implementing their obligations under EU, law is presumed to be in accordance with the ECHR as long as the

[21] At the time of drafting the questionnaire there is only the provisional draft provision to the Accession Agreement of the provisional report of the meeting of the Working Group on Accession CDDH-UE with the Commission of 28 January (Strasbourg, 28 January 2011, CDDH-UE(2011)03):

"1. Prior to a decision by the European Court of Human Rights on the merits of a case in which the European Union is a co-respondent, the Court of Justice of the European Union shall have the opportunity to rule, if it has not yet done so, on the [validity /conformity] of the act of the European Union [if the question of the validity/conformity is raised by the applicant] with [regard to] fundamental rights as set out in the [notification of that case // the case of which notice has been given] to the parties.

2. The Court of Justice of the European Union shall give such a ruling in accordance with internal rules of the European Union which shall, in particular, ensure that the ruling is delivered quickly so that the proceedings before the European Court of Human Rights are not unduly delayed.

3. It is understood that the procedure of the European Court of Human Rights takes into account the proceedings before the Court of Justice of the European Union as referred to in paragraphs 1 and 2."

[22] The Netherlands *College van Beroep voor het bedrijfsleven* [Industrial Board of Appeal], AWB 04/161, LJN: BD0646, *Socopa*, which suggests that as a consequence of *Bosphorus* also a *national* court must grant immunity of jurisdiction of Member State action in the implementation of EU law, unless the presumption is exceptionally rebutted.

ECJ provides equivalent, i.e. 'comparable', protection to that provided by the ECHR. This presumption can be rebutted if in the circumstances of a particular case the protection of ECHR rights is manifestly deficient. [23] For all acts falling outside its strict EU legal obligations, the Member State remains fully responsible.[24]

5. The future of fundamental rights protection, national and European, in the EU as an 'area of fundamental rights'

The European Union has been called 'an area of fundamental rights' (Viviane Reding). In order to consider what this means for the question whether the EU is or should be a 'human rights organization'[25], the relations between the protection provided by national bills of rights and the courts of Member States, on the one hand, and that provided by EU law and the European Courts, both in Strasbourg and Luxembourg, on the other, after the entry into force of the Lisbon Treaty, the Charter and accession to the ECHR, call for reflection.

General norms on these relations are contained in Title VII of the Charter, but also in the TEU in Articles 2, 4 and 6, which in turn also express general norms and principles developed in the ECJ case law.

In particular the clauses on the *scope of EU law*, which triggers EU fundamental rights protection, and that of autonomous Member State activity which is *not* governed by EU law is contentious both in theory and in practice. The precise meaning of Article 51 of the Charter is at stake here. Also, it is questioned whether the phrase 'within their respective scope of action' (Art. 53 Charter) is meaningful to explain away differences in the material scope of fundamental rights provisions, as it may lead to the situation that Member State authorities acting within the scope of EU law must refrain from protecting rights which they must protect when acting autonomously; this calls into question the very fundamental nature of the relevant rights.

In practice, some difficult questions lie ahead which will soon need to be adjudicated by the ECJ and national courts.

> A particular example touching on the interaction between sources and the respective scope of application is in the field of reverse discrimination, which is essentially due to a matter being outside the scope of EU law. There seem to be several national authorities and courts which have held that withholding a right from a national in an exclusively internal situation which a national of another EU Member State would have had under EU law in that country, amounts to discrimination under national law and infringes constitutional equality clauses.[26]

Also, regard should be had at increased fundamental rights activity through legislative action, supportive EU action and for instance the establishment of the Fundamental Rights Agency.

---

[23] ECtHR, 30 June 2005, Application n° 45036/98,*Case of Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, paragraphs 149-158; the doctrine was confirmed and applied in ECtHR, 29 January 2009, Application no. 13645/05, *Cooperatieve Producentenorganisatie Van De Nederlandse Kokkelvisserij U.A. against the Netherlands* concerning the right to respond to Advocate Generals' opinions, which has been a point of controversy.

[24] This was the case with regard to the 'Dublin II' Regulation in ECtHR, Case of M.S.S. v. Belgium and Greece, Application no. 30696/09, 21 January 2011, see paragraphs 338-340.

[25] The expression is taken from A. von Bogdandy, The European Union as a Human Rights Organization? Human Rights and the Core of the European Union. In: 37CMLRev 2000, 1307-1338.

[26] Thus Belgian *Conseil d'Etat/ Raad van State* and *Cour Constitutionnel/ Grondwettelijk Hof* seem to have held this to be the case, see Opinion of Adv-General Sharpston in Case 34-09, *Zambrano*, footnote 17. The Netherlands *Raad van State* has held in a series of advisory opinions that subjecting certain Netherlands nationals to 'integration requirements' from which nationals of EU Member States in an otherwise identical position are exempt on the basis of EU law, constitutes an infringement of the constitutional equality clauses of Article 1 of the *Grondwet*, Art. 26 ICCPR and Protocol 12 ECHR.

Questions

11 Is the interpretation which the ECJ has so far given of the general provisions on the scope of the Charter, its relation to national constitutional rights and human rights treaties, and on restricting the exercise of rights (Title VII of the Charter) looked upon favourably?

12 Is there a general EU human rights competence, or should there be such competence? What are the implications for the future of the ECHR system of protection of rights?

13 What role should be envisaged for EU institutions as to fundamental rights protection within a more polycentric constitutional system of Europe?
Would you conclude on the basis of the development of the ever-widening scope of EU law and fundamental rights activity, as well as your discussion of the previous questions in your report, that a gradual but definite transfer of human rights protection has taken place from Member States to the EU and from the Council of Europe and ECHR to the EU?

14 Although fundamental rights protection in the EU has been triggered by Member State courts, the common constitutional traditions of Member States on fundamental rights protection have not functioned as an important direct source of protection in the case law of the ECJ. This gives rise to the general question what the role of the common and individual constitutional traditions can be at present and in future.

ANNEX
THE QUESTIONS

1. Nature and scope of the rights protected

1. Are there any remaining (potential or actual) *gaps* in the substantive scope and level of protection of fundamental rights? And can (potential) gaps in one fundamental rights source be filled by reference to other fundamental rights sources?

2 What is the role of general legal principles: can they function as sources of fundamental rights protection?

2. Horizontal Effect and Collision of rights

3 To what extent is 'horizontal effect' of fundamental rights accepted in the Member States? How is the case law of the ECJ in this respect received?

4 How do Member States within their respective jurisdictions and EU institutions deal with case of the collision of rights, both as regards
a. collisions between classic rights (e.g. non-discrimination and freedom of expression or religion etc.), and
b. collisions between on the one hand classic rights and socio-economic and cultural rights on the other (e.g. free movement rights and freedom of expression, religion)
c. collisions between socio-economic and cultural rights inter se (e.g. right to strike and free movement)?

5 How does, or should, the balancing take place in the context of the multiplicity of EU, ECHR and national legal orders ('multilevel' legal order)?

6 What role does the legislature have in granting horizontal effect to fundamental rights? What is its role in ordering and prioritizing rights which might collide? In particular, what is the influence of the non-discrimination Directives on the exercise of other fundamental rights in the Member States?

3. Consequences of the entry into force of the EU Charter of Fundamental Rights

7 Is the Charter perceived as being a mere continuation and consolidation of the previous (i.e. pre-Lisbon) sources of EU fundamental rights protection; or does the Charter provide added protection (or rights) as compared to the pre-Lisbon situation, if one looks as the case law in various jurisdictions since its entry into force?

8 Has the distinction made in the Charter, especially in its official Explanations Relating to the Charter of Fundamental Rights (OJ 2007/C 303/02), between 'rights and freedoms' and 'principles' been reflected in the practice of courts and legislatures in the respective jurisdictions, as well as in the doctrine?

4. Consequences of the accession of the EU to the ECHR

9 Does EU accession to the ECHR overall add to the protection of fundamental rights of citizens; does it outweigh the procedural complications to which it may give rise, for

instance when the EU is co-respondent, and more especially when a prior involvement of the ECJ in a case pending at the ECtHR would become possible?

10 The ECtHR *Bosphorus* ruling exempts Member State action covered by EU law from scrutiny on the rebuttable assumption of an overall conformity of EU measures with the ECHR.
- Is this 'double standard' of review of Member State action, depending on whether it is determined autonomously or on the basis of EU law, justified and acceptable to all Member States?
- Have national courts followed the *Bosphorus* ruling in their case law when parties invoked the ECHR?
- Does the *Bosphorus* presumption have the overall effect of shifting the ultimate authority concerning the question whether ECHR rights have been infringed from Strasbourg to Luxembourg?
- Will the *Bosphorus* presumption be tenable, also in light of the purposes of accession to the ECHR?

5. The future of fundamental rights protection, national and European, in the EU as an 'area of fundamental rights'

11 Is the interpretation which the ECJ has so far given of the general provisions on the scope of the Charter, its relation to national constitutional rights and human rights treaties, and on restricting the exercise of rights (Title VII of the Charter) looked upon favourably?

12 Is there a general EU human rights competence, or should there be such competence? What are the implications for the future of the ECHR system of protection of rights?

13 What role should be envisaged for EU institutions as to fundamental rights protection within a more polycentric constitutional system of Europe?
Would you conclude on the basis of the development of the ever-widening scope of EU law and fundamental rights activity, as well as your discussion of the previous questions in your report, that a gradual but definite transfer of human rights protection has taken place from Member States to the EU and from the Council of Europe and ECHR to the EU?

14 Although fundamental rights protection in the EU has been triggered by Member State courts, the common constitutional traditions of Member States on fundamental rights protection have not functioned as an important direct source of protection in the case law of the ECJ. This gives rise to the general question what the role of the common and individual constitutional traditions can be at present and in future.