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THE ECHR AND THE CJEU: CREATING SYNERGIES IN THE FIELD OF FUNDAMENTAL RIGHTS PROTECTION

President Raimondi, Honourable Judges, Secretary General, Excellencies, Ladies and gentlemen,

Thank you very much, President Raimondi, for that kind introduction. It is a great honour for me to be here with you today at this solemn ceremony, marking the opening of the judicial year of this honourable Court.

It is indeed a great honour because of what the European Court of Human Rights (the 'ECHR') represents not only in the minds and hearts of judges, lawyers and other members of the legal profession, but also in those of European citizens.

The ECHR is a beacon of hope for those who feel that justice has been denied at national level. It is also the protector of a certain idea of European democracy, according to which policy choices made by the incumbent majority of the moment must respect the sphere of individual freedom guaranteed by the Convention. Last, but not least, it is a symbol of our shared European identity and common heritage as nothing unites Europeans more than the feeling that we all belong to a community of values where fundamental rights are upheld.

I would like to take this opportunity to share with you my views on the highly influential role that the Convention, as interpreted by the ECHR, has played, and continues to play, in the EU legal order. In so doing, I would also like to stress the fact that the Charter of Fundamental Rights of the European Union (the 'Charter'), despite its relative youth, has, in turn, influenced the interpretation of the Convention. As the title of my speech reveals, that mutual influence has the potential to create synergies between our two Courts that improve fundamental rights protection in Europe as a whole.

Although both the Convention and the EU legal order are committed to protecting fundamental rights, their respective systems of protection do not operate in precisely the same way.¹ Whilst the Convention operates as an *external* check on the obligations imposed by that international agreement on the Contracting Parties, the EU system of fundamental rights protection is an *internal* component of the rule of law within the EU.

¹ See, in this regard, S. O'Leary, 'Courts, charters and conventions: making sense of fundamental rights in the EU' (2016) 56 *Irish Jurist* 4, at 9.

Even though the EU is not a State,² the logic underpinning its system of fundamental rights protection is closer to that of an EU Member State than to that provided for by the Convention. The same logic applies to the Court of Justice of the European Union (the ‘CJEU’), the guarantor of the rule of law within the EU, whose role is, in effect, to act as both the Constitutional and Supreme Court of the European Union.

Just like any Constitutional Court in Europe, the CJEU ensures that the acts adopted by the EU institutions comply with primary EU law, notably the EU Treaties and the Charter. It is also called upon to rule on the allocation of powers between the EU and its Member States as well as between the EU institutions. Just like any Supreme Court in Europe, the CJEU ensures the uniform application of EU law throughout the territory of the EU Member States, from the Gulf of Finland to the Strait of Gibraltar and from the Atlantic to the Aegean.³ It does so through the preliminary reference mechanism, the keystone of the EU judicial system.⁴

Needless to say, in fulfilling those tasks, the CJEU must uphold the rule of law, of which fundamental rights, as recognised in the Charter, are part and parcel. This means, in essence, that the entire body of EU law – composed of thousands of directives, regulations and decisions – must be consistent with the Charter. That body must be interpreted in the light of the Charter. Nevertheless, where a consistent interpretation is not possible, the CJEU will have no choice but to annul or to declare invalid the EU act in question that constitutes an unjustified restriction on the exercise of a fundamental right. That was exactly what the CJEU did in *Digital Rights* where it declared invalid the Data Retention Directive, on the ground that by ordering the indiscriminate retention of personal metadata contained in electronic communications, that directive imposed a disproportionate restriction on the right to respect for private life as well as on the right to the protection of personal data, enshrined respectively in Articles 7 and 8 of the Charter.⁵

Since the enforcement of EU law is largely decentralised, the implementation of that body of law is, in principle, entrusted to the EU Member States and their courts. Accordingly, such implementation can only take place in compliance with the Charter. For example, in the seminal *Aranyosi and Căldăraru*,⁶ the CJEU held that a Member State may not execute a European Arrest Warrant where such execution entails a violation of Article 4 of the Charter brought about by the conditions of detention in the prison system of the requesting Member State. In the same way, it follows from the ruling of the CJEU in *Boungaoui and ADDH* that an EU Member State implementing Directive 2000/78 – a directive which seeks to combat discrimination on grounds of, *inter alia*, religion or belief in the work place – must prevent an employer from treating an employee unequally in circumstances where such unequal treatment is grounded in a customer’s refusal to use the services of that employer because the employee wears an Islamic headscarf.⁷

Unlike the system set out by the Convention, when it comes to the EU Member States, fundamental rights are not self-standing.⁸ Not all national measures may be examined in the light of the Charter, but only those that fall within the scope of EU law.⁹ Metaphorically speaking, the Charter is the ‘shadow’ of EU law. Just as an object defines the contours of its shadow, the scope of EU law determines that of the Charter.¹⁰ So, where a national measure falls outside the scope of that law, it also falls outside the scope of the Charter. This does not mean, however, that fundamental rights are left unprotected, since the compatibility of that measure with fundamental rights may be examined in the light of the relevant national constitution and the Convention.¹¹

The Charter is, thus, the EU’s ‘Bill of Rights’ and has made a significant contribution to improving the EU system of fundamental rights protection, by giving more visibility to those rights. Quantitatively, since the Charter entered into force in 2009, the number of cases before the CJEU raising questions involving the interpretation of fundamental rights has grown considerably. Currently, in 1 out of 10 cases brought before the CJEU, the Charter is **expressly** mentioned. Qualitatively, the Charter facilitates a more coherent, comprehensive and systemic interpretation of fundamental rights.

That said, it does not follow from the fact that the Charter is centre stage in the EU system of fundamental rights protection that the CJEU is required to adopt an isolationist or ‘EU-centric’ approach. On the contrary, the Charter mandates the CJEU to embrace openness and dialogue, in the field of fundamental rights, with the legal orders that surround the EU. That openness finds concrete expression in the Charter requirements that the CJEU should interpret fundamental rights in harmony with the constitutional traditions common to the EU Member States and, where relevant, that the CJEU should interpret the meaning and scope of those rights in the same way as the rights guaranteed under the Convention. Thus, the CJEU is required to engage in a constructive dialogue with the national courts – notably national Constitutional and Supreme Courts – and, of course, the ECHR.

Consequently, the Charter has not only codified but has also given new impetus to the case law of the CJEU in respect of the general principles of EU law, where it has held that the Convention has ‘special significance’.¹² With the entry into full legal force of the Charter, I am tempted to say that the Convention has now ‘a very special significance’ in the EU legal order.

It is true that, until the EU accedes to the Convention, that international agreement is not incorporated into EU law.¹³ As a result, the CJEU does not enjoy jurisdiction to answer questions that relate, for example, to the relationship between the Convention and the legal systems of the EU Member States.¹⁴ Nevertheless, the Convention provides precious insights and guidance to the CJEU in the field of fundamental rights.

8 Regarding the scope of application of the Charter, see generally C. Ladenburger, European Institutional Report, in J. Laffranque (ed) *The Protection of Fundamental Rights Post – Lisbon, FIDE XXV Congress*, Vol. 1 (Tartu, Tartu University Press, 2012); T. von Danwitz and K. Paraschas, ‘A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights’ (2012) 35 *Fordham International Law Journal*, at 1397; K. Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 *European Constitutional Law Review* 375; A. Tizzano, ‘L’application de la Charte de droits fondamentaux dans les États membres à la lumière de son article 51, paragraphe 1’, *Il Diritto dell’Unione Europea*, 2014, n° 3, at 429, and A. Rosas, ‘Five Years of Charter Case Law : Some Observations’ in S. de Vries, U. Bernitz and S. Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument* (Oxford, Hart Publishing, 2015) at 11. See also M. Dougan, ‘Judicial review of Member State action under the general principles and the Charter: Defining the “scope of Union law”’ (2015) 52 *Common Market Law Review* 1201.

9 CJEU, judgment of 26 February 2013, *Åkerberg Fransson*, C 617/10, EU:C:2013:105.

10 K. Lenaerts and J.A. Gutiérrez-Fons, ‘The Place of the Charter in the EU Constitutional Edifice’ in S. Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart Publishing, 2014) at 1567.

11 CJEU, judgment of 15 November 2011, *Dereci and Others*, C 256/11, EU:C:2011:734, paras 72 and 73. See also CJEU, judgment of 17 January 2013, *Zakaria*, C 23/12, EU:C:2013:24, para. 41.

12 CJEU, judgment of 18 June 1991, *ERT*, C 260/89, EU:C:1991:254, para. 41.

13 CJEU, judgment of 15 February 2016, N., C 601/15 PPU, EU:C:2016:84, para. 45. See, in this regard, J. Malenovský, ‘Comment tirer parti de l’avis 2/13 de la Cour de l’Union européenne sur l’adhésion à la Convention européenne des droits de l’homme’ (2015) *Revue générale de droit international public* 705.

14 CJEU, judgment of 24 April 2012, *Kamberaj*, C 571/10, EU:C:2012:233, para. 62. See, in this regard, G. Raimondi, ‘La relation de la Cour de Strasbourg avec les juges internes’ (2016) 43 *L’actualité juridique : droit administratif*, 2434.

2 CJEU, Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, para. 156.

3 J.-C. Bonichot and A. Nußberger, ‘Dialogue entre juges européens’, in B. Bonnet (ed), *Traité des rapports entre ordres juridiques* (Paris, LGDJ, 2016) 1269.

4 CJEU, opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, para. 176.

5 CJEU, judgment of 8 April 2014, *Digital Rights Ireland and Others*, C 293/12 and C 594/12, EU:C:2014:238.

6 CJEU, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C 404/15 and C 659/15 PPU, EU:C:2016:198.

7 CJEU, judgment of 14 March 2017, *Boungaoui and ADDH*, C 188/15, EU:C:2017:204. See Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ 303/16.

First, as Article 6(3) TEU confirms, fundamental rights recognised by the Convention constitute general principles of EU law, i.e. judge-made principles that enjoy constitutional status.

Second, unlike the EU Treaties themselves which are silent as to the way in which the CJEU is to interpret them, the Charter contains two specific provisions that provide interpretative guidance regarding the interaction between the Charter and the Convention, i.e. Articles 52(3) and 53 of the Charter.¹⁵

Article 52(3) of the Charter states, and I quote, that ‘in so far as [the] Charter contains rights which correspond to rights guaranteed by the Convention [...], the meaning and scope of those rights shall be the same as those laid down by the said Convention’. However, such deference to the Convention ‘shall not prevent [EU] law providing more extensive protection’. This provision is thus intended to ensure the necessary consistency between the Charter and the ECHR, ‘without thereby adversely affecting the autonomy of [EU] law and ... that of the [CJEU]’.¹⁶

The explanations relating to the Charter, which are to be given ‘due regard by the courts of the [EU] and of the Member States’,¹⁷ list those corresponding fundamental rights.¹⁸ To name just a few, this is the case for the prohibition against inhuman or degrading treatment,¹⁹ the right to liberty in the context of extradition procedures,²⁰ the freedom of expression and information,²¹ the right to freedom of conscience and religion,²² the right to respect for private and family life,²³ the right to property²⁴ and the principle that offences and penalties must be defined by law.²⁵

Once that correspondence is established, the CJEU will strive to ensure that the Charter is interpreted so as to provide, at the very least, a level of protection that corresponds to that of the Convention, as interpreted by the ECHR. Allow me to illustrate that point by looking at three recent examples taken from the case law of the CJEU in very different areas of EU law.

To begin with, in *Boungaoui and ADDH*, which I mentioned earlier, the CJEU held, referring to the Convention, that the term ‘religion’ laid down in the Charter was to be interpreted broadly so as to encompass ‘both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public’. In order to ensure consistency with both the Charter and the Convention, the term ‘religion’ set out in the Directive 2000/78 was also to be interpreted in the same fashion.²⁶

The second example arises from the ruling of the CJEU in *Florescu*,²⁷ a case concerning the compatibility with the right to property of austerity measures adopted by Romania in order to implement the conditions that the EU had attached to the grant of financial assistance to that Member State. In that case, the CJEU recognised that the need to rationalise public spending in an exceptional context of global financial and economic crisis constitutes a legitimate limitation on the exercise of that fundamental right. In so doing, the CJEU expressly referred to the ruling of the ECHR in *Ionel Panfile v. Romania*.²⁸

The third example involves an asylum case called *Al Chodor and Others*.²⁹ In that case, the CJEU was called upon to decide whether an EU Member State was under an obligation to define the notion of ‘a significant risk of absconding’ by adopting a binding provision of general application or whether settled case law or a consistent administrative practice were sufficient to fulfil that obligation. That was an important question given that the notion at issue provides the legal basis for the detention of asylum seekers. Indeed, the Dublin III Regulation provides that, in order to secure transfer procedures, an asylum seeker may be placed in detention ‘only where there is a significant risk of absconding’.³⁰ Referring to the ruling of the ECHR in *Del Río Prada v. Spain*,³¹ the CJEU found that in defining that notion, the EU Member State in question had to comply with strict requirements, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness. In that regard, the CJEU held that only a binding provision of general application could meet those requirements.

Moreover, the CJEU takes account of the Convention as the minimum threshold for protection, meaning that the EU system of fundamental rights protection may go above and beyond that threshold. For example, whilst the scope of Article 13 ECHR is limited to guaranteeing an effective remedy against violations of the rights set out in the Convention itself, that of the first paragraph of Article 47 of the Charter, which enshrines the right to an effective judicial remedy, covers not only the rights recognised by the Charter but also the ‘rights and freedoms guaranteed by the law of the Union’. This can be seen in environmental cases, where the CJEU has held that Article 47 of the Charter provides an effective remedy against national measures that violate rights that EU environmental law confers on individuals, including NGOs. That is so regardless of whether other provisions of the Charter are also at issue.³²

For its part, Article 53 of the Charter seeks to coordinate the three different standards of protection that co-exist in the EU Member States, namely those provided by national constitutions, those provided by EU law and those provided by international law, notably by the Convention. That provision of the Charter aims to bring order to pluralism by striking a balance between European unity and national diversity. In *Melloni*, the Court of Justice interpreted that provision as meaning that, where a Member State implements EU law, the application of national standards of protection of fundamental rights must compromise neither the level of protection provided for by the Charter, nor the primacy, unity and effectiveness of EU law.³³

As to the rights recognised in the Charter that correspond to those guaranteed by the Convention, this means, in essence, that an EU Member State may apply its own standards of protection, provided that three conditions are met. First, those standards must comply with the level of protection guaranteed by the Charter which, in turn, guarantees, at the very least, a level of protection equivalent to that of the Convention. Second, national standards may only be applied where the EU has not adopted a uniform level of protection which, needless to say, must itself comply with the Charter. Last, but not least, that higher level of protection must not jeopardise the objectives pursued by EU law.

¹⁵ See Article 6(1) TEU.

¹⁶ CJEU, judgment of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, para. 47.

¹⁷ See Article 6(1) TEU and Article 52(7) of the Charter.

¹⁸ See the explanations relating to Article 52 of the Charter, [2007] OJ C 303/17, at 32.

¹⁹ CJEU, judgment of 5 April 2016, *Aranyosi and Căldăraru*, C 404/15 and C 659/15 PPU, EU:C:2016:198, para. 86.

²⁰ CJEU, judgment of 16 July 2015, *Lanigan*, C 237/15 PPU, EU:C:2015:474, para. 57.

²¹ CJEU, judgment of 17 December 2015, *Neptune Distribution*, C 157/14, EU:C:2015:823, para. 65.

²² CJEU, judgment of 14 March 2017, *Boungaoui and ADDH*, C 188/15, EU:C:2017:204, para. 29.

²³ CJEU, judgment of 5 October 2010, *McB.*, C 400/10 PPU, EU:C:2010:582, para. 53.

²⁴ CJEU, judgment of 13 June 2017, *Florescu and Others*, C 258/14, EU:C:2017:448, para. 49.

²⁵ CJEU, judgment of 5 December 2017, *M.A.S. and M.B.*, C 42/17, EU:C:2017:936, para. 54.

²⁶ CJEU, judgment of 14 March 2017, *Boungaoui and ADDH*, C 188/15, EU:C:2017:204, para. 30.

²⁷ CJEU, judgment of 13 June 2017, *Florescu and Others*, C 258/14, EU:C:2017:448, para. 56.

²⁸ ECHR, decision of 20 March 2012, *Ionel Panfile v. Romania*, CE:ECHR:2012:0320DEC001390211, § 21.

²⁹ CJEU, judgment of 15 March 2017, *Al Chodor*, C 528/15, EU:C:2017:213.

³⁰ See Article 2(n) and Article 28(2) of 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, [2013] OJ L 180/31 (‘the Dublin III Regulation’).

³¹ ECHR, judgment of 21 October 2013, *Del Río Prada v. Spain*, CE:ECHR:2013:1021JUD004275009, §125.

³² See, e.g., CJEU, judgment of 8 November 2016, *Lesoochránárske zoskupenie VLK*, C 243/15, EU:C:2016:838. Regarding Article 47 of the Charter, see generally M. Safjan and D. Düsterhaus, ‘A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU’ (2014) 33 *Yearbook of European Law* 1.

³³ CJEU, judgment of 26 February 2013, *Melloni*, C 399/11, EU:C:2013:107, para. 60.

Allow me to illustrate that point by highlighting the contrast between, on the one hand, the ruling of the CJEU in *Melloni* and, on the other hand, those in *F*, *Åkerberg Fransson*, and *M.A.S. and M.B.* Whilst in the first of those cases, it was held that EU law did indeed prescribe a uniform level of fundamental rights protection, in the circumstances of the latter cases the opposite conclusion was reached, allowing room for national diversity.

In *Melloni*, the EU legislator amended, in 2009, the European Arrest Warrant Framework Decision with a view to protecting the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States. To that effect, the EU legislator introduced a new provision that lists the circumstances under which the executing judicial authority may *not* refuse execution of a European Arrest Warrant issued against a person convicted *in absentia*. In that regard, the CJEU noted that the new provision complied with Articles 47 and 48 of the Charter – two provisions that are in keeping with the scope that has been recognised for the rights guaranteed by Article 6(1) and (3) of the Convention³⁴ – given that it only applied to situations where the person convicted *in absentia* was deemed to have voluntarily and unambiguously waived his or her right to be present at the trial in the issuing Member State. Since the EU legislator had itself struck, in compliance with the Charter, a balance between the protection of those fundamental rights and the requirements of mutual recognition of judicial decisions, the application of higher national standards was ruled out.

By contrast, in *F*,³⁵ another case relating to the European Arrest Warrant, the CJEU found that there was room for national diversity in the context of the speciality rule. According to that rule, before the issuing judicial authorities prosecute the person concerned for offences other than those for which he or she has been surrendered, they must obtain the consent of the executing judicial authority. Thus, in *F*, the question was whether EU law prevented the person surrendered from bringing an appeal having suspensive effect against a decision taken by the executing judicial authority by which it gave its consent. In that regard, the CJEU found that the European Arrest Warrant Framework Decision, interpreted in the light of Article 47 of the Charter, neither imposed nor opposed such a right of appeal. Referring to the case law of the ECHR on Article 5(4) of the Convention,³⁶ it noted that the principle of effective judicial protection, as enshrined in Article 47 of the Charter, ‘affords an individual a right of access to a court but not to a number of levels of jurisdiction’. Thus, it was for the constitutional law of the executing Member State – and only for that law – to determine the existence or absence of such a right at national level. That said, if that right did exist, its exercise could not compromise the primacy, unity and effectiveness of EU law. For the case at hand, this meant that the exercise of that right of appeal could not have the effect of preventing the executing judicial authority from adopting a decision within the time-limits prescribed by EU law.

Similarly, there was also room for national diversity in *Åkerberg Fransson*, a case where the CJEU held that, in order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties. These penalties may therefore take the form of administrative penalties, criminal penalties or a combination of the two. In taking that decision, the national legislator must comply with Article 50 of the Charter, which enshrines the principle of *ne bis in idem*. Accordingly, it is only where an administrative penalty is criminal in nature for the purposes of Article 50 of the Charter and has become final that the Charter precludes criminal proceedings in respect of the same acts from being brought against the same person. As to the primacy, unity and effectiveness of EU law, the option chosen by the national legislator had to provide for sanctions that protected the financial interests of the EU in an effective, dissuasive and proportionate fashion.

³⁴ See CJEU, judgment of 26 February 2013, *Melloni*, C 399/11, EU:C:2013:107, para. 50, referring to ECHR, judgments of 14 June 2001, *Medenica v. Switzerland*, CE:ECHR:2001:0614JUD002049192; of 1 March 2006, *Sejdovic v. Italy*, CE:ECHR:2006:0301JUD005658100, and of 24 April 2012, *Haralampiev v. Bulgaria*, CE:ECHR:2012:0424JUD002964803.

³⁵ Judgment of 30 May 2013, *F*, C 168/13 PPU, EU:C:2013:358.

³⁶ *Ibid.*, para. 43, referring to ECHR, judgments of 15 November 1996, *Chahal v. the United Kingdom*, CE:ECHR:1996:1115JUD002241493; of 5 June 2012, *Khodzhamberdiyev v. Russia*, CE:ECHR:2012:0605JUD006480910, and of 4 March 2008, *Marturana v. Italy*, CE:ECHR:2008:0304JUD006315400.

More recently, this idea of diversity was again explained by the CJEU in *M.A.S. and M.B.*, another VAT case. There, the CJEU recalled that the Member States must ensure, in cases of serious VAT fraud, that effective and deterrent criminal penalties are adopted. Nevertheless, in the absence of EU harmonization, it is for the Member States to adopt the limitation rules applicable to criminal proceedings relating to those cases. This means, in essence, that whilst a Member State must impose effective and deterrent criminal penalties in cases of serious VAT fraud, it is free to consider, for example, that limitation rules form part of substantive criminal law. Where that is the case, the CJEU pointed out that such a Member State must comply with the principle that criminal offences and penalties must be defined by law, a fundamental right enshrined in Article 49 of the Charter which corresponds to Article 7(1) of the Convention.³⁷ Accordingly, even where the limitation rules at issue prevent the imposition of effective and deterrent criminal penalties in a significant number of cases of serious VAT fraud, the national court is under no obligation to disapply those rules in so far as that obligation is incompatible with Article 49 of the Charter. That does not mean, however, that those limitation rules are left untouched to the detriment of the financial interests of the EU. In the light of the primacy, unity and effectiveness of EU law, it is, first and foremost, for the national legislator to amend those limitation rules so as to avoid impunity in a significant number of cases of serious VAT fraud.

It follows from those examples that neither European unity nor national diversity is absolute, as they must both comply with the level of protection provided for by the Charter. In addition, national diversity must not jeopardise the EU integration project, since it must take due account of the primacy, unity and effectiveness of EU law.

Moreover, the meaning and scope of the rights recognised by the Charter are directly influenced by the Convention. This ‘*esprit d’ouverture*’ shows that the Charter is by no means a rival to the Convention, nor is it intended to impose competing obligations on the EU Member States in the field of fundamental rights. On the contrary, the Charter invites cooperation with Strasbourg.

In the same way, the ECHR has, on several occasions, decided to take account of the Charter. It has done so in order to give new impetus to the dynamic and evolutive interpretation of the Convention, under which that international agreement is to be read as a living instrument. Thus, the Convention, as interpreted and applied by the ECHR, also invites cooperation with Luxembourg.

In particular, the ECHR has relied on the Charter in order to update the content of Convention rights. The Charter was created, in essence, by setting down clearly in one single document a catalogue of fundamental rights stemming from the constitutional traditions common to the EU Member States, the Convention and other international agreements, as those sources of law stood at the beginning of this new millennium. Thus, whilst over the past six decades the Convention has established itself as a more mature system of fundamental rights protection, the ECHR has rightly relied on the Charter – a mere teenager by comparison – in order to reveal the existence of an emerging European consensus as to the standards to be achieved in the field of fundamental rights.³⁸

For example, as you all know, in *Scoppola v. Italy (no. 2)*, the ECHR,³⁹ departing from the previous decision of the European Commission of Human Rights in *X v. Germany*,⁴⁰ ruled that Article 7 of the Convention is to be interpreted so as to include the right to benefit from a more lenient penalty provided for in a law enacted subsequent to the offence. It did so despite the fact that the Convention

³⁷ See judgment of 5 December 2017, *M.A.S. and M.B.*, C 42/17, EU:C:2017:936, para. 55, referring to ECHR, judgments of 15 November 1996, *Cantoni v. France*, CE:ECHR:1996:1115JUD001786291; of 7 February 2002, *E.K. v. Turkey*, CE:ECHR:2002:0207JUD002849695; of 29 March 2006, *Achour v. France*, CE:ECHR:2006:0329JUD006733501, and of 20 September 2011, *OAO Neftyanaya Kompaniya Yukos v. Russia*, CE:ECHR:2011:0920JUD001490204.

³⁸ See G. Nicolaou, ‘The Strasbourg View on the Charter of Fundamental Rights’ (2013) *College of Europe, Cooperative Research Paper*, 03/2013, available at: <<https://www.coleurope.eu/research-paper/strasbourg-view-charter-fundamental-rights>>. See also, T. Lock, ‘The influence of EU law on Strasbourg doctrines’ (2016) 41 *European Law Review* 804.

³⁹ ECHR, judgment of 17 September 2009, *Scoppola v. Italy (no. 2)*, CE:ECHR:2009:0917JUD001024903.

⁴⁰ European Commission of Human Rights, *X v. Germany*, no. 7900/77, decision of 6 March 1978, CE:ECHR:1978:0306DEC000790077. That decision was subsequently endorsed by the ECHR in judgments of 5 December 2000 *Ian Le Petit v. the United Kingdom*, CE:ECHR:2004:0615JUD003557497, and of 6 March 2003, *Zaprianov v. Bulgaria*, CE:ECHR:2004:0930JUD004117198.

is silent in that regard. In the course of its reasoning, the ECHR referred to the ruling of the CJEU in *Berlusconi*⁴¹ and to the fact that Article 49 of the Charter expressly recognises that right.⁴² Both findings supported the view that, after the decision in *X v. Germany* was delivered, ‘a consensus [...] gradually emerged in Europe and internationally [demonstrating that that right had] become a fundamental principle of criminal law’.⁴³ The ECHR followed a similar approach in *Bayatyan v. Armenia*, where it held that Article 9 of the Convention recognises the right to conscientious objection, a right that is expressly mentioned in Article 10(2) of the Charter. In so doing, it held that that provision of the Charter ‘reflects the unanimous recognition of the right to conscientious objection by the [M]ember States of the European Union, as well as the weight attached to that right in modern European society’.⁴⁴

Whilst it is true that, on occasion, our two Courts may adopt divergent approaches on a particular question, I am convinced that, as a matter of principle, both of our courts strive to achieve convergence, as the rulings of the ECHR in *Povse v. Austria* and *Avotiņš v. Latvia*,⁴⁵ and those of the CJEU in *Aranyosi and Căldăraru* and *C.K.*⁴⁶ demonstrate.

This substantive convergence facilitates the application and interpretation of fundamental rights by the national courts which are called upon to operate in the multi-level system of fundamental rights protection that exists in Europe. Most importantly, this convergence is not left to chance but is the result of a constructive and cooperative relationship between the CJEU and the ECHR that is based on comity and mutual respect.

This afternoon’s seminar focused on the question of judicial authority and the challenges to that authority. In that regard, I would like to add, if I may, that the judicial authority of both Courts is strengthened when they work together, as such cooperation is mutually reinforcing and creates synergies in the field of fundamental rights protection. In my view, there is no better way to improve the protection of fundamental rights at European level than to enhance citizens’ trust and confidence in their two European Courts, by showing that they share the same values and work together, to the benefit of all Europeans.

Thank you very much

41 CJEU, judgment of 3 May 2005, *Berlusconi and Others*, C 387/02, C 391/02 and C 403/02, EU:C:2005:270.

42 ECHR, judgment of 17 September 2009, *Scoppola v. Italy (no. 2)*, CE:ECHR:2009:0917JUD001024903, § 105.

43 Ibid., § 106.

44 ECHR, judgment of 7 July 2011, *Bayatyan v. Armenia*, CE:ECHR:2011:0707JUD002345903, § 106.

45 ECHR, decision of 18 June 2013, *Povse v. Austria*, CE:ECHR:2013:0618DEC000389011, and judgment of 23 May 2016, *Avotiņš v. Latvia*, CE:ECHR:2016:0523JUD001750207.

46 CJEU, judgments of 5 April 2016, *Aranyosi and Căldăraru*, C 404/15 and C 659/15 PPU, EU:C:2016:198, and of 16 February 2017, *C. K. and Others*, C 578/16 PPU, EU:C:2017:127.