SAFEGUARD RULES IN THE EUROPEAN LEGAL ORDER: 
THE RELATIONSHIP BETWEEN ARTICLE 53 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 
AND ARTICLE 53 OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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1. Introduction

Dovetailing the human rights protection of the European Convention on Human Rights (hereafter: ECHR) with the Charter of Fundamental Rights of the European Union (hereafter: Charter) is high on the agenda of Europe. Still, so far one avenue has rarely been explored: the safeguard rule that the ECHR in Article 53 and the Charter in Article 53 have in common. This contribution draws the attention to the effect of these two provisions and their mutual relation. Both provisions concern the concurrence of human rights or freedoms which are similar in object but not identically defined and which have been laid down in different legal instruments. For such situations safeguard rules provide that the most protective elements of comparable fundamental rights provisions are to prevail irrespective of their rank in the legal hierarchy.

The safeguard rules in Article 53 of the ECHR and Article 53 of the Charter have rarely been applied. Only in a few instances did the Strasbourg Court take into account Article 53 of the ECHR or its predecessor, Article 60. The Charter has been in force since 1 December 2009, but it was not until 26 February 2013, in Melloni, that the Court of Justice of the European Union (hereafter: Court of Justice) applied Article 53 of the Charter for the first time.¹ In Melloni, the Spanish Constitutional Court asked whether Article 53 of the Charter allows the Member States to apply a higher national standard of protection of human rights in situations that fall within the scope of EU law. The Court of Justice answered that in those situations national authorities and courts remain free to apply national standards of protection of human rights, provided that the primacy, unity and effectiveness of EU law are not thereby compromised.

In its Opinion 2/13 of 18 December 2014 on the EU’s accession to the ECHR the Court of Justice faulted the draft accession agreement for not containing a provision regarding the relationship between Article 53 of the ECHR and Article 53 of the Charter.² To support that conclusion the Luxembourg Court referred to its judgment in Melloni. Opinion 2/13 thus not only confirms the interpretation of Article 53 of the Charter in Melloni, but, even more interestingly, also touches upon the relationship between the safeguard rule laid down in that provision and the safeguard rule in Article 53 of the ECHR.

The safeguard rule has also found expression in Article 5 of the Convention relating to the Status of Refugees, Articles 5(2) of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, Article 19(8) of the Constitution of the International Labour Organisation, Article 13 of the Convention on the Reduction of

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² CJEU, Grand Chamber, Case C-399/11, Melloni.
Statelessness, Article 1(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 23 of the Convention on Elimination of All Forms of Discrimination of Women, Article 4(4) of the Convention on the Rights of Persons with Disabilities, Article 32 of the European Social Charter, Article H of the Revised European Social Charter and Article 29 of the American Convention on Human Rights. This shows that the safeguard rule has become an essential element of human rights law.

The purpose of this contribution is to explore the safeguard rules in Article 53 of the ECHR and Article 53 of the Charter further. First of all, in paragraph 2 a preliminary comparison will be made between the similarities and differences between both provisions. The third and fourth paragraphs contain a brief overview of the Strasbourg Court’s case-law and the Luxembourg Court’s case-law regarding the safeguard rule. With that case-law in mind, we will elaborate the relationship between Article 53 of the ECHR and Article 53 of the Charter in the later paragraphs.

2. A Preliminary Comparison

Although Article 53 of the ECHR and Article 53 of the Charter are roughly similar in tenor, there is a major difference between both provisions, since the Charter applies to a variety of rights that are not only ‘classical’ ones, but also belong to the social and economic sphere. To begin with, some observations are in place about the provisions’ preparatory works, their scope and, especially, about the reference in Article 53 of the Charter to national constitutions as a source of fundamental rights. This is followed by a preliminary comparison of both provisions.

2.1 Article 53 of the ECHR

Article 53 of the ECHR reads: ‘Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.’

The travaux préparatoires of Article 53 of the ECHR are frugal and do not clarify its purport. During the drafting of Article 53 underwent only some minor changes in the wording. When in 1998, through the 11th Protocol, all Convention provisions got a heading, Article 53 was headed ‘Safeguard for existing rights’ without any explanation. The word ‘existing’ may suggest that only fundamental rights laid down in older legal instruments have to be safeguarded and that newer rights of a higher standard that came into force after the Convention would fall outside the scope of Article 53. This is unlikely, though: it reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States.

2.2 Article 53 of the Charter

Article 53 of the Charter reads: ‘Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.’

Article 6(1) TEU provides that the Charter ‘shall have the same legal value as the EU treaties’ and further provides that the Charter should be interpreted ‘with due regard to the explanations referred to in the Charter that set out the sources of those provisions’. These ‘Explanations relating to the Charter’ are in their own words ‘a valuable tool of interpretation’ to ‘understand the Charter provisions’ and ‘prepared and updated under the authority and responsibility of the Praesidium of the European Convention’ which drafted the Charter.

The Explanations contain little information about Article 53. They merely mention that this provision ‘is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law. Owing to its importance mention is made of the ECHR.’ The Charter’s preamble, by contrast, gives more hold. It ‘reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the rights to freedom of thought, conscience and religion, to freedom of expression, to freedom of assembly and of association, and to the right of everyone to participate in the conduct of public affairs at the national and local level…’


6 See with regard to a more progressive interpretation of existing constitutional provisions P. Ducoulombier, Les conflits de droits fondamentaux devant la Cour européenne des droits de l’homme, Brussels, Bruylant, 2011, § 453.

7 Literally ‘the headline is not the law’, meaning that in case of a discrepancy between a provision’s headline and its content the latter ought to prevail.

the European Convention for the Protection of Human Rights and (…) the case-law of the Court of Justice of the European Union and of the European Court of Human Rights'. These references to the principle of subsidiarity and to the Strasbourg Court's case-law clearly support the legal obligation to respect domestic fundamental rights and those of the Convention, but they are silent with regard to their exact mutual ranking.

Article 53 belongs to the Charter's Title VII, entitled 'General Principles Governing the Interpretation and Application of the Charter'. Here, an important if not ominous distinction has been made. The Explanations with respect to Article 52(5) indicate that 'principles', in contrast to 'rights' mentioned elsewhere in Article 52, 'do not (...) give rise to direct claims for positive action by the Union's institutions or Member States authorities'.

Apparently, this is meant as a reassurance to Member States fearing that in particular the Charter's fundamental social rights would be justiciable; a reassurance even laid down for Poland and the United Kingdom in a special protocol. Generally, the Charter's drafters insisted that the Charter should not create additional obligations for the Member States. In the same vein it has been stipulated that such principles need to be implemented by legislative or executive acts of the Union or the Member States before the courts can apply them. Still, it seems most unlikely that the distinction between principles and rights is also relevant to Article 53. That provision does not require any implementation and can be applied equally to principles as well as rights. It does not change their nature but merely determines their rank.

2.3 The Two Provisions Compared

Article 53 of the ECHR and Article 53 of the Charter differ in wording mainly in two respects. First, the latter contains the proviso 'in their respective fields of application'. This underscores that the Charter's effect is limited to Union law and any implementing domestic law and that in this respect no changes of the existing distribution of powers or competencies among the Union's institutions and between the Union and the Member States are intended. A second difference consists in the reference in Article 53 of the Charter to fundamental rights recognised in the 'Member States' constitutions'. Article 53 of the ECHR refers to fundamental rights 'under the laws of any High Contracting Party'. The latter is considerably broader as it potentially extends priority to Acts of Parliament and delegated legislation as well.

Judging provisionally from their texts and contexts it seems evident that the safeguard provisions in the Charter and the Convention differ with regard to the range of the fundamental rights to which they apply, to the related domestic legal norms and to the manner in which they have to be interpreted.

3. The Strasbourg Court and the Safeguard Rule

3.1 General Features

This paragraph contains an overview of the Strasbourg Court's case-law on the safeguard rule. First of all, it should be noted that in principle neither the nature nor the status of the law is decisive for the Court's supervision; even constitutional provisions are subject to the Court's supervision. Once interpreting the Convention, the Strasbourg Court may take into account a more protective domestic or other international right, but the Court is not entitled to enforce the domestic or other international norm. Besides, the Court usually refrains from expressing an opinion about the interpretation of the domestic norm, because it refuses to act as a court of appeal or a so-called 'fourth instance'. Applications claiming a more favourable interpretation of domestic law are frequently declared inadmissible ratione materiae. On other occasions the Court simply follows the national authorities' interpretation. This explains why there are so few cases reported in which the individual applicant invokes Article 53.

It should also be kept in mind that the Convention standards are not hard and fast rules themselves. The Convention's supervisory mechanism allows for – small – negative deviations. Trivial cases may be declared inadmissible and an applicant may fail to qualify as a 'victim' in the sense of Article 34 ECHR.

Further and more important deviations may occur when the Strasbourg Court decides to examine a dispute under another right than the right invoked by one or both of the parties. By virtue of the jura novit curia principle the Court considers itself master of the characterisation of the facts. It may, for example, prefer Article 8 (the right to respect for private and family life) to Article 3 (prohibition of torture) or substitute a material right for a procedural right even if these provisions vary considerably in awarded protection.

3.2 The ECHR and Domestic Law

Already in 1976, the Strasbourg Court emphasised that 'Article 53 ECHR never imposes lower Convention standards on Contracting States nor obligates them to limit the Convention rights and freedoms'. In 1998 it
added: ‘the Convention reinforces, in accordance with the principle of subsidiarity, the protection afforded at the national level, but never limits it (Article 60 of the Convention).’ Article 53 neither prevents the State from offering a better protection than the Convention nor requires the Court to keep the State to maintain that level of protection.22

Whenever the Court finds a Convention right to be more protective than the corresponding domestic fundamental right it is implied that the Convention is superior to domestic law. Although the Court usually stresses – somewhat obligatorily – its own role in materializing the ECHR as subsidiary to the role of the national authorities, this superiority is inherent in these judgments and usually accepted and faithfully complied with by most States found in default. Nowadays, most Contracting Parties recognise the Convention rights as directly applicable and justiciable within their legal order. It is hardly conceivable that this would not hold equally true for Article 53. Once applied the safeguard clause – so to speak – merges with the Convention right concerned.

An early case in which a Contracting State invoked Article 53 is Open Door and Dublin Well Woman v. Ireland.23 The case concerned the prohibition of abortion under Irish law, but was narrowed down in Strasbourg to Article 10 (freedom of expression), more specifically to the issue of imparting and receiving information in Ireland about abortion clinics abroad and to the question whether the rights of the unborn are included in the term ‘rights of others’ in the limitation clause of Article 10. The government, invoking Article 17 (abuse of fundamental rights) and Article 60 (now Article 53), had submitted ‘that Article 10 should not be interpreted in such a manner as to limit, destroy or derogate from the right to life of the unborn’. Although the right of the unborn is enshrined in the Irish Constitution, the Strasbourg Court did not follow the government. Neither did it deal with the alleged limitation under ‘the right of others’ as mentioned in paragraph 2 of Article 10, but opined that ‘it is not the interpretation of Article 10 but the position in Ireland as regards the implementation of the law that makes possible the continuance of the current level of abortions obtained by Irish women abroad’. Some dissenting judges referred to Article 53 but did not really clarify its function. They merely advanced that the rights of the unborn come under ‘the rights of others’ and that the Irish legislation offered a broader protection than the ECHR.24 A comparable picture presents Gustafsson v. Sweden,25 where the safeguard rule was invoked by Sweden and referred to in separate opinions, but the Court did not respond to the plea.26

The case-law on Article 6 about the term ‘civil rights and obligations’ is of particular interest. A first example is Okayav et al. v. Turkey, where the Strasbourg Court found that ‘the concept of “civil right” under Article 6 ECHR cannot be construed as limiting an enforceable right in domestic law within the meaning of Article 53.’27 Another example, Vilho Eskelinen et al. v. Finland,28 concerns a dispute involving civil servants. Here the Grand Chamber did not take a stance on the safeguard clause. It was a dissenting minority instead that admitted that ‘nothing prevents a high Contracting Party from recognising in its law freedoms or guarantees which go further than those set forth in the Convention’.29 In the eyes of the minority, however, the safeguard clause constitutes only a second-best solution; it warns that the line adopted in the instant judgment ‘encourages a dependent and variable, not to say uncertain, interpretation’. This criticism – although voiced by five dissenters – testifies to a remarkably negative view on the safeguard clause, since it focuses more on the clause’s danger for legal certainty than its potential contribution to diversity and pluralism.

Another example from the case-law on Article 6 presents Micallef v. Malta about injunction proceedings. The Court’s Fourth Section considered ‘that through its system of collective enforcement of the rights it establishes, the Convention reinforces, in accordance with the principle of subsidiarity, the protection afforded at national level..., but never limits it (Article 53 of the Convention). The Court does not countenance the view that human rights protection in any particular area should be weaker in Strasbourg than it is in domestic tribunals’.30 Then, the Court reiterated the above-cited conclusion reached in Okayav and found Article 6 to be applicable to injunction proceedings.

The case was referred to the Grand Chamber, which also concluded that Article 6 was applicable, but did so on other grounds. In view of a changing practice it deemed a change in its case-law necessary; it noted, in particular, that ‘many Contracting States face increasingly considerable backlog and overburdened justice systems leading to excessive length of ordinary proceedings’ and that in these circumstances ‘injunction proceedings will often be tantamount to a decision on the merits’.31 The difference in reasoning may explain why the Grand Chamber did not elaborate upon Article 53, despite the fact that not only the parties but also the intervening Czech government had explicitly mentioned the clause.32 Apparently, the Grand Chamber was led more than the Chamber by the desire to find a consensus among the Contracting States.33

Finally, a special technique can be mentioned here with a long tradition and used by the Strasbourg Court in regard to the relationship between Convention and domestic rights, although this technique is not based on Article 53. Delcourt v. Belgium is a case in point. The Strasbourg Court considered that ‘Article 6(1) of the Convention does not, it is true, compel the Contracting State to set up courts of appeal or of cassation. Nevertheless, a State which does institute such courts is required to ensure

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26 So Lisborg (supra note 8), p. 25, with respect to Gustafsson.
27 EurCourtHR 12 July 2005, Okayav v. Turkey, Case No. 36220/97, § 68.
30 EurCourtHR 15 January 2008, Micallefv. Malta, Case No. 17056/06, § 44.
31 EurCourtHR [GC] 15 October 2009, Micallef v. Malta, Case No. 17056/06, § 78, 30 HRLJ 274 at 280 (2009-2010).
32 Ibid., §§ 65, 69 and 73, 30 HRLJ 274 at 279, 280 (2009-2010).
33 See also Van de Heyning (supra note 4) p. 78, who concludes: ‘This case suggests that Art. 53 will most likely continue to play a limited role in the EurCourtHR jurisprudence’. 
that persons amenable to the law shall enjoy before these courts the fundamental guarantees contained in Article 6,\textsuperscript{34} In this manner the Court applied the higher domestic standard of – in this case – a more elaborate system of judicial organisation.

This overview of the relationship between the Convention and domestic law illustrates that the underlying value of the safeguard rule manifests itself in different contexts and is as such not being disputed. Still, Article 53 has been used neither frequently nor intensively. The Strasbourg Court, on the one hand, may consider and apply the provision \textit{ex officio} but, on the other hand, even if the rule is being invoked, the Court does not always feel obliged to apply it. The instances are rare in which the Court explicitly recognises a domestic law standard to be more protective than the Convention requires. Generally the safeguard rule tends to be applied far from systematically and – if applied at all – in anonymity.

\subsection{3.3 The ECHR in Relation to International Law, Including EU Law}

International norms also influence the Strasbourg Court’s case-law. Sometimes, they are a means for the interpretation of the ECHR\textsuperscript{35} or merely serve as a source of inspiration, as is illustrated in the above-mentioned judgment in \textit{Vilho Eskelinen}\textsuperscript{36} about the status of civil servants. In that judgment the Convention was mirrored to EU law, but the latter was not decisive. In other instances, the Court often plays down the differences between concurring norms by a reconciliatory or integrating interpretation.\textsuperscript{37}

In the rare instances of a reconciliation of the different norms not being feasible the Strasbourg Court tends to let the Convention prevail. Such was implied in \textit{Soering v. United Kingdom}\textsuperscript{38} at the expense of treaty rules on international cooperation in matters of criminal law, but the question was left undecided in a later case \textit{Picker v. Poland}.

Another illustration offers the interpretation of Article 3 (the ban on torture and inhuman treatment) as ‘absolute’,\textsuperscript{39} which certainly is stricter than Article 33 of the Refugee Convention containing an exception in paragraph 2 to the effect that the expulsion or return of an alien is permissible if he can be reasonably regarded as a danger to the security of the country in which he is or a danger to the community of that country. No reverse case has been reported in which the Court set aside a Convention right in favour of an external treaty right\textsuperscript{40} or overtly respected the latter as the better one.

For long the authorities in Strasbourg, the Commission and the Court, have been struggling with the special problem of Contracting States’ accountability under the Convention for acts of international organisations and for implementing measures and rules set by those organisations. In these situations, the Court usually employs the doctrine of ‘equivalent protection’. That doctrine – already developed by the European Commission\textsuperscript{41} – apparently reached maturity in \textit{Bouhorn Airways v. Ireland}.

The case concerned the implementation through EC Directive 900/93 of UN sanctions against the former Republic of Yugoslavia and reiterated that state action in compliance with membership obligations of an international organisation is presumed to be justified, provided that the organisation protects fundamental rights in a manner which ‘can be considered at least equivalent’ – i.e. comparable\textsuperscript{42} – to that provided for by the ECHR. The novelty of this decision is that the presumption of ‘equivalent protection’ is rebuttable if in the circumstances of the case the protection of the fundamental rights proves to be deficient. Apparently, some deviance from the Convention standards once tested in the light of UN obligations is permissible; in those instances, the safeguard rule does not require strict application.

\subsection{3.4 Provisional Conclusions and Observations}

The practice with regard to Article 53 of the ECHR, especially \textit{vis-à-vis} domestic fundamental rights, is neither steady nor regular. The Strasbourg Court does not deny its competence to rely on the rule but shows reluctance to do so explicitly. Often, the safeguard rule disappears – so to speak – in the balancing of interests. The Strasbourg Court may apply the rule \textit{ex officio} and on the initiative of a party to the proceedings: both the individual litigant and the defendant State are reported to have invoked the rule. Yet, the Court does not feel obliged to respond to such a plea and if it does, it examines the matter with variable intensity. Available case-law suggests that the Strasbourg Court envisages the safeguard rule not as a principle of law but primarily as a rule of interpretation. In general it is applied flexibly and in a harmonizing mode and mainly used as a base for a balancing of interests. So far the safeguard rule has not ‘trumped’ or overridden Convention rights.\textsuperscript{43}

Sometimes the safeguard rule proves to be useful to respect the better norm in domestic law or in other treaties. More often, though, the Strasbourg Court seems to prefer a reconciliatory interpretation or rather avoids the problem by using the judicial technique of distinguishing and even – simply – by ignoring the safeguard rule.

\section{4. The Luxembourg Court and the Safeguard Rule}

The safeguard rule is now explicitly enshrined in Article 53 of the Charter. That being said, the fact that the

\textsuperscript{34} EurCourtHR 17 January 1970, Delcourt v. Belgium, § 25.


\textsuperscript{36} EurCourtHR, Vilho Eskelinen (supra note 28), § 60 = 28 HRLJ 369 at 376 (2007) and the joint dissenting opinion of judges Costa, Wildhaber, Türmen, Borrego Borrego and Jožič, § 5 = 28 HRLJ 369 at 381 (2007).

\textsuperscript{37} See e.g. EurCourtHR 23 September 1994, Jerers v. Denmark, Series A 298, § 30 = 15 HRLJ 361 at 368 (1994) concerning Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and Article 10 ECHR.


\textsuperscript{39} EurCourtHR 7 November 2013, Pickar v. Poland, Case No. 10441/06, § 53.

\textsuperscript{40} See EurCourtHR 15 November 1996, Chabal v. UK, Case No. 22414/93, §§ 76-82.

\textsuperscript{41} So De Schutter (supra note 8) at p. 410, note 1699.

\textsuperscript{42} EurComHR 9 February 1990, M & Co v. Germany, Case No. 1255/87; see generally R.A. Lawson, \textit{Het EVRM en de Europese Gemeenschappen (The ECHR and the European Communities)}, PhD Leiden 1999.

\textsuperscript{43} EurCourtHR 30 June 2005, Case No. 45036/98, §§ 155-167 = 26 HRLJ 18 at 35 f. (2005); see also EurCourtHR 26 November 2013, Al-Dulimi and Montana Managing Inc. v. Switzerland, Case No. 58006/08, §§ 114 ff.


\textsuperscript{45} De Witte (supra note 8) p. 1524.
safeguard rule was not enshrined in any provision of EU law before the Charter does not necessarily mean that the idea underlying that rule had been completely unknown. The first part of this paragraph focuses on case-law which makes clear in our opinion illustrates that the safeguard rule was also vital in the Luxembourg Court's early case-law. The second part elaborates upon Article 53 of the Charter, the judgment in Melloni and other relevant case-law.

4.1 Case-Law Before the Proclamation of the Charter

In our opinion the idea underlying the safeguard rule is also visible in the well-known case-law regarding the tension between national fundamental rights and the requirements of European integration. In 1974, in Solange I, the German Constitutional Court (Bundesverfassungsgericht) ruled that it would not accept the primacy of EU law as long as the European legal order did not have a catalogue of fundamental rights of its own. Consequently, it explicitly reserved the right to review secondary EU law for its compatibility with fundamental rights guaranteed by the German Constitution.73

The Court of Justice responded swiftly and emphasised in its following case-law that fundamental rights form an integral part of the general principles of EU law.74 In safeguarding those rights, the Court considered itself bound to draw inspiration from constitutional traditions common to the Member States and international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that respect, the Court emphasised, special significance would be given to the ECHR.49

The case-law following Solange I sufficiently satisfied the Bundesverfassungsgericht. In 1986, in Solange II, it considered an additional review of secondary EU law no longer needed.50 In later cases the German Constitutional Court even made more reconciliatory steps. In 2000 it ruled that any claim for review of secondary EU law should state reasons why it failed to meet national standards.51 Two years later the German Constitutional Court further reduced the risk of conflicts over the protection of fundamental rights by announcing its intention to submit any such claim beforehand to the Court of Justice for a preliminary ruling.52

It is remarkable how the Court of Justice and the Bundesverfassungsgericht managed in this way to minimize the risk of conflicts over the protection of fundamental rights.53 The case-law of the Court of Justice indicates that it was willing to adapt, and thereby enhance, the standard of protection of fundamental rights guaranteed by EU law to the standard provided for at the national level or, in particular, by the ECHR.54 This can be illustrated by the judgments in Baustahlgewebe and Krombach.55 In both cases the Court recognised the right to a fair trial within a reasonable time enshrined in Article 6 of the ECHR as a general principle of EU law. Accordingly, in Baustahlgewebe, which concerned an appeal against a judgment of the Court of First Instance, the Court of Justice had to consider the duration of the proceedings. Eventually, it ruled that the proceedings before the Court of First Instance had not satisfied the requirements concerning completion within a reasonable time. In Krombach, which concerns the recognition and enforcement of judgments between Member States, the Court referred to the Strasbourg case-law according to which the right of every person charged with an offence to be effectively defended by a lawyer is a fundamental element in a fair trial.56 An accused person cannot give up that right simply because he or she is not present at the hearing. The Court ruled that in light of this case-law a national court is entitled also under EU law to hold that the refusal to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of a fundamental right. That breach could be a reason to refuse the recognition and enforcement of a judgment issued in another Member State, the Court concluded.

Case-law illustrating that the Court of Justice was also prepared to adapt to the standard guaranteed by the Member States' constitutions is far more difficult to find. Perhaps the judgments in Schmidberger and Omega are worth mentioning. Both cases concern the question whether national fundamental rights can justify a restriction of fundamental principles of EU law like the free movement of goods and the freedom to provide services. The Court answered this question in the affirmative. Focusing on Omega, the Court had to consider an order issued by the Bonn police authority that prohibited Omega from offering games involving the simulated killing of human beings with a laser beam. According to the Bonn police authority these games infringed human dignity and therefore constituted a danger to public order. On appeal, Omega argued that the order infringed EU law, particularly the freedom to provide services.

The Court of Justice determined that the order issued by the Bonn police authority restricted not only the freedom to provide services, but also the free movement of goods, because Omega had entered into a franchise contract with a British company that marketed the games in the United Kingdom and supplied Omega equipment. According to the Court the restriction of the fundamental freedoms could be justified on the ground of protecting human dignity. After repeating its settled case-law that

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47 29 May 1974, BVerfGE 37, 271.
48 See e.g. Case C-373/91, Nold, Case C-222/84, Johnston, Case C-588, Wachau; Case C-260/89, EKT. See, on the notion of constitutional traditions, inter alia H.C.K. Senden, Interpretation of Fundamental Rights in a Multilevel Legal System, PhD thesis Leiden 2011, School of Human Rights Research Series, volume 46, pp. 320-352.
50 22 October 1986, BVerfGE 73, 339.
51 7 June 2000, Bananenmarkordnung, BVerfGE 102, 147.
52 6 July 2015, Honeywell, 2 BvR 266/06, BVerfGE 126, 286.
fundamental rights form an integral part of the general principles of EU law, the Court considered: "As Advocate General Vigh argued in (...) her Opinion, the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right."

Although the Court seemed reluctant to embrace the standard of protection of human dignity guaranteed by German constitutional law, it accepted that such national fundamental rights could justify a restriction of the freedom to provide services and the free movement of goods, and, accordingly, outweigh fundamental legal principles of Union law.

4.2 The Safeguard Rule in Article 53 of the Charter

As described above, Article 53 of the Charter explicitly states that the Charter does not affect human rights protection given by international law or international human rights treaties to which the EU or all its Member States are parties, and by the Member States' constitutions. Another provision that is equally important and fundamental, and to which Article 53 is closely related, is Article 51. That provision determines the scope of application of the Charter and is, accordingly, also the keystone for the application of Article 53. Before turning to the case-law relating to Article 53, it is therefore necessary to focus first on Article 51.

According to Article 51(1), the provisions of the Charter bind Member States 'only when they are implementing Union law'. The meaning of these terms has been extensively debated in the literature. In short, the debate came down to the question whether the terms 'implementing Union law' should be read narrowly or broadly. The Luxembourg Court's Grand Chamber resolved this debate in its judgment of 26 February 2013 in Åkerberg Fransson. That case concerned Swedish legislation under which tax evasion and fiscal fraud can be punished. Åkerberg Fransson was found guilty of having provided false information in his tax returns for substantial amounts of revenue linked to the levying of administration and punitive penalties for tax offences and fraud was compatible with the ne bis in idem principle under Article 50 of the Charter.

According to several intervening Member States and the European Commission, the Court of Justice had no jurisdiction to answer the questions referred for a preliminary ruling. They argued that the present case did not concern the implementation of EU law within the meaning of Article 51(1). The Grand Chamber rejected that argument and took the opportunity to clarify that the fundamental rights guaranteed by the Charter must be complied with where national legislation falls within the scope of EU law. Accordingly, there are no situations that are covered by EU law without fundamental rights guaranteed in the European legal order being applicable. The applicability of EU law entails, in other words, the applicability of the fundamental rights guaranteed by the Charter. To support that conclusion the Grand Chamber explicitly referred to previous case-law and the Explanations to the Charter. The case of Åkerberg Fransson fell within the scope of EU law because the administrative and punitive penalties against him were connected to breaches of the obligations to declare VAT. In relation to VAT, EU law obliges the Member States to take all measures appropriate for ensuring the collection of VAT and for preventing evasion. Furthermore, Member States are under the obligation to take effective and deterrent measures to counter fraud affecting the financial interests of the EU.

Despite some critical reactions, notably from the German Constitutional Court, the Luxembourg Court has not changed its view on the scope of application of the Charter and Article 53(1). For the applicability of the Charter and, accordingly, Article 53, it is necessary and sufficient that the case in hand falls within the scope of EU law.

4.2.1 Melloni

Although the Charter has been in force since 1 December 2009, it was only on 26 February 2013 that the Court of Justice applied and interpreted Article 53 of the Charter for the first time. On that date the Grand Chamber issued not only its judgment in Åkerberg Fransson, but also its judgment in Melloni. Concerned Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States, Melloni, who resided in Spain, was suspected of bankruptcy fraud in Italy. An Italian court issued two arrest warrants for his extradition in 1993. Two years later, a Spanish court authorized the extradition to Italy. Following that decision, Melloni was released on bail and fled. The criminal proceedings in Italy continued in

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59 Omega (supra note 54), § 34, 25 HRLJ 266 at 269 (2004).
60 See e.g. D. Sarmiento, "Who’s afraid of the Charter: the Court of Justice, national courts and the new framework of fundamental rights protection in Europe", 50 CMLRev 1272-1277 (2013); K. Lenaerts (supra note 11), 8 ECLR Rev 376-387 (2012), with further references.
62 Case C-627/10, Åkerberg Fransson.
63 Ibid., § 19.
64 Ibid., § 22.
65 Ibid., § 20.
66 Ibid., §§ 25-27.
68 Case C-39/01, Melloni. See for a case note N. de Boer, 50 CMLRev 1083-1104 (2013).
Melloni’s absence. In 2000 Melloni was sentenced in absentia by an Italian court to ten years’ imprisonment. After higher courts had confirmed this sentence, the Italian public prosecutor issued a European arrest warrant for the execution of Melloni’s sentence.

Following the European arrest warrant, Melloni was again arrested in Spain and once again a Spanish court authorized his extradition to Italy. Melloni challenged that decision before the Spanish Constitutional Court. He argued that he had been convicted in Italy without him being present at the trial. Italian law, however, offered no opportunity to challenge his conviction. According to Melloni that infringed the right to a fair trial laid down in Article 24(2) of the Spanish Constitution as interpreted by the Spanish Constitutional Court.

Although Article 4a(1) of the Framework Decision allows a national judge to refuse the execution of a European arrest warrant on the ground that a person was convicted without him being present at the trial, this is not the case when that person was aware of the trial and was represented at the trial by a legal counsel appointed by him or the State. In the present case, Melloni had been aware of his trial in Italy and was represented before the Italian courts by two lawyers. Consequently, the Framework Decision did not allow the Spanish court to refuse the execution of the arrest warrant issued against Melloni, nor did it allow the Spanish court to make the execution of the arrest warrant conditional upon Melloni’s conviction being open to review.

The Spanish Constitutional Court (Tribunal Constitucional) decided for the first time in its history to make a preliminary reference to the Court of Justice. The first question it asked was whether Article 4a(1) of the Framework Decision must indeed be interpreted as purporting to make the surrender of a person convicted in absentia by an Italian court to ten years’ imprisonment, and to a fair trial as provided for in Articles 47 and 48 of the Charter. The third and final question was, in the event that this second question should also be answered in the affirmative, whether Article 53 of the Charter allows a Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review, in order to prevent a breach of its Constitution.

The third question was not that surprising. In its Declaration 1/2004 on the Treaty of Lisbon the Tribunal Constitucional had already elaborated on Article 53 of the Charter.68 It concluded that the Treaty of Lisbon was not incompatible with the Spanish Constitution. To support that conclusion the Tribunal Constitucional gave special emphasis to Article II-113 of the Treaty, which would eventually become Article 53 of the Charter, and considered the safeguard rule laid down in that provision to be identical to Article 53 of the ECHR.69 In its reference for a preliminary ruling, the Tribunal Constitucional explicitly submitted that interpretation to the Luxembourg Court for consideration. It also referred to two other possible interpretations.70

In its judgment of 26 February 2013 the Grand Chamber of the Court of Justice affirmed that Article 4a(1) of the Framework Decision precludes the national judicial authorities from making the execution of a European arrest warrant conditional upon the conviction rendered in absentia being open to review, and that Article 4a(1) is compatible with Articles 47 and 48 of the Charter.71 In response to the third question the Grand Chamber, like Advocate General Bot, explicitly rejected the first interpretation referred to by the Tribunal Constitucional. The Grand Chamber emphasised that to read Article 53 of the Charter like Article 53 of the ECHR would undermine the primacy of EU law.72 According to well-established case-law, by virtue of the principle of primacy of EU law, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law.73 The Grand Chamber continued:

"It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised." 74

In the remainder of the judgment the Grand Chamber determined that allowing the Spanish judicial authorities to make the execution of the arrest warrant conditional upon Melloni’s conviction in Italy being open to review would undermine the principles of mutual trust and recognition which Framework Decision 2002/584 purports to uphold and would therefore compromise its efficacy. The third and final question of the Spanish Constitutional Court was consequently answered in the negative.

Interestingly, the negative answer to the third question was no reason for the Spanish Constitutional Court to confront the Luxembourg Court. Instead, it adopted a defensive attitude and simply reversed its interpretation of the right to a fair trial laid down in Article 24(2) of the Spanish Constitution.75 As one concurring judge rightly noted, it did so without even discussing the implications of the Luxembourg Court’s strict interpretation of Article 53 of the Charter in Melloni or referring to its Declaration 1/2004 on the Treaty of Lisbon.76

4.2.2 Åkerberg Fransson

To illustrate that the Luxembourg Court’s strict interpretation of Article 53 of the Charter in Melloni does not mean that the application of a higher national standard of protection of fundamental rights is completely out of the picture, we need to return to the judgment in Åkerberg Fransson. It is not a coincidence that the judgments in Melloni and Åkerberg Fransson were delivered on the same day. As described above, the latter case concerned the Swedish system of imposing administrative and criminal penalties for tax offences and
Jeremy F. was classified as child abduction. Three days later Jeremy F., who resided in France, agreed to his surrender. After his surrender and while in custody, the British judicial authorities made a request to extend the arrest warrant for acts committed in the United Kingdom, which might constitute an offence other than that for which Jeremy F. was surrendered. According to the judicial authorities, Jeremy F. was also to be prosecuted for the offence of sexual activity with a child under sixteen. In January 2013, a French court gave its consent to the extension of the arrest warrant. Jeremy F. appealed against that decision to the Cour de cassation. He argued that Article 965-46 of the French Code of Criminal Procedure was incompatible with the right to an effective judicial remedy laid down in Article 13 of the ECHR, Article 47 of the Charter and guaranteed by French constitutional law, as well as with the principle of equality before the law, in so far as it ruled out an appeal to the decision to extend the arrest warrant. The Cour de cassation decided to refer the case to the Constitutional Council, which, in its turn, decided to make a preliminary reference to the Court of Justice. In short, the Council asked whether Framework Decision 2002/584 precludes Member States from providing for an appeal with suspensive effect to the decision of the national judicial authorities to consent to the execution of an European arrest warrant or, as in the present case, to extend the arrest warrant for offences committed prior to the surrender other than the offence for which Jeremy F. was surrendered.

The Court of Justice emphasised that the purpose of Framework Decision 2002/584 is based on the principle of mutual recognition and on the high level of confidence that should exist between the Member States. The Framework Decision seeks to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the EU to become an area of freedom, security and justice. With regard to the possibility of bringing an appeal with suspensive effect against a decision to execute an arrest warrant or a decision giving consent to an extension of the warrant, the Court noted that the Framework Decision does not explicitly provide for that possibility. However, neither Article 13 of the ECHR nor Article 47 of the Charter, which both entail the right to an effective judicial remedy, require the possibility of filing an appeal against a judicial decision. Therefore, the fact that Framework Decision 2002/584 does not provide for a right of appeal does not make it incompatible with the right of an effective remedy laid down in the ECHR and the Charter. That does not mean, however, that Member States are prevented from ensuring a right of appeal with suspensive effect against such a decision:

In the absence of further detail in the actual provisions of the Framework Decision, and having regard to Article 34 EU, which leaves to the national authorities the choice of form and methods needed to achieve the...
desired results of framework decisions, it must be concluded that the Framework Decision leaves the national authorities a discretion as to the specific manner of implementation of the objectives it pursues, with respect inter alia to the possibility of providing for an appeal with suspensive effect against decisions relating to a European arrest warrant.96 The provisions of the Framework Decision did not fully determine the regulatory framework, the French judicial authorities remained free to ensure a higher level of protection of a fundamental right by providing for a right of appeal with suspensive effect against a decision giving consent to the surrender of a person or to an extension of a European arrest warrant for offences committed prior to the surrender. The Court of Justice added, however, that given the underlying logic of the Framework Decision and its objectives, certain limits must be set as regards the margin of discretion that a Member State enjoys. According to the Court a Member State still has to comply with the time limits set in Article 17 of the Framework Decision for making a final decision.97

Although the Court of Justice did not mention Article 53 of the Charter nor referred to its judgment in Åkerberg Fransson, the cases of Jeremy F. and Åkerberg Fransson are comparable to a great extent. After all, in both cases EU law did not completely determine the regulatory framework but left the Member States discretion. Therefore, the national authorities were allowed to apply a higher standard of protection of a fundamental right at the national level, provided that the primacy, unity and effectiveness of EU law are not thereby compromised. Interestingly, in its judgment in Jeremy F. the Court did not mention the primacy, unity and effectiveness of EU law either. Instead it referred to the underlying logic of Framework Decision 2002/584 and its objectives to support its judgment that certain limits must be set as regards the discretion that the national authorities enjoy. One may assume, however, that without those limits the unity and effectiveness of the Framework Decision would be compromised.

4.3 Concluding Observations and Opinion 2/13

Before 2000, the year when the Charter was proclaimed, the safeguard rule was not explicitly enshrined in any provision of EU law. This does not mean, however, that the idea underlying this rule was completely absent. The well-known case-law regarding the tension between national fundamental rights and the requirements of European integration illustrates that the safeguard rule was also vital in the early years of the European project; it shows that the Luxembourg Court was in principle willing to adapt, and thereby enhance, the standard of protection of fundamental rights guaranteed by EU law to the standard provided for at the national level and, in particular, by the ECHR.

The safeguard rule is now explicitly enshrined in Article 53 of the Charter. According to one possible interpretation the safeguard rule in that provision is to be read so that the Charter represents a minimum human rights standard. The Grand Chamber of the Luxembourg Court explicitly rejected that interpretation in its judgment of 26 February 2013 in Melloni. Reading that judgment together with the judgment of the same date in Åkerberg Fransson, and as can be illustrated by the judgment in Jeremy F., it follows that there is only room for Member States to apply fundamental rights guaranteed by their own constitutions when the regulatory framework is not completely determined by EU law and there is no European legislative consensus.

In its Opinion 2/13 delivered on 18 December 201449 the Luxembourg Court faulted the draft agreement on the EU’s accession to the ECHR90 and inter alia confirmed its strict interpretation of Article 53 in Melloni. It also attaches great value to Article 6(2) TEU, which explicitly states that the EU’s accession to the ECHR ‘shall not affect the Union’s competences as defined in the Treaties’. According to the Luxembourg Court: ‘The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of (…) fundamental rights [recognised by the Charter] be ensured within the framework of the structure and objectives of the EU.’90 In this respect, the tenor of Opinion 2/13 emphasises the supremacy of EU law and claims inviolability of the Union’s institutional law vis-à-vis the Charter’s fundamental rights in particular. When it comes to Article 53 of the Charter and its relation to Article 53 of the ECHR, the Court added:

‘In so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited – with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR – to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.’99

According to the Luxembourg Court, before accession of the EU to the ECHR can take place, a coordinating provision regarding the relationship between Article 53 of the Charter and Article 53 of the ECHR is needed. That provision must ensure that in cases that fall within the scope of EU law Article 53 of the ECHR is to be interpreted like Article 53 of the Charter in Melloni, so that it only allows Member States to apply national fundamental rights in situations where EU law does not completely determine the regulatory framework, and leaves the Member States discretion in the way they act.

It is questionable whether it was really necessary to fault the draft accession agreement for not containing a coordinating provision between Article 53 of the ECHR and Article 53 of the Charter.92 The Court’s strict interpretation of Article 53 of the Charter in Melloni is based first and foremost on the principle of primacy of EU law and there is no scope for national law to override national fundamental rights granted by the Charter, as can be illustrated by the judgment in Jeremy F. So it follows that there is only room for Member States to apply fundamental rights guaranteed by their own constitutions when the regulatory framework is not completely determined by EU law and there is no European legislative consensus.

96 Ibid., § 52.
97 Ibid., especially §§ 56 and 73.
100 Opinion 213, § 170, 34 HRLJ 452, 469 (2014).
101 Ibid., § 189, 34 HRLJ 452 at 471 (2014).
law. Such primacy is basically alien to the sphere of international fundamental rights. It is precisely the function and value of fundamental rights to offer an external standard, outside the State or the international organisation. That standard inspires the confidence with citizens as well as with the outside world that important principles of the Rule of Law will be abided by and is a major and indispensable source for legitimation.

Secondly, the pretended inviolability of the EU's own structure and its relationship with the Member States are at odds with the very essence of fundamental rights. Naturally these rights are constitutional and structural, and will influence structural relations and affect for instance the division of labour between the branches of government. Several of the ECHR rights, notably Article 6 (fair trial) to the extent it defines the position of the judicial branch, can be material for structural relationships e.g. between the judiciary, administration and legislature. Denial of such possible consequences implies a reduction of the safeguard rules' scope and would detract from the idea of progressive development of fundamental rights that these rules epitomise.

Finally, the effect of Article 53 of the ECHR is not – as is suggested in the last quote from Opinion 2/13 - confined to powers granted to (Member) States; it also extends to the rights of individuals that cannot be diminished unilaterally by the EU Member States.

For these reasons, it is in our opinion questionable whether the reasons advanced with regard to the Charter could also justify a restrictive interpretation of Article 53 of the ECHR.

5. The Two Safeguard Rules Combined

5.1 The Safeguard Rules in Theory and Practice

The foregoing sketches the role of Article 53 of the ECHR and Article 53 of the Charter in the case-law of the Strasbourg and Luxembourg Courts respectively. However, the combined application of both provisions and its possible effect is still not clear. While it is in principle the combined application of the safeguard rules in Article 53 of the ECHR and Article 53 of the Charter may present itself to the legislature, the administration and the judicature, the focus in this contribution lies on the judiciary. In theory a combination of both safeguard rules might occur in diverging circumstances, depending on the proceedings and facts of the case in hand. At least in three situations application is conceivable: by the Strasbourg Court, the Luxembourg Court and by domestic courts of the EU Member States, notably when adjudicating the legality of legislation or administrative acts implementing Union law.

Within the domestic legal orders both safeguard rules are legally valid, although applicability may vary from one state to the other according to domestic constitutional law and be directed by judgments or preliminary rulings of the European Courts. The binding force of both safeguard rules is – since they are treaty provisions – beyond doubt and has not been disputed in the case-law. They bind the EU Member States and as far as Article 53 of the Charter is concerned also the EU itself. The rules' material binding force finds support in the widespread international practice to include the safeguard rule as a principle in human rights treaties.

Both European Courts take the view that they lack jurisdiction to enforce other treaties like the Charter or domestic law and will – when interpreting the Convention or Union law as the case may be – merely take into account the relevant treaty and domestic law provisions and their authoritative interpretation by the competent supervisory bodies. The Luxembourg Court already acknowledges the ECHR as part of the general principles of Union law, particularly when it is testing the legality of Union law under Article 19(1) TEU. The Luxembourg Court will be formally bound if and when the EU accedes to the ECHR.

How does all this affect the safeguard rules? Should a combination of the safeguard rules itself be governed by the rule that the most favourable elements of a safeguard provision are to prevail and do they reinforce each other? A textual argument against such combined use is that the safeguard rules laid down in Article 53 of the ECHR and Article 53 of the Charter – strictly speaking – are no fundamental rights themselves, but merely instrumental for the operation of those rights. Still, this argument does not appear to be decisive. Several arguments militate in favour of attributing the mutually reinforcing effect to both provisions. The Charter's preamble and its Articles 52 and 53 effect recognise the Convention as a common standard. Article 52(3) of the Charter provides that the 'meaning and scope' of the Charter rights shall be the same as under the Convention itself, while according to the Charter's preamble due regard should be given to inter alia the case-law of the Strasbourg Court.

Further, it is beyond doubt that the Charter must not encroach upon the ECHR. Unilateral reduction by the EU or by its Member States of the obligations under the ECHR would run contrary to Article 351 TFEU and to the Viena Convention's rules on successive treaties, as it would prejudice the rights of those States Parties to the Convention that are not also Member States of the Union. It should also be noted that the EU could not circumvent this discrepancy by making a reservation at the moment of accession to the ECHR. Such a reservation would inevitably be of a general character and Article 57(1) of the ECHR expressly forbids general reservations.

A provisional conclusion may be that there are good reasons to extend the rule that the most protective human rights provision has to prevail, equally to the two intertwined safeguard rules themselves. That would be clearly in line with the object and purpose of human rights treaties and in particular with the finality of the safeguard rules.

5.2 A Scenario as an Illustration

As noted above Opinion 2/13 presses for further analysis of the relationship between the safeguard rules in Article 53 of the ECHR and Article 53 of the Charter. We will elaborate this relationship through what seems the most probable scenario.

This scenario is – at least partly – a Melloni type of case. It starts with a request of a national judge for a preliminary ruling from the Luxembourg Court about the compatibility of domestic law with Union law. Taking requests for a preliminary ruling as a starting point is the most obvious because they occur frequently and are apt to serve as a vehicle for legal disputes about fundamental rights laid down in the Charter and the ECHR.

93 Article 52(2) reads: 'Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

94 §§ 189-190, 34 HRLJ 452 at 471 (2014).
The next step would be that the Luxembourg Court—taking into account Article 53 of the Charter—finds the domestic legal rule not to offer more protection than Union law. After the national judge has duly incorporated that ruling into its decision the way to the Strasbourg Court lies open for a discontented justiciable. The object of an application by a discontented justiciable to the Strasbourg Court is the State’s failure to take duly into account the domestic legal norm in violation of both a material Convention right and Article 53 of the ECHR. It is noteworthy that after the coming into force of the 16th Protocol to the ECHR also the highest courts and tribunals of a Contracting State may request the Court to give ‘an advisory opinion on questions and principles relating to the interpretation and application of the rights and freedoms defined in the Convention’.

As a further step the Strasbourg Court can either reject or entertain the individual application. A rejection, however, cannot simply be founded on the Luxembourg Court’s strict and conditional interpretation of Article 53 of the ECHR in Opinion 2/15; that would deprive the justiciable of the guarantee of the safeguard clause as already developed in the Strasbourg Court’s case-law.

If in the alternative the application were successful, the judgment is—pursuant to Article 46 of the ECHR—legally binding only on the parties to the case. Yet, it will at the same time be an authoritative and therefore compelling interpretation of the Convention rights including the safeguard clause vis-à-vis the other Contracting Parties to the ECHR, including all EU Member States and, eventually, the EU itself after having acceded to the ECHR. It is our strong conviction that the EU and the Luxembourg Court will be bound by the judgment of the Strasbourg Court. The Luxembourg Court is likely to adapt to the Strasbourg Court’s case-law, not only for the reason of ‘comity’ or ‘courtesy’ between the two European Courts, but, more emphatically, also for the sake of procedural economy or judicial efficiency. If the Luxembourg Court declines to adapt to the Strasbourg Court’s case-law, any potential applicant could seek the conclusion of a violation by the State concerned in a binding judgment of the Strasbourg Court. Besides, the Luxembourg Court will be inclined to extrapolate and anticipate the Strasbourg Court’s case-law. This is precisely what already happened in Melloni when Advocate General Bot examined the Strasbourg Court’s case-law and concluded that a (negative) preliminary ruling would be in accordance with the ECHR; however, neither his advice nor the judgment further analyzed domestic Spanish law for possible applicability of Article 53 of the ECHR.

A provisional conclusion, though limited to the scenario above, may be that the Luxembourg Court under various legal titles and sometimes in a roundabout ‘procedural’ way—as an effect of a private legal action—has to pay due regard to the Strasbourg Court’s case-law and more particularly to its interpretation of Article 53 of the ECHR.

5.3 The Application of the Safeguard Rules—Possible Occurrence and Strictness

This provisional conclusion needs some further observations to put it into perspective. How likely is it that the Luxembourg and Strasbourg Courts will diverge in view and, if so, how strictly will any safeguard rule be applied? We expect that the Strasbourg Court will in most instances not come to a different conclusion than the Luxembourg Court. Comity, functionality (viz. an efficient division of labour between the two European Courts), the margin of appreciation and the doctrine of ‘equivalent protection’ are major grounds paving the way for conformity. Generally, the Strasbourg and Luxembourg Courts are already inclined to strive for the greatest procedural coherence. The Charter and the ECHR are being interpreted and applied in a harmonious and reconciliatory manner to avoid friction. Therefore, the problem of conflicts has so far been less real than it might appear.

Nevertheless, discrepancies in views between the two European Courts remain imaginable. They may present themselves in ‘hard cases’ that cannot be bridged by a flexible and conciliatory interpretation. This is especially relevant in situations where the Luxembourg Court is likely to stress the Union’s legal principles of unity and effectiveness as opposed to the Strasbourg Court attaching more value to pluralism and the individual’s perspective. The bottom line is—to put it somewhat dramatically—that these differences should not result in an escape route for the EU and its Member States from their obligations under the ECHR.

Potential future battlefields are the principle of non-discrimination, notably in the field of immigration policy, privacy, property and fair trial guarantees. Also the free movement of persons and family life are potential bones of contention. The more the Union’s activities expand, especially into the ‘areas of freedom, security and justice’ (Article 4(2) lit. j TFEU), the more discrepancies could surface causing safeguard rules to be invoked and subsequently to be applied. Disparities are conceivable in particular in cases where the limitation clauses of the Charter and the ECHR diverge. Article 52(1) of the Charter connects the limitations of the Charter rights with the Union’s aims of general interest, whereas the ECHR’s limitation clauses do not expressly provide for the limitation of rights and freedoms for such specific purposes. Still, a few riders in the ECHR refer to ‘the economic well-being of the country’ or similar, more general, grounds e.g. the ‘public order’.## 84 §§ 78-80.## 85 See Joint Communication of the Presidents of those Courts, Costa and Skouris of 24 January 2011, 31 HRLJ 236 (2011); C. Timmermans, ‘Fundamental rights protection in Europe before and after accession of the European Union to the European Convention on Human Rights’, in M. van Roomen et al. (eds.), Fundamental Rights and Principles (Liber amicorum Pieter van Dijk), Cambridge, Intersentia, 2013, pp. 226-229.


## 86 See Callewaert (supra note 44), at pp. 132-133, citing as an example EurCourtHR 30 September 2003, Case No. 40892/98, Koua Poirez v. France (where the Court found a violation concerning discrimination based on nationality, although the French domestic courts had duly taken into account a preliminary ruling of the Luxembourg Court).

## 87 See Lenaerts (supra note 89).


## 89 Article 52(1) of the Charter reads: ‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.’
order of Europe”, which could cover and legitimize limitation of fundamental rights for the sake of Union aims. As for proceedings in Strasbourg, it has been noted above that the Court is not applying the safeguard clause ex officio, whereas applicants are still unlikely to pray the safeguard rules in aid and the States will only invoke them as a defence. In the future this may change, since EU regulations and directives will increasingly be a subject matter in Strasbourg and may thus be challenged by individual applicants. It should also be noted that the proposed introduction of the correspondent mechanism in Article 3 of the draft agreement on the EU’s accession to the ECHR, amending Article 36 of the ECHR, will enable the Strasbourg Court to invite a State involved to become a party to the proceedings. Finally, the safeguard rules may be at stake once advisory opinions are solicited by domestic courts as provided for in the 16th Protocol to the ECHR.

A further observation about the strictness of Article 53 of the ECHR is in place. The scarce case-law shows that this safeguard rule is not being applied in an absolute manner, but rather as an element in a process of weighing interests, leaving some discretion to the State. The Strasbourg Court also applies the doctrine of ‘equivalent protection’ completed by the ‘Bosphorus-presumption of compliance’ with regard to acts of the EU, which creates a threshold for supervision. All this is coupled with – as yet inexplicable – judicial reticence: so far the safeguard rules have been applied less than could reasonably have been expected and hence there is still a lack of relevant case-law.

On balance the potential of both safeguard rules for the European Courts when assessing crucial disputes about the priority of fundamental rights is obvious. They constitute a legally binding touchstone. This calls for mutual changes, or even better, more convergence in the perception of fundamental rights – including the related safeguard rules. The so far leading principles within the Union are directed first and foremost towards promoting the cohesion of the EU itself and of the EU with its Member States: the constitutional framework with its specific characteristics and autonomy of the EU law. The safeguard criterion borrowed from the human rights discourse, by contrast, emphasises the individual’s interests and allows for diversity. These differences in perspective and concomitant divergences in object and purpose might very well reflect on both European Courts’ interpretation of fundamental rights and on any decision about which right is to prevail. Especially for the EU a shift of emphasis towards the individual’s interest will be the inevitable consequence of acceding to the ECHR and submitting itself to the Strasbourg forum. As for the Strasbourg Court itself a reconsideration of the doctrines of ‘equivalent protection’ and the Bosphorus-presumption seems called for.

The two safeguard rules may eventually – but most likely only on rare occasions – tip the scale and topple the hierarchy of norms in the case in hand; it strikes at the heart of both the structural relations between the States and the EU and the distribution of powers within the States themselves. Last but not least, it will be of significance for the protection of the individual in his fundamental rights and freedoms.

6. Conclusion

The quest for the significance of the safeguard rules in Article 53 of the ECHR and Article 53 of the Charter has not yet finished. Their nature and function are still in need of further elaboration. This applies to the core of the safeguard rule: the procedural and material conditions leading to priority for the most protective fundamental right, but also to the possible consequence of its use: a breakthrough of the ordinary hierarchy of legal norms.

The Strasbourg Court’s case-law offers a chequered picture. With respect to domestic law the Court envisages the safeguard rule primarily as a rule of interpretation generally applied not rigorously but in a harmonizing mode.

The case-law of the Luxembourg Court breathes another atmosphere. In Mellonl the Luxembourg Court interpreted and applied the safeguard rule in Article 53 of the Charter for the very first time and did so in a restrictive manner: the safeguard rule was outweighed by the principle of primacy of EU law. Only in situations where EU law leaves discretion to the Member States and does not reflect a consensus reached about the level of protection of a fundamental right involved, is there room for applying national fundamental rights. In Opinion 2/13 on the EU’s accession to the ECHR the Luxembourg Court confirmed its interpretation of Article 53 of the Charter and added that in cases falling within the scope of EU law, Article 53 of the ECHR ought to be interpreted like Article 53 of the Charter in Mellonl.

Although it is questionable whether the reasons advanced with regard to Article 53 of the Charter could also justify a restrictive interpretation of Article 53 of the ECHR, it is not likely that the Luxembourg Court will change course and adopt a less restrictive interpretation in the near future. Therefore it is conceivable that in matters of fundamental rights, discrepancies in views between the Strasbourg and Luxembourg Courts will occur.

We have tried to demonstrate that the safeguard clauses as legally binding rules may play a role in solving such discrepancies. In a wider perspective they are potentially important for far-ranging issues about the hierarchy among fundamental norms in Europe. For that purpose, however, the scope and effects of the clauses would require further research and analysis.

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102 See e.g. EurCourtHR 23 March 1995, Loizidou v. Turkey (preliminary objections), Series A 310, §§ 75 and 94 = 16 HRLJ 15 at 24 and 25 (1995).
103 See A. Delgado Casteleiro, “United We Stand: The EU and its Member Status in the Strasbourg Court”, in: Kosta et al. (supra note 89), pp. 105-120.
104 See O. De Schutter, “Bosphorus Post-Accession: Redefining the Relationships between the European Court of Human Rights and the parties to the Convention”, in Kosta et al. (supra note 89), pp. 177-198.
105 Cf. C. Timmermans, “Some Personal Comments on the Accession of the EU to the ECHR”, in: Kosta et al. (supra note 89), pp. 333-339 § II.

Editors’ note: See also, most recently, the judgment of the CJEU in the case of Lanigan with regard to the consequences of a failure to observe time-limits when executing a European arrest warrant and the obligation to respect the case-law of the EurCourtHR regarding Article 5 § 1 lit. f of the ECHR, 35 HRLJ 190 at p. 194, paras. 36 ff. (2015), in the present issue.