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Introduction

For more than 10 years after the signature of the Treaty of Rome in 1957, the question of the protection of human rights had never been in issue.² The emphasis was on the creation and consolidation of the common market establishing the free movement of persons, of services, of goods and of capital. Neither the initial Treaties nor the jurisprudence of the Court made any reference to the protection of human rights in the process of the creation of the common market.

It all started in 1969 in the *Stauder* case with this very short sentence: “Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court”.³

Forty years later, with the adoption of the Treaty of Lisbon, which came into force on 1 December 2009, fundamental rights are part of primary law. The achievement has been remarkable if we consider the very beginning of the process. It is not an exaggeration to say that the Court with its jurisprudence has been the driving force and the source of inspiration for this achievement.

1) Fundamental rights in the Union law: historical overview

Let us recall this long process through the jurisprudence of the Court. Soon after the *Stauder* judgement, the Court delivered in December 1970 the judgement in the *Internationale Handelsgesellschaft* case in which it went a step further making explicit reference to its source of inspiration. I quote: “In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community”.⁴

A formula was thus established on the basis of which human rights could be protected within the judicial order of the European community. But this formula was not yet complete. The missing element was added less than four years later with the judgement of the Court in the *Nold* case. The Court repeated the statement in the *Internationale Handelsgesellschaft* case and went beyond by adding: “Similarly, international Treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law”.⁵

¹ This speech was given on the occasion of a symposium organised by the Presidency of the Council together with the College of Europe and the Cyprus Bar Association, on 16 November 2012. All views expressed are strictly personal. The oral character of the text has been kept.

² Reference is made to the founding treaty of the European Economic Community (EEC).

³ Judgment of 12 November 1969, *Stauder*, case 29/69, ECR 419 (paragraph 7).

⁴ Judgment of 17 December 1970, *Internationale Handelsgesellschaft*, case 11/70, ECR 1125 (paragraph 4).

⁵ Judgment of 14 May 1974, *Nold KG v. Commission*, case 4/73, ECR 491 (paragraph 13).

The most important treaty in this respect is the European Convention for the protection of Human Rights and Fundamental freedoms (the “European Convention”). The Court did not make any specific reference to this Convention in the *Nold* case but took it into consideration in its case-law one year later.⁶

The abovementioned case-law of the Court of Justice was “integrated” in the Treaty of Maastricht, signed on 7 February 1992. Article 6 (ex-Article F) of this Treaty stated: “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law”.

This Treaty placed its emphasis on the European Convention and not on international treaties and conventions in general. That was the result of a long jurisprudential practice in which special reference was made to the European Convention. Indeed, the Court drew inspiration and made special reference to the said Convention for the first time in its judgement in the *Rutili* case in 1975.⁷

The next major step in the long process towards the Treaty of Lisbon was the solemn proclamation of the Charter in 2000 by the European Parliament, the Council of Ministers and the European Commission.⁸ In 2000, the Charter had no legal force but since the Treaty of Lisbon, it has the same legal value as the EU treaties⁹ and is a legally binding document. We must acknowledge that the rights of the Charter were not new. A great number of its articles correspond to rights and principles contained in the treaties or in the case-law of the Court of Justice as underlined in the Explanations relating to the Charter.¹⁰ For this reason, we could not see the Charter as a revolutionary text but it allowed the EU citizens to clearly identify their rights. In this respect, the Charter emphasizes in its preamble that “It is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter”. It is also appropriate to underline that the Charter goes beyond the European Convention and recognizes some rights which are not expressly listed in the European Convention (e.g. rights of the elderly and right of access to health care).

2) The Charter in the case-law of the Court of Justice

It should be noted that the number of cases in which the Court has mentioned the Charter in its reasoning has significantly increased after the Treaty of Lisbon. I will give you some figures in order to understand the impact of the new legal status of the Charter on the work of the Court of Justice.

Taking into account only those cases in which the Charter is mentioned in the reasoning of the Court:

- for a period of 9 years following the proclamation of the Charter in Nice, between December 2000 and November 2009: 12 judgments and 2 orders referred to articles of the Charter and

⁶ Judgment of 28 October 1975, *Rutili*, case 36/75, ECR 1219.

⁷ *Ibid.*

⁸ The Charter was drafted by a convention composed of 62 members, including members of the European Parliament and representatives of the heads of government.

⁹ Article 6 TUE.

¹⁰ See Articles 11, paragraph 2, 15, 16, 17, 20, 41, 45, 49, paragraph 3, 50, 51 and 52 OJEU, (2007/C 303/02), these explanations constitute an important tool to clarify the provisions of the Charter.

- for a period of 3 years following the entry into force of the Treaty of Lisbon, between December 2009 and October 2012: the Court of Justice mentioned the Charter in its reasoning in 92 judgments, 24 orders and 1 decision of review.¹¹ These figures confirm what my colleague Allan Rosas has recently underlined stating that the Charter holds a prominent position in the EU legal system and that its application has become a matter of daily business with the entry into force of the Treaty of Lisbon.¹²

It has to be noted that there has been an evolution in the interpretative methods employed by the Court in the cases relating to fundamental rights showing that the Charter has progressively found its place in the case-law of the Court. After the proclamation of the Charter in 2000, the Court maintained its previous jurisprudence referring to the general principles of law without mentioning the Charter.¹³ It was not until the judgment in case *Parliament v. Council* of 27 June 2006, relating to the Directive of 2003 on the right to family reunification,¹⁴ that the Court mentioned the Charter in its reasoning. The Court analysed the rules of law under which the Directive's legality could be reviewed and stated: "While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm 'rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe [...] and the case-law of the Court and of the European Court of Human Rights'".¹⁵ After this statement in the judgment *Parliament v. Council*, the Court continued to use the concept of general principles of law in fundamental rights issues and, in most cases, specified that these rights were "reaffirmed" by the Charter.¹⁶

In January 2010, in the *Kücükdeveci* case, the Court underlined for the first time the new legal status of the Charter, stating that "the Charter of Fundamental Rights of the European Union is to have the same legal value as the Treaties" and referred to Article 21 of the charter as regards non-discrimination on grounds of age.¹⁷ The treaty of Lisbon did not disrupt fundamental rights in their substance. In that respect, in two judgments of 3 May 2012 in which Article 47 of the Charter was invoked, the Court ruled that, before the entry into force of the Treaty of Lisbon, in several cases, the right to a fair trial, as enshrined, notably, in Article 6 of the European Convention,

¹¹ This analysis covers the case-law of the Court between 7 December 2000 and 31 October 2012 and only takes into consideration cases where reference is made to the Charter in the Court's reply and not only in the summary of the observations submitted to the Court.

¹² Allan Rosas and Heidi Kaila, « L'application de la charte des droits fondamentaux de l'Union européenne par la Cour de justice: un premier bilan », *Il diritto dell'unione europea*, Anno XVI Fasc. 1, 2011.

¹³ See judgment of 12 June 2003, *Schmidberger*, case C-112/00, ECR I-5659 (paragraph 71), judgment of 1 April 2004, *Commission v. Jégo-Quéré*, case C-263/02 P, ECR I-03425 (paragraph 29) and judgment of 12 May 2005, *Regione autonoma Friuli-Venezia Giulia et ERSA*, case C-347/03, ECR I-3785 (paragraphs 119 et 120).

¹⁴ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p.12).

¹⁵ Judgment of 27 June 2006, *Parliament v. Council*, case C-540/03, ECR I-5769 (paragraph 38).

¹⁶ Judgment of 13 March 2007, *Unibet*, case C-432/05, ECR I-2271 (paragraph 37), judgment of 18 December 2007, *Laval un Partneri*, case C-341/05, ECR I-11767 (paragraph 91) and judgment of 16 July 2009, *Der Grüne Punkt - Duales System Deutschland GmbH v. Commission of the European Communities*, case C-385/07 P, ECR I-6155 (paragraphs 178 and 179).

¹⁷ Judgment of 19 January 2010, *Kücükdeveci*, case C-555/07, ECR I-365 (paragraph 22).

was already a fundamental right that the European Union respected as a general principle under Article 6, paragraph 2, EU.¹⁸ Nevertheless, from the Treaty of Lisbon, the Charter, which was used as an added value in the reasoning of the Court, has become a “reference text and a starting point” when the Court has to consider issues concerning EU fundamental rights.¹⁹

It is also important to add that the Treaty of Lisbon has preserved the use of general principles of EU law for the protection of fundamental rights, which would eventually allow the Court of Justice, if need be, to integrate new rights which are not written in the Charter but which would correspond to changes in society and would be established in the Member States. In other words, the Court has still the possibility to intervene in the development of fundamental rights even though these rights are set out in a legally binding document.

3) The balance between the 3 systems of protection of fundamental rights in the EU

The protection of fundamental rights in the EU is guaranteed by three levels of jurisdiction: the Court of Justice of the European Union, the European Court of Human Rights and the national courts (more specifically the courts of last resort). According to the Treaty, the Court has three main sources of inspiration as regards the protection of fundamental rights within the Union legal order: the Charter, the Convention and the Constitutional traditions common to the Member States.

Article 6 TEU gives the Court of Justice all the elements to be considered in interpreting the provisions of the Charter. Indeed, its first paragraph provides, firstly, that “The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties” and, secondly, that these provisions “shall be interpreted in accordance with the [...] provisions [...] of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions”.²⁰ Thus, the interpretation of the Charter requires the Court to take into consideration several parameters such as the constitutional traditions common to the member States and the national laws and practices as specified in the Charter, the Convention for the Protection of Human Rights and Fundamental freedoms, the case-law of the Court of Strasbourg as well as the Explanations relating to the Charter.

a) The relationship between the ECJ and the Member States: the application of Article 51 of the Charter

According to Article 51(1) of the Charter, its provisions are firstly addressed to the institutions, bodies, offices and agencies of the Union which have to respect the provisions of the Charter when performing their functions and whose authority is limited accordingly. A judgment of the Court of 19 July 2012, *Parliament v. Council*, in

¹⁸ Judgments of 3 May 2012, *Legris Industries v. Commission*, C-289/11 P and *Comap v. Commission*, C-290/11 P, not yet published.

¹⁹ Joint communication from Presidents Costa and Skouris dated January 24, 2011. See judgment of 9 November 2010, *Volker und Markus Schecke*, case C-92/09 and 93/09, ECR I-11063: this judgment illustrates the mentioned evolution and more recently, judgment of 19 July 2012, *Dülger*, case C-451/11, not yet published (paragraph 53).

²⁰ A. Arnall, “The European Court of Justice after Lisbon”, in *The Treaty of Lisbon and the Future of European law and Policy* edited by M. Trybus and L. Rubini, pp. 49-50.

which the European Parliament asked the Court to annul a Council Regulation referred to this duty imposed on all the institutions to respect fundamental rights.²¹

As regards the Member States, when the Charter was drafted, one of the main questions was to determine how the Charter could apply to them. The answer is to be found in Article 51 which states that this text is addressed to the Member States “only when they are implementing Union law”. It must also be noted that Article 51(2) of the Charter states that “The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the treaties”.²² Indeed, Member States apply the provisions of the Charter only when they are implementing Union law but their institutions, bodies, offices or organs are bound and their authority is also limited by the provisions of their own constitutions when applying provisions of their national legislation and they are ultimately subject to the control under the provisions of the European Convention.

Are the terms “only when they are implementing Union law” so clear? In the Treaty and the Charter itself, there are provisions whose purpose is to delimit the application of the Charter. In this respect, in accordance with Article 6(1) TEU, the rights, freedoms and principles in the Charter shall be interpreted with due regard to the Explanations relating to it. In this respect, Article 52(7) of the Charter states that those “explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States”.

In order to clarify the field of application of the Charter to the Member States, the explanations relating to Article 51 of the Charter refer to three important decisions of the Court; the cases *Wachauf*, *ERT* and *Annibaldi*. It is then stated that: “As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law”.

Two further points need to be made with reference to the said explanations. The term “Member States” in Article 51 covers not only the central authority but also regional and local bodies as well as public organisations. The term “when implementing Union law” covers all situations independently of the fact that a Member State fulfils an obligation under the Treaties or under secondary Union law.

As underlined by my colleague Koen Lenaerts in a recent contribution, we “may distinguish two different types of obligations that EU law imposes on the Member States, namely (1) EU obligations that require a Member State to take action (as in the situations in *Wachauf* [...]) and (2) EU obligations that must be complied with when a Member State derogates from EU law (as the situation in *ERT* reveals). Conversely, where EU law imposes no obligation on the Member States, the Charter simply does not apply (as the example of *Annibaldi* demonstrates)”.²³

In the *Wachauf* case,²⁴ the Court stated that Member States, when implementing Community rules, must, as far as possible, apply those rules in accordance with the

²¹ Judgment of 19 July 2012, *Parliament v. Council*, case C130/10, not yet published (paragraph 83).

²² Article 51(2) repeats in essence the statement made in Article 6 (1) TEU.

²³ Koen Lenaerts, “The Court of Justice of the European Union and the Protection of fundamental rights”, *Polish yearbook of international law*, 2011.

²⁴ Judgment of 13 July 1989, *Wachauf*, case 5/88, ECR 2609.

requirements of the protection of fundamental rights in the Community legal order. In other words, the Charter applies to the Member States when they are acting as part of the decentralized administration of the Union and applying or implementing a regulation, transposing a directive or executing a decision of the Union or a judgment of the Court.²⁵

In the *ERT* case²⁶, the Court went further by holding that it could also review a national rule which may restrict a fundamental freedom on grounds of public order, public security or public health, adding that such a rule must be interpreted in the light of the general principles of law and in particular of fundamental rights whose observance is ensured by the Court.

The Court being coherent with its previous jurisprudence and in an effort to interpret the Charter in a way which does not conflict with the above explanations has so far interpreted the provisions of the Treaty and of the Charter in a prudent manner as to avoid any possibility of encroaching on the competences of the Member States when applying their national system of protection of fundamental rights. The interpretation of Article 51 of the Charter by the Court has not been disrupted by the Treaty of Lisbon. I will try to clarify the above statement by making reference to the relevant case-law of the Court.

The first judgment of the Court to quote Article 51 of the Charter after Lisbon is the *McB* case dealt with under the urgent procedure.²⁷ The Court was asked by the Irish court to interpret Regulation No 2201/2003 containing provisions against the wrongful removal or retention of a child and more precisely whether, in the case of a father of a child who was not married to the mother, a Member State is precluded from requiring by its law that the father obtains a court order granting him custody in order to qualify as having “custody rights” rendering the removal of the child from its country of residence wrongful. The Court replied that the national law was not contrary to the provisions of the regulation and in fact that the regulation renders the child's removal wrongful dependent on the existence of rights of custody. But the Court was also asked whether this interpretation was affected by Article 7 of the Charter. The Court having reminded the provisions of Article 51 (1) of the Charter, concluded that the Charter should be taken into consideration solely for the purpose of interpreting the Regulation concerned and there should be no assessment of national law as such.

In the *Gueye* case whose judgement was delivered on 15 September 2011, the Court followed the reasoning which was adopted in the *McB* case. The Court ruled that the secondary Union legislation in issue should have been interpreted in a way which would guarantee the respect for fundamental rights. The national law, however, according to which the Member State exercised its choice as to the criminal measures which it had to take in order to comply with the Union secondary legislation did not, per se, fall within the scope of the said secondary legislation and cannot be assessed in the light of the Charter.²⁸

²⁵ T. von Danwitz and K. Paraschas, “A fresh start for the Charter: fundamental questions on the application of the European charter of fundamental rights”, *Fordham International Law Journal*, Vol. 35, 2012.

²⁶ Judgment of 18 June 1991, *ERT*, case C-260/89, ECR I-2925.

²⁷ Judgment of 5 October 2010, *McB.*, case C-400/10 PPU, ECR I-8965.

²⁸ Judgment of 15 September 2011, *Gueye and Salmerón Sánchez*, joined cases C-483/09 and C-1/10 (paragraph 69).

In the *N.S.* judgment,²⁹ which was rendered on 21 December 2011, the Court was asked to decide whether the Charter was applicable to a national decision adopted by a Member State on the basis of a provision of the so-called Dublin Regulation according to which a Member State is in principle free to decide whether to examine an asylum claim which is not its responsibility under the criteria set out in Chapter III of the said Regulation. More precisely, the question was whether having the Member State decided to make use of that provision it should comply with specific provisions of the Charter. The Court replied in the affirmative pointing out that “a Member State which exercises that discretionary power must be considered as implementing Union law within the meaning of Article 51(1) of the Charter”. It could be argued here that the Court gave a broad interpretation of the Charter provision, however, it must be noticed that the discretionary power enjoyed by the Member State in this particular case must comply with other provisions of Union law.

Beyond the cases which fall within the *Wachauf* and *ERT* jurisprudence, the Charter does not apply to Member States although acting within the scope of the powers of the EU when there is no specific link between the national measure and Union Law. This is the conclusion drawn from the *Annibaldi* case, which was chosen by the authors of the Explanations as a case illustrating the situations where Union law does not impose an obligation and therefore the compatibility of a national measure with fundamental rights will not be considered under Union law.

In the *Annibaldi* case,³⁰ the court had to consider whether national legislation, such as an Italian regional law which established a nature and archaeological park in order to protect and enhance the value of the environment and the cultural heritage of the area concerned, fell within the scope of Community law. The Court having recognised that Union law (community law at that time) pursues objectives in the fields of the environment, culture and agriculture proceeded to note that this regional law did not implement a provision of Union law in any of those three fields but was general in character. In such circumstances, the Court ruled that it had no jurisdiction to answer the questions referred to by the Italian court.³¹

Since the entry into force of the Treaty of Lisbon, the Court has applied the *Annibaldi* jurisprudence in a significant number of cases. The Court has recently analysed its competence regarding Article 51 of the Charter in a certain number of orders. In doing so, it has repeatedly stated that the limitation concerning the application of the Charter to the Member States as provided for in the said Article “has not been amended by the entry into force of the Treaty of Lisbon on 1 December 2009, since when, under Article 6(1) EU, the Charter has the same legal value as the Treaties” adding that “That article states that the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.”³² Furthermore, several judgments in the line of *Annibaldi* jurisprudence were delivered.

The first example is the *Dereci* judgement of 15 November 2011.³³ The applicant before the national court, Mr. Dereci, was a third country national who applied for a residence permit in Austria based on a derivative right of residence on the grounds that his children had the status of European citizens being Austrian nationals. These

²⁹ Judgment of 21 December 2011, *N.S.*, joined cases C-411/10 and C-493/10.

³⁰ Judgment of 18 December 1997, *Annibaldi*, case C-309/96, ECR I-7493.

³¹ See *Annibaldi*, paragraphs 21 and 22.

³² Order of the 1 March 2011, *Chartry*, case C-457/09. See also orders *Rossius et Collard* (C-267/10), *Vino* (C-161/11), *Pagnoul* (C-314/10), *Lebrun et Howet* (C-538/10), *Corpui Național al Polițiștilor* (C-434/11), *Boncea e.a.* (C-483/11) which contain the same statement.

³³ Judgment of 15 November 2011, *Dereci e.a.*, case C-256/11, not yet published.

children had never left Austria. First, the Court answered that Directives 2003/86 and 2004/38 are not applicable to third country nationals who apply for the right of residence in order to join their European Union citizen family members who have never exercised their right to free movement and who have always resided in the Member State of which they are nationals. Secondly, the Court observed that a refusal to grant Mr. Dereci a residence permit did not deprive his minor children «of a genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union» in so far as the contested decision did not oblige his children «to leave the territory of the Union as a whole». The said decision did not fall within the scope of the Treaty provision on EU citizenship and therefore Austria was not implementing Union law when deciding not to grant Mr. Dereci a residence permit and therefore the Court lacked jurisdiction to control whether such a refusal was compatible with Article 7 of the Charter.

The second judgement which I would like to mention in that regard is a very recent one delivered one week ago on 8 November: the *Iida* case. In this case, the Court fully applied its *Annibaldi and Dereci* jurisprudence. First, the Court ruled that Mr. Iida as a national of a third country could not take advantage of certain rights accorded by the directive 2004/38 to persons who are members of a family of a citizen of the Union who has exercised his right of freedom of movement. Such rights can only be accorded to a third country national only in the host country to which the citizen of the Union has moved. In this case, Mr. Iida remained in Germany, and did not join his wife and daughter, both of German nationality, to Austria. Consequently, he could not benefit of the rights the relevant directive could have accorded to him. His situation could not have changed by the application of Articles 7 and 24 of the Charter. Indeed, the Court held that the refusal of the national authorities in Germany to grant Mr. Iida a residence permit could have been a matter to be regulated by the Union law in the sense of Article 51 of the Charter if the case of Mr. Iida was caught by a provision of Union law. This was not, however, the case provided that the applicant could not fulfil the conditions required for granting him such a permit according to Directive 2004/38. Moreover, he did not apply for a permit on the basis of Directive 2003/109 and there was no other link with the provisions of EU law on citizenship.³⁴

It is appropriate here to underline that where there is no link with the Union law, Member States can act according to their constitutional provisions and in conformity with the European Convention and the jurisprudence of the European Court of Human Rights. The Court, in the *Dereci* case, expressly mentioned this possibility to the referring court with the followings words: “if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR”.³⁵

Finally, I would like to draw your attention on a pending case, *Åkerberg Fransson*, in which the referring court asks for the interpretation of the “*ne bis in idem*” principle as laid down in Article 4 of Additional Protocol No 7 to the ECHR and Article 50 of the Charter. This case is interesting in two respects; it deals with the application of Article 51 of the Charter and it also concerns the relationship between the national legal system and those of the EU and the Convention.³⁶

³⁴ Judgment of 8 November 2012, *Iida*, case C-40/11, not yet published.

³⁵ Judgment *Dereci*, paragraph 72.

³⁶ Pending case C-617/10, *Åkerberg Fransson*.

And with this remark, we are led to examine the relationship existing between the Court of Strasbourg and the Court of Luxembourg and consequently between the charter and the European Convention.

b) The relationship between the ECJ and the European Court of Human Rights

The new status of the Charter was not the only important step brought by the Treaty of Lisbon concerning the protection of fundamental rights. This Treaty established, in Article 6, paragraph 2 TEU, a legal basis for the EU's accession to the European Convention to which all the Member States are parties. The conditions of this accession are not yet definitely established so I will not make any comments on that but I will rather focus on the current relationship between the two systems.

The European Convention has always been a reference text for the Court of Justice which drew inspiration and made special reference to the said Convention since the *Rutili* case in 1975.³⁷ Three years after Lisbon, the Court continues to associate the European Convention to the Charter in its judgments.³⁸ Article 52 of the Charter itself underlined that the Charter is considered as a minimum standard in the protection of fundamental rights in the EU and makes reference to the Convention providing that when in the Charter there is reference to rights which correspond to rights guaranteed by the Convention their meaning and scope shall be the same as those laid down by the Convention.

A long judicial dialogue has been established between the two Courts. Indeed, the relationship is reciprocal as, over the years, the Luxembourg Court often referred to the case-law of the Strasbourg Court³⁹ and this latter also cited the jurisprudence of the Court of Luxembourg. I do not intend to make a thorough analysis of the relevant case-law of the two Courts. I will only make a short reference to the extent to which that can explain their relationship.

The Court of Justice of the European Union has referred to the jurisprudence of the Court of Strasbourg in a great number of cases as an aid to interpret EU law. For example, in a certain number of competition cases, the Court, in deciding on the protection of the rights of undertakings under investigation, found inspiration and made direct reference to the jurisprudence of the European Court of Human Rights. I will give you two examples.

The first one is the *Hüls* case of 1999 in which reference was made to two judgements of the Court of Human Rights in order to conclude that the presumption of innocence as set out in Article 6 (2) of the European Convention applies to procedures relating to infringements of Articles 81 and 82 EC (now Articles 101 and 102 TFUE) that may result in the imposition of fines or periodic penalty payments. The Court of Luxembourg took into consideration, first, the nature of the infringement and, second, the nature and degree of severity of the ensuing penalties. In the *Hüls* case, it stressed the fact that the presumption of innocence is one of the fundamental rights which are protected in the Community legal order.⁴⁰

³⁷ See footnote 6.

³⁸ See judgment of 5 September 2012, *Y and Z*, joined cases C-71/11 and C-99/11, not yet published (paragraph 61).

³⁹ The Court of Justice explicitly mentioned for the first time the case law of the Strasbourg Court in the case of *P/S and Cornwall County Council*, 30 April 1996 (Case C-13/94, ECR I-2143).

⁴⁰ Judgment of 8 July 1999, *Hüls v. Commission*, case C-199/92 P, ECR I-4287 (paragraph 150).

The second one is the *LVM* case of 2002, concerning the privilege against self-incrimination. The Court observed that since one of its previous judgment (*Orkem*), there had been further developments in the case-law of the European Court of Human Rights (thus referring to the recognition of the right to remain silent in criminal cases) which the Community courts must have taken into account when interpreting the fundamental rights.⁴¹

Three years after Lisbon, the Court of Justice continues to refer to the Strasbourg Court's case-law. In the *G* case dated 15 March 2012, the Court justified its answer by holding that: "It is apparent, furthermore, from the case-law of the European Court of Human Rights that the right to a fair trial, guaranteed by Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, which corresponds to the second paragraph of Article 47 of the Charter, does not preclude 'summons by public notice', provided that the rights of those concerned are properly protected."⁴²

As I have already mentioned, the Court in Strasbourg has also made reference to the jurisprudence of the Court in Luxembourg although in a much fewer cases. I will confine myself in making reference to a recent judgement in the *Sergey Zolotukhin v. Russia* case of 10 February 2009 where the Court decided to interpret the concept "*ne bis in idem*" in the light of the case-law of the Court of Luxembourg.⁴³

There is, however, a second group of cases of the Court in Strasbourg to which I would like to make reference in brief and which give another dimension to the existing relations between the two Courts, insofar as the Strasbourg Court in a way reviewed EU law. I will cite only a few examples. In 1996, in the *Cantoni v. France* case, the Strasbourg Court examined a provision in the French Public Health Code and said that the fact that it was based almost word for word on the European Community Directive did not remove it from the ambit of Article 7 of the European Convention entitled "No punishment without law".⁴⁴ In 1999, the same Court, ruled in the case *Matthews v. United Kingdom* that the exclusion of UK nationals residing in Gibraltar from direct elections to the European Parliament by virtue of a European Community Act was conflicting with the applicant's right to vote as guaranteed by the European Convention.⁴⁵

Finally, I will make reference to the well known *Bosphorus* case delivered in 2005 in which a Turkish airline charter company brought an action against Ireland.⁴⁶ The Strasbourg Court was asked in essence whether it had jurisdiction to review the compatibility with the European Convention of a national measure which executed a binding text of EU secondary law, which means that national authorities had no margin of discretion. The Court held that it had jurisdiction and accepted to proceed

⁴¹ Judgment of 15 October 2002, *Limburgse Vinyl Maatschappij e.a. v. Commission*, joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, ECR I-8375 (paragraphs 273 to 275): the Court of Justice stated however in that regard that those developments were not such as to put in question the statements of principle in *Orkem*.

⁴² Judgment of 15 March 2012, *G*, case C-292/10, not yet published (paragraph 58): in this case, the ECJ referred to a judgment of the European Court of Human Rights in *Nunes Dias v. Portugal* in 2003. See also judgments of 5 October 2010, *McB.*, case C-400/10 PPU, ECR I-8965 (paragraph 53), of 22 December 2010, *Sayn-Wittgenstein*, C-208/09, ECR I-13693 (paragraph 52), of 21 December 2011, *X*, C-507/10, not yet published (paragraph 43).

⁴³ Judgment of the ECtHR of 10 February 2009, *Sergey Zolotukhin v. Russia*, application no. 14939/03.

⁴⁴ Judgment of the ECtHR of 11 November 1996, *Cantoni v. France*, application no. 17862/91.

⁴⁵ Judgment of the ECtHR of 18 February 1999, *Matthews v. the United Kingdom*, application no. 24833/94.

⁴⁶ Judgment of the ECtHR of 30 June 2005, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, application no.45036/98.

with the interpretation of EU law and held that the protection of fundamental rights by EU law could be considered to be “equivalent” to that of the Convention recognising therefore a “presumption of equivalent protection” which could only be rebutted by a “manifest deficiency” in this protection on a case-by-case analysis.

Most of the academic writers underlined the inevitable end of the *Bosphorus* approach with the accession of the EU to the European Convention but others think that the *Bosphorus* jurisprudence will be maintained since the Strasbourg Court will have to take into account the specificity of the EU, as an “international organisation”, and the nature of its acts. It will be interesting to see how the Strasbourg Court will review EU acts after the accession of the EU to the European Convention.⁴⁷

That was more or less the state of things between the two Courts before the entry into force of the Treaty of Lisbon by virtue of which the Charter has obtained a binding legal effect. Is the Luxembourg Court aspiring to become a human rights Court? The answer is straightforward and is clearly a negative one. By rendering the Charter a legally binding document, the Treaty did not intend to make the Union a “human rights organisation” nor the Court a second European Court of Human Rights. This conclusion can be easily drawn from the jurisprudence of the Court which I have tried to analyse.

Conclusion

I will conclude with the following remarks.

First, I would like to underline a few basic elements concerning the European Union legal order which are very important in order to better understand the role of fundamental rights within the said legal order but also that of the Court of the EU. It is important to bear in mind that EU law has always been meant to be a complete legal order based on a solid construction of fundamentals or principles and even if it is founded on the principle of conferral from the Member States it has developed as a “supranational legal order”. It is also important to underline the role of the Court of Justice of the EU as the only institution which in an authoritative way can interpret the EU law and impose its respect and implementation and that it was through the jurisprudence of the Court that the supranational legal order of the Union has been consolidated. It was then inevitable that the Court would “take the protection of rights in its own hands and to the full extent necessary: First and foremost in its own preserve or domain; secondly, [...] in that part of the national legal order directly determined by EU law”.⁴⁸

Indeed, the protection of fundamental rights has always had a special place in the case-law of the Court of Justice. As I mentioned before, it is the Court itself which introduced this notion in the EU legal order, which finally led to the adoption of the Charter. The Treaty of Lisbon brought two novelties in the field of fundamental rights: the incorporation of the Charter in EU primary law and a provision allowing the accession of the EU to the European Convention.

We can affirm that the Charter is now the “reference text and the starting point”⁴⁹ when the Court of Justice deals with a matter relating to fundamental rights. Since the entry into force of the Lisbon treaty, the Court of Justice has used this legally

⁴⁷ See contribution of P. Mahoney, “From Strasbourg to Luxembourg and back: speculating about human rights protection in the European Union after the Treaty of Lisbon”, *Human Rights Law Journal*, Vol. 31, No. 2-6, 2011.

⁴⁸ P. Cruz Villalón, “Rights in Europe: the crowded house”, closing lecture presented at the Annual Lecture of the Centre of European studies at King’s College London, 2011.

⁴⁹ See footnote 19.

binding text in a substantial number of cases. It is also important to add that, even if the Charter can be seen as the major legal text used by the Court in order to ensure the respect of fundamental rights in the EU, many other sources are still at the Court's disposal.

My assessment concerning the application of the Charter to the Member States is twofold: first, the Treaty by adopting the Charter did not aim at promoting the harmonisation of the systems of protection of fundamental rights of Member States but it rather aimed at eliminating the possibility that Member States in implementing Union law would apply different standards of protection of fundamental rights; second, we observe that the Court has maintained a prudent approach by applying Article 51 of the Charter in order to avoid any encroachment on the competences of the Member States.

As regards the European Convention, we can deduce from my previous remarks that the Court of Justice is very concerned with the consistency of its judgments with the case-law of the Strasbourg Court. Besides, the text of the Charter itself ensures the coherence between the rights it guarantees and those contained in the European Convention. In my view, this suggests that the accession of the EU to the Convention can be seen as a "translation" of the existing dialogue between the two Courts before and after the entry into force of the Treaty of Lisbon.