

THE UNIVERSITY OF HULL

**ON DIVERGENCE IN EUROPEAN HUMAN RIGHTS LAWS – THE
EUROPEAN CONVENTION ON HUMAN RIGHTS AND
EUROPEAN COMMUNITY LAW – A CLAIM OF NON-
DIVERGENCE**

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by

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(Summary of PhD dissertation)

The issue of divergence in human rights protection (adjudication) between the law of the European Convention on Human Rights (ECHR) and European Community/Union (EC/EU) law has been in the centre of academic attention for decades. The position that there are instances of divergence and there is a risk of divergence between the two legal orders has gained authority in academic discourse despite the fact that its premises were subject to challenges on numerous occasions.

The claim that human rights protection in EC law is divergent from that under the ECHR appears to suffer from certain shortcomings. First, it is not clear how the divergence claim addresses the question of incommensurability that unavoidably emerges in a comparison of judgments originating from different jurisdictions. Second, the divergence claim has largely eluded to address the quality of flexibility possessed by ECHR and EC human rights law. Both legal orders operate mechanisms of flexibility that enable a treatment of differing human rights solutions other than rejection.

In reaction to these problems the present thesis advances the arguments of **flexibility and similarity**. The flexibility argument holds that the issue of divergence is largely neutralised by the ability of ECHR law (and to a lesser extent of EC law) to react to the problem of divergence flexibly. This entails that the human rights solutions of Community courts could often be accommodated within the flexible framework of ECHR law. The similarity argument provides that the style of human rights protection in ECHR and EC law is similar. The comparison of styles is based on a general system of analysis that aims to avoid the problem of incommensurability.

The two arguments are not independent - the success of each argument depends on the availability of the other. The limits of flexibility are found in the requirement of similarity and the impreciseness of the similarity argument is corrected by the potentials inherent in the flexibility argument. On this basis, the relationship between ECHR and EC law could be described as a flexible status of non-divergence.

Preface

The fissure formed at the birth of European integration has long been regarded as a scar disfiguring the imaginary visage of Europe. It accentuated in the development of parallel mechanisms of protecting fundamental rights under the European Convention for the Protection of Fundamental Rights (ECHR) and in European Community (EC) law. It was inevitable that claims of divergence in human rights protection (adjudication) between the two jurisdictions would arise. Nevertheless, despite the adversities a relationship appeared to form between ECHR and EC law that can hardly be characterised by divergence. Presenting a claim of non-divergence is even more pertinent considering that the introduction of a legally binding catalogue of fundamental rights for the European Union (EU) and the accession of the European Union to the ECHR are at hand once again.

Introduction

The European human rights scene is crowded with various actors playing diverse characters all within the same plot. Human rights systems attached to states and supranational organisations compete for the genuine human rights solution. Their relationship is obscured by debates concerning their identity and by the arrangements of their functioning. The complexity of their coexistence is reflected in the way they approach divergence in law – the denouement of their play.

The legal orders at issue – the law of the European Community/Union and the ECHR – are different.¹ They have different priorities and they apply different means to reach different ends. Their experiences and their instincts are different. Nonetheless, this does not entail that their relationship in the overlapping area of human rights protection/adjudication could only be characterised by difference.

The present thesis proposes that the relationship between human rights protection in ECHR and EC law is characterised by flexibility and similarity, and not by difference. The thesis advances a claim of non-divergence between ECHR and EC law countering the ever-fashionable divergence claim. It relies on a dual argument: the **argument of flexibility** and the **argument of similarity**. Their combination not only manages to accommodate the various components of ECHR and EC human rights protection within

¹ Scheuner saw difference in the purposes of the two legal communities: EC – uniform law, ECHR – national law should stand by its obligations under the ECHR, pp. 225-226, Scheuner: 1968.

a comprehensive analytical framework, but also provides a sound analysis of (non-) divergence between human rights adjudication in the two jurisdictions.

The premises are simple. Despite its alleged authority there is no universal claim of divergence between ECHR and EC law shared unequivocally in legal commentary. Moreover, there is no uniform approach towards difference in law. Rejection is not the only response legal systems would produce when they encounter another (different) legal system. Accommodating the other by reacting flexibly to the difference it incorporates is another possibility. Therefore, the issue of divergence cannot be fully comprehended without exploring whether ECHR and EC law would react flexibly to differences in human rights protection (the **flexibility argument**).² Besides, the divergence claim relies on the comparison of potentially incommensurable cases and may avoid considering evolution and context. By means of a circumspectly crafted method of comparison, involving the scope, language, functioning and flexibility of overlapping fundamental rights, these difficulties of comparison can be addressed and the similarity of judicial approaches in ECHR and EC human rights law can be established (the **similarity argument**).³

The **similarity argument** requires little explanation. It is logical that divergence can be countered by asserting its opposite, similarity. The only difficulty it may entail is finding an appropriate method of comparison that enables establishing the similarity of commensurable elements. The **flexibility argument** builds primarily on the feature of ECHR law that besides propagating common requirements in human rights protection, it is able to accommodate diverse (domestic) human rights solutions. The particularity of local human rights solutions can be respected by means of reacting flexibly to difference in the area of interpreting the scope of and accepting justifications to interferences with fundamental rights. When difference is accommodated within the flexible common human rights framework it will be of no utility for the divergence claim. The flexibility offered under EC law relieves Community courts of producing human rights solutions compliant with ECHR law by deferring the duty of human rights adjudication to the courts of its Member States linked to the ECHR system.

The duality of arguments introduced in the present thesis renders the reconsideration of the term divergence unavoidable. It is arguable that not all forms of difference between laws can be equated with the phenomenon of divergence in law. It follows from the flexibility argument that those manifestations of difference between laws that receive a

² See Part II.

³ See Part III.

reaction of accommodation (signalling the compatibility of the laws involved) cannot be considered as falling under the scope of the concept of divergence. This leaves the consequence that for the present purposes the concept of divergence is to be equated with non-compatible differences in law.

Methodology

1. The question of scope

In order to avoid misdirection as regards the content of the present thesis it appears advisable to determine its scope. Fundamentally, it addresses the issue of (non-) divergence in human rights adjudication between ECHR and EC law.⁴ It puts forward a claim of non-divergence between the case law of the Strasbourg organs, the European Court of Human Rights (ECtHR) in particular, and the human rights case law of Community courts. Consequently, only those fundamental rights are taken into account that have been subject to human rights adjudication in both jurisdictions. These are the right to private life, the right to family life, freedom of expression, freedom of association and assembly, the right to property, the right to free elections, the right of access to a court, fair trial rights, the right to a trial in a reasonable time, the privilege against self-incrimination, the presumption of innocence, the principle of no punishment without law, and the right not to be tried or punished twice.⁵

Apart from comparing substantive human rights solutions the thesis explores those mechanisms, also defined by case law, that determine how ECHR and EC law relate to other legal systems providing human rights protection. As a result, the thesis includes a comparison that is informed of structure, context and functioning bringing the complexity of ECHR and EC human rights adjudication under its scope.

⁴ The term EC law is utilised instead of EU law as most instances of human rights adjudication took place under the scope of European Community law; this, however, does not mean that human rights case law in the law of the European Union (II and III pillar) is not taken into account. Nevertheless, for the purpose of simplification the present work resorts to using the term EC law only. The impact of the ill-fated Constitutional Treaty and the proposed Reform Treaty are not included, although the Charter of Fundamental Rights of the European Union (EUCFR) will be considered.

⁵ The list was finalised on the basis of the rights and freedoms protected under the ECHR which also enjoy protection under EC law. Inevitably, this resulted in the exclusion of numerous freedoms/rights that are fundamental in the Community legal order; on what is a pure fundamental right in EC law, see, pp. 641-646, Hillion: 2004. The principle of non-discrimination does not form part of the present work. Although researching divergence in this regard would be essential, the present thesis concentrates on the core free-standing requirements of the ECHR and on those areas of divergence that are most often mentioned in literature.

Testing individual human rights solutions in EC law on the basis of ECHR law is not intended. The comparison focuses on the dominant elements of human rights adjudication. Accordingly, the thesis does not endeavour to assert that the individual EC human rights solution is compatible with ECHR law as only the ECtHR could determine that with authority. Instead, it establishes a framework of analysis that substantiates that judicial approaches to fundamental rights protection in ECHR and EC law are not divergent.

It is best to distinguish the present work from what it is not. It does not address the compatibility of Community/Union legislation and the Founding Treaties with the requirements of ECHR law. Although examining conflicts or concordances in this regard holds a great potential, the thesis will not depart from comparing judicial approaches in fundamental rights protection. Nor does it cover human rights policy. Since (non-) divergence is mainly an actor-oriented problem of EC human rights protection, a victim-oriented analysis will not be implemented.⁶ Moreover, although non-divergence is an important quality of the EC human rights regime, the ensuing analysis will not provide a general evaluation of the adequacy of EC human rights protection. The non-divergence claim takes ECHR and EC law as it stands; their appropriateness is excluded from its scope. Finally, the thesis does not consider the issue of “primordial divergence”⁷ – that is divergence between national and EC human rights law. Not denying its relevance focus will be kept on divergence between ECHR and EC law.⁸

2. The question of conditions

The appropriate assessment of divergence in European human rights laws is subject to certain conditions. First, the approach invested on scholars researching European law – the integrationist, the unifying, the convergence propagating or the coherence establishing state of mind – must be abandoned. One must not approach another legal system with preconceptions stemming from another.⁹ Therefore, the ECHR/EC must not be examined on the basis of EC/ECHR conceptions of a supranational legal order.

⁶ The actor oriented discourse in EC human rights law was identified as one of the significant weaknesses of (analysing) EC human rights protection, p. 103, Clapham: 1991.

⁷ Pp. 629, Besselink: 1998.

⁸ See, however, a short detour in connection with the question of standards in Part II/Chapter 4/ Point 3.

⁹ It is essential to neutralise such “uniformity bias”, p. 772, Dehousse: 1994.

Second, the different purposes of human rights protection in the two jurisdictions must be respected. While the ECHR is a subsidiary mechanism of supervising the protection of fundamental rights in the Contracting States, the role of human rights protection in the EC is to ensure the legality of Community law irrespective whether it concerns Community action or the application of Community law by the Member States. Consequently, the Community finds itself in the position of a state protecting fundamental rights and must not be regarded as a rival to the ECHR in supervising international human rights obligations.

Third, for the present purposes Community human rights solutions will be treated like the human rights solutions of ECHR Contracting States. In assessing divergence, where appropriate, it needs to be taken into account that Strasbourg supervision has inherent limits and that the EC would enjoy a margin of discretion when it comes to balancing between the interests of the European Community and fundamental rights.

Fourth, the interests of the EC serving as grounds for interferences with fundamental rights must not be regarded as inferior to the domestic interests summoned in Strasbourg by the Contracting States. In the present context it needs to be assumed that the often economic Community rationale for the restriction of fundamental rights is not weaker than that of sovereign states and the interests invoked by the Community are not alien or unfamiliar to its Member States.

3. The question of methods

Divergence between legal systems is an autonomous theme in comparative law. Consequently, the non-divergence claim, especially the **similarity argument**, must utilise comparative methodology.¹⁰ Under the working hypothesis that ECHR law is the master legal system to which EC law must adhere comparison entails contrasting elements of ECHR law with that of EC human rights protection. The aim of the comparison is to counter the divergence claim by contradicting its thesis that holds that human rights protection in Community law lacks the qualities required from legal systems in contemporary Europe. As a result, a better understanding of the relationship between the two jurisdictions will emerge and, ultimately, the concept of divergence in law could be reassessed.

¹⁰ Besides comparative methodology, the non-divergence thesis builds on other theoretical considerations which address the issue of difference/divergence in law such as legal pluralism, post-modernism/post-structuralism in law, globalisation and law, Europeanisation and law, or (new) constitutionalism.

Comparison is burdened by (methodological) difficulties. In particular, comparing the human rights case law of different jurisdictions raises the question of incommensurability. Due consideration will be given to this problem in Part III, however, the following remarks are warranted here. It is crucial to consider the problem of incommensurability in this thesis as the divergence claim appears to ignore the possibility of distinguishing on grounds of their different parameters the cases it holds comparable. An adequate conclusion on divergence cannot avoid determining whether comparison is truly possible. The same problem of incommensurability also threatens the success of the non-divergence claim as its **similarity argument** is to execute a comparison of potentially incomparable judgments. However, hopefully failure can be avoided as the **similarity argument** is based on a system of comparison that is aware of the dangers of incommensurability. This specific system of comparison, introduced in Part III, appears to be capable of fitting the individually incommensurable cases in ECHR and EC law into a comparison of general patterns of human rights protection.

Besides incommensurability the problem of level comparison/analysis emerges. Essentially, it concerns whether legal systems functioning on different levels, for instance national law and Community law, or Community law and the ECHR, can be compared. There are inherent difficulties to cross-level analysis that must be addressed. In particular, instead of assuming the similarity of the different levels their fundamental differences should be given due consideration.¹¹ The interaction of the different levels must also be considered.¹² Lastly, the evaluation of any legal system is only attainable by using concepts of its own or interchangeable categories derived from other legal systems.¹³

The issue of divergence in law might be oblivious of these problems. However, the difficulties of cross-level comparison should not be underestimated. According to our working hypothesis the legal orders in question are situated on different levels.¹⁴ The two levels demonstrate major functional differences. While EC human rights protection is partially introverted concentrating on ensuring the legality of the Community legal order, the ECHR is essentially extroverted supervising the human rights performance other legal systems. This, however, should not impede cross-level comparison as the extroverted nature of ECHR law manifested in tolerating the particularities of other

¹¹ P. 770, Dehousse: 1994.

¹² Pp. 771-772, *ibid.*

¹³ Pp. 774, 777, *ibid.*

¹⁴ Although the EC is regarded as a supranational organisation in ECHR law at para. 150, Bosphorus, ECtHR, again, for the present purposes it takes the position *vis-à-vis* the ECHR of an ECHR Contracting State.

legal systems can be exploited for our purposes. The flexibility of ECHR law forms part of present the cross-level analysis along with exploring similarities through comparison. The interaction between EC and ECHR law will also be taken into account. EC human rights protection is not isolated but attached to the ECHR level with many threads. The non-divergence claim cannot avoid highlighting the elements of EC human rights protection that are the result of intensive and mutual communication with ECHR law. Finally, transposing legal concepts to describe another legal system is a delicate matter in ECHR – EC relations. Those concepts of ECHR law that relate to the conduct of its Contracting States, such as the scope of the Convention right, the elements of the permissible restrictions test, are transposable. On the other hand, concepts determining the identity and status of the ECHR are not applicable in defining EC human rights protection. In sum, the present work does not avoid addressing these problems associated with cross-level analysis.

The course of the ensuing discussion is the following. Part I establishes the non-divergence claim by examining the problems inherent in the divergence claim and exploring the various modes difference/divergence in law can be approached. Part II presents the **flexibility argument** including the issues how it contributes to the non-divergence claim and what limitations it faces in this respect. Part III presents the **similarity argument** that provides the ultimate underpinning to the non-divergence claim. Finally, Part IV revisits the achievements of the thesis and provides a reassessment of the concept of divergence in law.

Part I: Opening the non-divergence claim

Chapter 1: Founding the non-divergence claim

When establishing the non-divergence claim the arguments of its adversary, the divergence claim, need to be considered. Apart from exploring the shortcomings of those arguments it must be ascertained whether the problem of divergence can be approached from a standpoint that the divergence claim has failed to comprehend. These elements surpassing the divergence claim provide sufficient ammunition for the non-divergence claim to advance its own **arguments of flexibility and similarity**.

1. The divergence claim and its disadvantages

Divergence in human rights protection between ECHR and EC law is an unswerving claim in academic writing that has gained authority over time.¹ It holds that human rights protection (adjudication) in Community law does not comply with the requirements on human rights protection (falls short of the standards) of ECHR law.² It is utilised as a (*bona fide*) critique of the evolution of human rights adjudication in EC law urging its amelioration. However, the divergence claim fails to appear as a uniform body of arguments based on unchallengeable premises. In the following, the major traits of the divergence claim will be presented with special attention to its shortcomings.

1(a): Claims of threats of divergence

Since divergence between legal systems that are supposed to be in a relationship of harmony/compliance³ refers to a quality in law (non-compliance)⁴ signifying a

¹ See, p. 140, Ward: 1996, suggesting that divergence might be the result of a whim of P. Pescatore (then judge at the European Court of Justice (ECJ)), insisting on including the ECHR in EC human rights protection.

² The direction of the divergence discourse (EC law must not diverge from ECHR law) might be due to the fact that as stated at p. 136, Williams: 2004 the ECHR has acquired an almost iconic status of purity and symbolized values – it became a moral text providing basic conditions for any European legal system. However, in an early contribution Pescatore suggested that it would be a mistake to sacrifice the developed system of judicial protection under EC law for that of the ECHR, p. 76, Pescatore: 1972. The ECHR was also seen unsuitable for the purposes of the EC by Scheuner, p. 181, Scheuner: 1975.

³ See in this respect, p. 40, Rideau: 1991, stating that divergence between systems of human rights protection is not necessarily a problem as many differences can be explained by reference to the

breakdown in the relationship between the legal systems at issue, many divergence claims will settle for a claim of threat(s) of divergence. A cottage industry has grown out of the EC human rights discourse formulating warnings of risks of divergent interpretation by Community courts from that of Strasbourg.⁵ Often the flagships of the divergence claim having set their target on demonstrating clear-cut cases of divergence make do with more modest assertions of possibilities of divergent interpretations in their conclusions.⁶

However, contending risks of divergence may fail to stimulate the receptors of law. Forecasting threats of divergence appears unintelligible when the domain of interpretation of divergence in law acknowledges only the values of (non-) compliance and (non-) compatibility. What is more, frequent reference to risks of divergence in legal commentary induces a sensation that there is actual non-compliance involved in the relationship between ECHR and EC law. Furthermore, when difference is not defined accurately⁷ it is problematic to label it as a threat not knowing that it may stand for acceptable practices. Nonetheless, it must be accepted that risks of divergence represent a valid concern outside the domain of interpretation of divergence in law. Legal commentary is not prevented from making predictions of divergence as part of a larger argument while maintaining the distinction between assumptions and fully explored assertions.

1(b): Hardcore claims of divergence

specificity of that system; however, when differences are combined with interferences between the systems the acute problem of divergence appears.

⁴ Divergence between legal systems that are not in the relationship of compliance, for instance between French, German and English law, does not refer to a quality of non-compliance but to an observation on their perceived differences. On the diversity of relations between legal systems ranging from relevance to irrelevance meaning that relationships between legal systems are not necessarily of compliance/subordination, pp. 142-145, van de Kerchove and Ost: 1994.

⁵ *Inter alia*, pp. 335-336, Lecourt: Wiarda; p. 1465, Spielmann: Cohen-Jonathan; pp. 204-205, McBride and Neville Brown: 1981; pp. 578-579, de Schutter and Lejeune: 1996; pp. 639-640, Cohen-Jonathan and Flauss: 1999; pp. 278-279, Benoît-Rohmer: 2003; pp. 95-97, Lenaerts and de Smijter: 2001; pp. 177-180, Delmas-Marty: 2002; pp. 666-667, Renucci: 2002; pp. 239-243, Skouris: 2004; pp. 305-306, Jacqué: 1993; pp. 226-227, Young: 2005; pp. 372, 390-391, Woods: 2006.

⁶ Lawson ended with “at very least the possibility of diverging interpretations” when starting from “divergences apparently occur, inadequate protection, inconsistencies”, pp. 252, 235, 247, 250, Lawson: Schermers. Spielmann’s conversion was more dramatic: commenced with a strong divergence argument and gradually began to soften even to contradict the divergence claim, pp. 764, 769, 770, 771-776, 777, 779, D. Spielmann: 1999. Peers’ divergence of limitation formulas claim also conceded to a claim of possible gaps in human rights protection, pp. 150-151, Peers: 2004.

⁷ Whether it constitutes divergence/non-compliance or difference that can be accommodated within compliance.

The divergence claim has also produced assertions of genuine divergences.⁸ Generally, divergence is associated with the situation when Community courts apply (interpret) ECHR law including case law, or when they rely on a Convention right without the corresponding ECtHR case law.⁹ Allegations of divergence build on a limited number of instances in which Community courts allegedly interpreted the scope of and permissible restrictions to fundamental rights different from what is required under ECHR law.¹⁰ It is suggested that the scope of the right to a private life and the privilege against self-incrimination is interpreted narrower in EC law than provided under ECHR law,¹¹ and that the right to submit observations on the submissions of the Advocate General before Community courts differs from the law of the Convention concerning similar procedural arrangements.¹²

The other strand of the divergence claim concerns how justifications to interferences with fundamental rights are approached in the two legal systems.¹³ Besselink claimed that difference in the justification criteria might cause divergence.¹⁴ Von Bogdandy asserted that the scrutiny of permissible limitations in EC law is insufficient and it is utilised for the detriment of fundamental rights.¹⁵ He suggested that the reason for divergence lies in the application of the proportionality test as different applications yield different levels of scrutiny.¹⁶

⁸ For a summary, see, *inter alia*, pp. 148-152, Stein: 1977; pp. 183-184, 187-189, Delmas-Marty: 2002; pp. 728-729, O'Neill: 2002; pp. 341-342, Tridimas: 2006.

⁹ See, pp. 213-214, Janis: Schermers; p. 235, Lawson: Schermers; pp. 1146-1147, Puissochet: Ryssdal.

¹⁰ Cohen-Jonathan distinguished between material and organic divergence, the former referring to divergence in scope, the latter in limitations, pp. 94-95, Cohen-Jonathan: Schermers. See also, pp. 40-47, Rideau: 1991, mentioning differences in the techniques of protection, the nature, subject, and scope of rights.

¹¹ In particular, the judgment in *Hoechst* concerning the protection of business premises under the right to private life (ECHR counterpart: *Niemietz*), and *Orkem* concerning the privilege against self-incrimination and the obligation to produce documents in Community competition investigations (ECHR counterpart: *Funke and Saunders*). *Inter alia*, pp. 94-95, Cohen-Jonathan: Schermers; pp. 234-250, Lawson: Schermers; p. 1147, Puissochet: Ryssdal; pp. 323-324, Bonichot: 1991; pp. 11-12, Ryssdal: 1995; pp. 23-24, Waelbroeck: 1995; pp. 29-43, Tomuschat: 1996; pp. 764-771, Spielmann: 1999; pp. 461-462, Turner: 1999; p. 6, Krüger and Polakiewicz: 2001; pp. 40-43, Costello and Browne: 2004; pp. 648-651, Douglas-Scott: 2006.

¹² *Inter alia*, pp. 770-771, Spielmann: 1999; p. 1206, Goldsmith: 2001; p. 7, Krüger and Polakiewicz: 2001; pp. 40-43, Costello and Browne: 2004; pp. 241-243, Skouris: 2004; pp. 344-347, Tridimas: 2006. Access to justice in EC law was also seen as divergent from Article 6 and 13 ECHR, pp. 439-440, A. Ward: 2001.

¹³ See, pp. 255-262, Pauly: 1998, suggesting that divergence can only be assessed from the perspective of the proportionality of limitations to human rights. See also, pp. 878-879, de Witte: 1999.

¹⁴ Pp. 651-652, Besselink: 1998.

¹⁵ Pp. 1320-1321, and footnotes 61 and 62, von Bogdandy: 2000.

¹⁶ Pp. 1323-1324, *ibid.* Rossi claimed that EC law has imposed more severe restrictions (although she never demonstrated it by way of comparison), pp. 43-44, Rossi: 2002. It was also suggested that there is a difference in the intensity of review under proportionality that risks leading to the dislocation of human rights standards, p. 79, Arai-Takahashi: 2005.

Peers' divergence claim also concentrated on adjudicating permissible limitations to fundamental rights. He opted for discovering divergence through a textual interpretation of the limitation formulas. Having recalled the elements of the limitation formulas (labelling them standards) in ECHR and EC law¹⁷ he concluded that *prima facie* the EC formula is more open ended and the threshold for justification is easier to cross¹⁸ offering lesser protection.¹⁹

The divergence claim also relies on cases in which the ECJ decided not to provide a human rights solution.²⁰ Community law has been reproached for the failure to transplant the autonomous concepts of ECHR law as well.²¹ These concerns, however, are somewhat alien from the core of the divergence claim (the EC human rights solution does not meet the requirements of ECHR law), although they may be valid as part of a general criticism of human rights adjudication in EC law. It is difficult to read the obligations of Contracting States under the Convention that all legal disputes affecting fundamental rights must be transformed into fundamental rights disputes irrespective of whether an adequate solution under domestic substantive law is available. Community courts are not in the least prevented from resolving legal disputes involving human rights concerns on grounds of substantive Community law.²² With respect to the autonomous concepts of ECHR law, surely, the Community institutions must consider their meaning. However, divergence is not a matter of subscribing to these concepts but of complying with the requirements of ECHR law that employ them.

¹⁷ Pp. 142-143, Peers: 2004. Although he considered the proliferation of these formulas, pp. 143-149, *ibid.*, he never examined how the limitation formulas are actually applied and what that entails in terms of the level of protection.

¹⁸ P. 143, *ibid.* The following evidence was provided: huge difference between the EC standard and the inability to derogate from or to limit certain ECHR rights (with respect to which he never produced an example); divergence is becoming more apparent in justice and home affairs (with respect to which he failed to provide an example), p. 151, *ibid.* For a like-minded divergence claim see, pp. 399-400, Woods: 2006, claiming that there are discrepancies in the limitation formulas as the EC proportionality test does not follow the ECHR on the general width of the margin of appreciation (never examined the real intensity of judicial control but referred simply to the judgment in *Connolly*). See also, pp. 59-61, Triantafyllou: 2002, asserting that the lack of a law concept in the limitation formula as provided under ECHR law could cause divergence.

¹⁹ Pp. 162, 178, Peers: 2004. He also claimed that Community courts often chose the lower EC standard (never demonstrated that the EC standard is inferior), p. 149, *ibid.* He denied that producing the same human rights solutions would matter as the question would linger whether the ECHR standard would have been more supportive of fundamental rights, pp. 150-151, *ibid.*, also claiming inconsistent, haphazard application of standards (formulas) in EC law, p. 178, *ibid.*

²⁰ Freedom of speech: dissemination of information (*Grogan*)/broadcasting (*Dutch broadcasting cases*), *inter alia*, pp. 129-139, Busch: 2003; pp. 234-250, Lawson: Schermers; pp. 1187-1189, Ress: Ryssdal; pp. 321-324, Bonichot: 1991; pp. 318-319, De Búrca: 1993; pp. 11-12, Ryssdal: 1995; pp. 578-579, de Schutter and Lejeune: 1996; p. 761, Spielmann: 1999. The right to a name: pp. 234-250, Lawson: Schermers, advancing only an assumption that the internal market solution under EC law is divergent as the right to a name cases under ECHR law concern very different circumstances.

²¹ See, p. 639, Cohen-Jonathan and Flauss: 1999 and pp. 104-106, Rideau and Renucci: 1997.

²² Woods accepted that this does not necessarily lower the standard of protection, pp. 392-393, Woods: 2006.

1(c): The rationale of the divergence claim

The imminent cause of divergence is found in the plurality of human rights regimes in Europe.²³ The emergence and evolution of an autonomous system of human rights protection within the framework of European economic integration induced a reaction contemplating that it may be contrary to existing human rights arrangements. Rideau suggested that the risk of divergence is present when plural legal orders exist in the same domain. Plurality creates the conflict of divergence, and since plurality is unavoidable divergence must be faced.²⁴ Limbach claimed that divergence is inherent in the coexistence of parallel human rights jurisdictions.²⁵ Others held that the interpretation of a single set of norms (the ECHR) in different jurisdictions is a hotbed of divergence.²⁶

In particular, the autonomous nature of EC human rights protection presented a cause for divergence concerns.²⁷ The problems of duality of jurisdictions in human rights matters escalated in establishing the human rights review of national measures under EC law²⁸ and drafting the EUCFR.²⁹ A more acute source of divergence in this regard was identified in the Community specific interpretation of fundamental rights which allegedly privileges economic interests for the detriment of fundamental rights.³⁰ For the propagators of the divergence claim it appeared obvious that taking Community interests into account in human rights adjudication leads to divergence.³¹

²³ See in this respect, Part I/Chapter 2/Points 2(c) and 3(a) on the monist reaction to multiplicity.

²⁴ P. 14, Rideau: 1991. See also, p. 321, Bonichot: 1991, claiming that the plurality of legal sources without mechanisms of harmonisation leads to divergence; and p. 274, Benoît-Rohmer: 2005.

²⁵ P. 334, Limbach: 2000. Divergence is endemic to the system, pp. 656, 680, Besselink: 1998. Pescatore predicted that when the ECHR will have become fully effective there will be problems of overlapping, p. 76, Pescatore: 1972.

²⁶ P. 1465, Spielmann: 2004. See also, p. 10, Ryssdal: 1995 and pp. 104-106, Rideau and Renucci: 1997.

²⁷ See, pp. 278-279, Benoît-Rohmer: 2003. From the perspective of the Member States the creation of an autonomous system of human rights protection in the EC instead of setting up minimum international human rights standards set forth a worrying prospect of divergence, p. 329. Verhoeven: 2002.

²⁸ See, p. 640, Cohen-Jonathan and Flauss: 1999. See also, p. 308, De Búrca: 1993, stating that it appears as a haphazardly applied and ill-worked-out duplication of the ECHR function.

²⁹ See, pp. 57-58, Benoît-Rohmer: 2003; p. 267, Légér: 2003; p. 273, Lenaerts and de Smijter: 2001a; p. 6-7, Krüger and Polakiewicz: 2001. Accepting risks of divergence but maintaining that after the EUCFR the situation will not deteriorate, pp. 244-246, Skouris: 2004; see also in this regard, p. 26, Léger: 2002; p. 785, Arnulf: 2003; Point 111, 113, Lords EU Select Committee, 2003.

³⁰ See, p. 251, Lawson: Schermers; p. 1465, Spielmann: Cohen-Jonathan; pp. 128-129, Busch: 2003; p. 321, Bonichot: 1991; pp. 34-39, Rideau: 1991; pp. 499-500, Toth: 1997; pp. 639-640, Cohen-Jonathan and Flauss: 1999; pp. 665, 670, Zampini: 1999; pp. 226-227, Young: 2005; pp. 390-391, 401, Woods: 2006.

³¹ P. 550, Waelbroeck: 1996; pp. 499-500, Toth: 1997, at p. 504, however, Toth seems to object giving up human rights adjudication based on EC interests for that of the ECHR; pp. 322-323, Bonichot: 1991. EC interests prevailing over human rights was also a criticism formulated as regards the insufficiency of EC

1(d): Questioning the rationale of the divergence claim

It is undoubted that the plurality of distinctive human rights regimes without a common point of reference (a final arbiter) is not beneficial for coherent human rights protection in Europe. However, the issue of divergence remains open to further investigation. The starting point is that in the present context divergence is not a simple issue of perceiving difference between two inflexible and isolated sets of norms.³² Jacobs warned that when determining its relationship with EC law the ECHR should not be misconceived as implementing a uniform human rights law in Europe.³³ Mendelson argued that in this respect it shall not be overlooked that the ECHR is not a homogenous body of law binding uniformly: ECHR jurisprudence accepts that some variation to the standards is permitted.³⁴ Even Lawson and Spielmann agreed that the ECHR concedes to the fact that there are many national human rights solutions involved and hence there will be different interpretations that need to be accommodated.³⁵ Wildhaber suggested that the question of coherence between ECHR and EC law must be considered from the perspective of the subsidiarity of ECHR law based on effective domestic procedures and accommodating different abilities to provide fundamental rights protection.³⁶ Frowein claimed that the restrictive clauses of ECHR law allowing limitations to the rights protected could work in favour of the Community.³⁷ Similarly, Pescatore asserted that Strasbourg must show understanding towards the particularities of EC human rights protection as provided in case of national legal systems separated by deep divergences.³⁸

human rights protection outside the context of the divergence claim, pp. 682-684, 690, 692, Coppel and O'Neill: 1992, attacked on grounds that the exact opposite could also be deducted, pp. 84-94, Weiler and Lockhart: 1995.

³² Verhoeven saw no drama in the relationship between ECHR and EC law as the autonomy of EC human rights protection did nothing but to bring the evolutionary, contestable and ever-contested content of human rights to the fore, pp. 326-328, Verhoeven, 2002; the fact that courts are torn between plural human rights regimes is part of the game, pp. 329-330, *ibid*.

³³ P. 571, Jacobs: Schermers. See also, p. 28, I. Ward: 2001, stating that there is nothing more human in the human rights protection under the ECHR than that of the ECJ; they are simply different enumerated rights recognised by different courts.

³⁴ Pp. 162-163, Mendelson: 1981. See also, p. 62, Drzemczewski: 2000 and p. 62, Wachsmann: 2000.

³⁵ Pp. 229-230, Lawson: Schermers; p. 779, Spielmann: 1999. See also, p. 216, Janis: Schermers, accepting that a regional (EC) interpretation of the ECHR can be acceptable under the ECHR.

³⁶ P. 165, Wildhaber: 2002. See also, pp. 564, 570, Jacobs: Schermers; p. 647, Cohen-Jonathan and Flauss: 1999.

³⁷ P. 332, Frowein: 1986. See also, p. 1147, Puissechet: Ryssdal, stating that the EC human rights solution might be different but beneficial to individuals, therefore, acceptable under the ECHR.

³⁸ P. 454, Pescatore: Wiarda.

It follows that the existence of another (different) human rights regime does not automatically induce divergence (non-compliance). When ECHR law is characterised by a certain degree of flexibility towards the legal systems it binds as it is not homogenous and uniform, and it builds on the local human rights solutions assessing its relationship with EC human rights protection cannot neglect these characteristics. On this basis, claims calling for complete harmony and coherence between the two legal orders³⁹ are difficult to adhere to. It must be accepted that human rights protection in the EC is autonomous shaped by its specific context.⁴⁰ Harmony with ECHR law does not require renouncing that specificity completely. However, despite the autonomy of EC human rights protection developed amidst realising aims which would not exist or would have lesser vitality on national level it must be considered that ECHR law was created to the detriment of the autonomy of participating legal systems.⁴¹ Nevertheless, the autonomy of EC human rights law must also enjoy the respect given to the autonomy of domestic human rights laws under the ECHR.⁴²

The profound difference of the ECHR regime from that of the EC⁴³ does not entail divergence. This is also apparent in the contradiction inherent in some divergence claims. They condemn any difference as divergence but maintain later in connection with the accession of the EU to the ECHR that the subsidiarity of ECHR law will contribute to preserving the autonomy of EC human rights law.⁴⁴ Rejecting and embracing at the same time the specificity of human rights protection in the EC hardly makes the divergence claim more convincing.

Zampini suggested that the autonomous nature of EC human rights protection is not at odds with the requirement of a non-divergent protection of human rights as there are certain factors which minimise the risk of divergent interpretation.⁴⁵ In particular, EC law is under the constant guidance of ECHR law exercising direct influence on the interpretation of Community courts.⁴⁶ Similar developments in the two laws⁴⁷ and

³⁹ Pp. 100-101, Cohen-Jonathan: Teitgen; p. 324, Bonichot: 1991; p. 59, Benoît-Rohmer: 2000; p. 29, Drzemczewski: 2001; p. 41, Bultrini: 2002, stating that Europe must be reunified. *A contrario*: complete harmony is not essential, p. 79, Costello and Browne: 2004.

⁴⁰ Pp. 648-651, Douglas-Scott: 2006.

⁴¹ It was suggested that the autonomy human rights regimes in Europe can only be relative due to the frequent combining application of diverse human rights influences, p. 694, Zampini: 1999.

⁴² No wonder that Picod urged Community courts not to adhere automatically to the ECHR interpretation but to retain the Community logic/interpretation in their human rights jurisprudence, pp. 305-314, Picod: 1998. Nothing prevents pushing forward EC specific considerations in EC human rights law, p. 770, Spielmann: 1999.

⁴³ P. 101, Arnall: 2004.

⁴⁴ P. 15, Ryssdal: 1995; p. 58, Benoît-Rohmer: 2000; p. 9, Krüger and Polakiewicz: 2001; Point 125, Lords EU Select Committee, 2003.

⁴⁵ P. 680, Zampini: 1999.

⁴⁶ Pp. 680-683, *ibid*.

actual convergences⁴⁸ also ensure that the autonomous nature of EC human rights protection does not risk divergence.⁴⁹

2. *Claims of non-divergence*

Belief in divergence in human rights adjudication between ECHR and EC law is not shared by all commentators. Some argued that there are no major points of divergence and there is no major risk of divergence.⁵⁰ Others maintained that it is not a grave issue and it will be resolved,⁵¹ and that growing similarity and harmony of judgments characterise the relationship between EC and ECHR law.⁵² An early report suggested that generally there is no fundamental incompatibility between the two treaties.⁵³ Some propagators of the divergence claim conceded in their conclusions that divergence may not be an issue after all.⁵⁴ Others questioned whether the risk of divergence has ever been appropriately determined.⁵⁵ It was also stated that the divergence claim has failed to convince.⁵⁶ De Witte asserted that the plurality of human rights regimes has prompted misgivings among commentators on EC standards falling short of ECHR standards.⁵⁷ He added that there might not be a real problem of EC human rights standards being lower than that of the ECHR.⁵⁸ With respect to divergence in permitting interferences with fundamental rights Craig held that there is scant evidence that the ECJ has ignored the type of specific limitations that can be found in the ECHR.⁵⁹ Others

⁴⁷ Pp. 684-687, *ibid*, such as similar approaches to scope and restrictions, and the ‘mercantilisation’ of ECHR law. The latter refers to the ECHR increasingly protecting corporate rights, see in this regard, pp. 134-138, Clapham: 1993; pp. 3, 10-14, 197-207, Emberland: 2006.

⁴⁸ Pp. 691-692, Zampini: 1999.

⁴⁹ Community courts are driven to produce non-divergent human rights law in order to appear legitimate, effective and credible; the ECJ has nothing to gain by bad human rights law, *ibid*.

⁵⁰ See, p. 352, Anderson: Slynn; p. 565, Jacobs: Schermers; pp. 267-268, Légér: 2003; p. 157, Hilf: 1976; p. 188, Everling: 1977; p. 28, Lords EC Select Committee, 1992; pp. 4-7, Schermers: 1998; p. 629, Kühling: 2003; pp. 5-6, De Búrca: 2001; pp. 13-14, Pernice and Kanitz: 2004.

⁵¹ See, pp. 23-24, Waelbroeck: 1995; p. 334, Limbach: 2000; p. 6, Krüger and Polakiewicz: 2001; pp. 43-44, Rossi: 2002.

⁵² See, p. 41, Lords EC Select Committee, 1992; pp. 1276-1277, Rodríguez Iglesias: 1995; p. 1210, Hilf: 1995; pp. 231-233, Young: 2005.

⁵³ P. 4, Mendelson: 1984. See also, pp. 86-87, Capotorti: 1968, stating that direct conflict of the ECHR with other international agreements is unlikely; as regards overlap with the ECs he suggested that the ECs could be bound by the ECHR. Waelbroeck, however, considered that conflict may arise from the interpretation and application of the ECHR by the ECs, pp. 94-95, Waelbroeck: 1968.

⁵⁴ See, p. 647, Cohen-Jonathan and Flauss: 1999; pp. 770, 772-776, Spielmann: 1999; p. 243, Skouris: 2004; p. 277, Benoît-Rohmer: 2005; p. 390, Lawson: 2005; p. 342, Lawson: 2007.

⁵⁵ Pp. 39, 40, Discussion, The Developing Role of the ECJ: 1995.

⁵⁶ P. 350, Pellonpää: Wildhaber; p. 170, Rosas: 2005.

⁵⁷ Pp. 878-879, de Witte: 1999.

⁵⁸ P. 890, *ibid*.

⁵⁹ Pp. 352-353, Craig: 2004. See also, pp. 43-44, Rossi: 2002. Even Peers accepted the appropriateness of the formula in case of property rights in EC law, p. 151, Peers: 2004.

claimed that the limitation formula in the EUCFR does not dilute the limitation(s) allowed under ECHR law.⁶⁰ The textual comparison of the limitation formulas led others to conclude that they are to the same effect.⁶¹

3. Divergence as a temporal and contextual issue

One must also consider that divergence is a matter of time and context. The temporal dimension of divergence is well known from general observations on the convergence/divergence debate according to which studying convergence/divergence must include a dynamic comparison (alongside a static comparison) that is sensitive to change/evolution in time.⁶² In the ECHR – EC context commentators drew attention to the fact that the core examples of the divergence claim are of little significance as evolution in Community law has eradicated divergence.⁶³ Time is an important factor from the perspective of the constant fluctuation of laws meaning that divergence needs constant assessment and reassessment as the law develops. Due to the temporal dimension of divergence the examples of the divergence claim resemble the fate of the sperm whale falling onto planet Magrathea in *The Hitch Hiker's Guide to the Galaxy* having very little time to come to terms with its identity as a whale before it had to come to terms with not being a whale any more.⁶⁴

Time also bears relevance as regards the claim that when the ECtHR alters its interpretation the divergence of EC human rights protection will be inevitable.⁶⁵ Certainly, this holds true in the given time interval. In fact, such modification would affect every legal system under the Convention which for the time being will be threatened by divergence. However, time and evolution will bring relief in the form of gradual adjustment to the new interpretation making divergence only a passing mirage. Condemning such species of divergence would deem legal systems to linger in a state of immobility, as the interest of coherence would impede legal evolution. It must be mentioned that when EC law provides a new, more progressive interpretation of

⁶⁰ P. 53, Costello and Browne: 2004.

⁶¹ P. 550, Lenaerts and Van Nuffel: 1999.

⁶² See, p. 8, Drahos: 2001; p. 308, Antokolskaia: 2006. On time as a factor in divergence in law, see, p. 2, Ost: 1999 and pp. 396, 398-399, Ost and van de Kerchove: Rigaux.

⁶³ See, pp. 770, 777, Spielmann: 1999; p. 688, Zampini: 1999; p. 525, Craig: 2006; pp. 757, 761, Jacqué: 2005; pp. 112-113, Costello: 2006. Undoubtedly, there could have been intervals (there will be) when divergence was apparent, but temporal divergence seems inevitable as ECHR and EC law cannot evolve simultaneously but with an obvious phase shift.

⁶⁴ Pp. 107-108, Adams: 1994.

⁶⁵ See, p. 29, Bultrini: 2002; pp. 1146-1147, Puissochet: Ryssdal.

fundamental rights expanding their protection, the divergence claim does not seem to raise objections.⁶⁶

Context is also of significance as divergence may be explained by the specificity of individual cases expressing no disagreement on the level of principles.⁶⁷ It was suggested that in ECHR law individual human rights solutions are a matter of judgement of proportionality supported by small majorities within the ECtHR.⁶⁸ Consequently, a (non-) divergence claim must take into consideration that the cases (human rights solutions) selected from each jurisdiction are liable to be distinguished on grounds of their facts and circumstances rendering the conclusion of divergence reached by way of comparison unattainable.⁶⁹

Divergence must also be viewed as a matter of process. Instant alignment is hardly the reaction of legal systems to an emerging expectation of non-divergence. This is even more so when the legal systems involved have only recently found their autonomy and identity.⁷⁰ It is not unheard of that courts come up with different conclusions in a developing situation.⁷¹ Non-divergence between legal systems is a guided process of evolving concordance. From this perspective intermediate disturbances should hardly raise concerns. It would be unrealistic to strive for a system of European human rights protection in which the question of compatibility is never raised, as the entities under that regime would always be compliant. Furthermore, when the limits of what is permitted under that regime resist exact definition it cannot be expected that no disputes on these limits will arise. One may suggest that divergence is natural to the process of co-existence between legal systems. European human rights laws are difficult to imagine as being in a state of constant harmony.⁷²

4. The complexity of divergence

⁶⁶ See in this respect, p. 1333, von Bogdandy: 2000, holding that the broadness of EC human rights protection is not a problem as the ECHR conceives human rights protection similarly broad.

⁶⁷ See, p. 39, Discussion, *The Developing Role of the ECJ*: 1995.

⁶⁸ P. 40, *ibid.*

⁶⁹ See, Part III on the issue of incommensurability.

⁷⁰ The Convention only began its functioning in the late 70s, early 80s, p. 555, De Salvia: Wiarda. This is the time when Community courts began providing human rights protection, p. 358-361, Brown and Kennedy: 2000.

⁷¹ P. 28, Drzemczewski: 2001, asserting in footnote 162 that this is the opinion of N.P. Engel the editor of HRLJ.

⁷² Certainly, there is a potential for conflicting rulings in the future (p. 316, De Búrca: 1993), however, potentials for divergence hardly matter in the long run in the European system of human rights protection.

Despite the limitedness of the divergence claim's examples in number and diminishing in time it has become a widely accepted (repeated) argument in legal commentary. The claims are often formal and minimal, and they mostly concern the specific context of EC human rights protection criticising it from the perspective of the allegedly purely human rights oriented ECHR law. The influence of the divergence claim is confounding when one considers that divergence between human rights adjudication in ECHR and EC law has eluded a genuinely comprehensive analysis so far.

It is certain that divergence in the present context is a complex issue; the interactions between the legal systems in question are crossed and the pressures are reciprocal.⁷³ When one considers the inter-systemic fluidities and crossings, the fragile complexity of the awkward co-existence of ECHR and EC law⁷⁴ divergence fails to appear as instant conclusions available from impetuous comparisons.

Indeed, the relationship between Strasbourg and Luxembourg, which provides the fuel to the divergence debate, can hardly be characterised as simple. A psychologically informed approach saw their relationship as a matter of vanity in which the courts are joined in a battle for the position of the most autonomous, senior, and authoritative court.⁷⁵ They avoid defining their relationship⁷⁶ as they balance between retaining autonomy and avoiding conflicts.⁷⁷ Their relationship was also described as characterised by interdependence in providing human rights protection.⁷⁸ It was seen as a combination of stimuli and equilibrium that requires self-control and self-discipline.⁷⁹ This complexity is also reflected in case law. The ensuing analysis of case law in Part II and III will demonstrate that the courts are aware of the delicacy of the situation and manoeuvre with care on the perilous waters of their complex inter-systemic relationship burdened by expectations of harmony and coherence. The non-divergence claim advanced below proposes a system of comparison within the **similarity argument** that takes into account the complexities of the divergence problem.⁸⁰ It considers the problem of incommensurability in comparing cases decided in different jurisdictions and it neutralises the problems caused by the temporal and evolutionary dimension of divergence, and the implications of context on divergence. By virtue of the **flexibility argument** the non-divergence claim incorporates into examining the problem of

⁷³ P. 688, Zampini: 1999.

⁷⁴ Pp. 631, 639, Douglas-Scott: 2006.

⁷⁵ P. 644, *ibid.* See also, p. 229, Lawson: Schermers and p. 208, Schermers: 2000.

⁷⁶ P. 657, Douglas-Scott: 2006.

⁷⁷ Pp. 660, 662-663, *ibid.*

⁷⁸ Pp. 700-706, Zampini: 1999.

⁷⁹ P. 707, *ibid.*

⁸⁰ See Part III.

divergence the specific structural arrangements between ECHR and EC law.⁸¹ Altogether, the imprudent treatment of details and structure is turned against the divergence claim in the following comprehensive analysis of divergence between human rights protection in ECHR and EC law.

Prior to elaborating the key arguments of the present thesis another characteristic of the divergence claim must be examined. It is apparent from the above that the divergence claim strives on the typically monist dismay of another autonomous legal order appearing in the same legal space. Fostered by the perceived disorderliness the plurality of legal orders may entail the divergence claim expresses concern for coherence and for the weakening of the common European (human rights) heritage.⁸²

However, considering that ECHR and EC law are designed to function among an increasing multiplicity of legal orders such reaction appears misplaced. The issue of divergence will be misinterpreted when the selected approach rejects difference seeing it as a (potential) conflict that requires urgent remedy by dismissing the source of the conflict and fails to appreciate that legal systems (ECHR and EC law) are able to react to the difference of the other legal system differently. Provided that legal systems (ECHR and EC law) are equipped with mechanisms that enable accommodating the different human rights solution of the other (the **flexibility argument**), the appropriate approach towards divergence is one that considers divergence as intrinsic to the coexistence of legal systems. It holds that divergence demands to be managed and it must not be despised on the sole ground that difference irritates our conception of legal order(s).

It follows that the present non-divergence thesis must contemplate the possible approaches to divergence in law. In the following chapter the most appropriate approach to divergence in law will be selected. This will enable the construction of an adequate **flexibility argument** presumed to be inherent in the claim of non-divergence between ECHR and EC law.⁸³

⁸¹ See Part II.

⁸² Pp. 278-279, Benoît-Rohmer: 2003.

Chapter 2: Approaches to divergence in law

As suggested previously a comprehensive non-divergence claim necessitates a general analysis of approaches to divergence in law. Generally, the relevant positions either reject otherness to protect the self or embrace otherness since one's identity is dependent on interactions with others. These positions, described as monist and pluralist, affect how the causes of divergence are ascertained and determine how conflicts among the diverse elements of multiplicity can be managed. Establishing a successful non-divergence claim depends on choosing the appropriate approach to divergence in law.

1. Approaching divergence

Divergence is an everyday phenomenon. It is a natural status; there is infinite variety and complexity in the physical world.¹ Diversity is a fact.² It is the result of variation and change.³ Other views link diversity with human nature.⁴ It owes its origin to the autonomy of a person understood as self-direction.⁵ Particularity is the common characteristic of human beings.⁶ Societies are also marked by diversity and difference.⁷ Our approach towards divergence is determined when we evaluate difference. Two reactions are plausible. Difference can be seen confusing, but it can also be a source of innovation. Difference appreciates changes and helps keeping in touch with local variation and specificity.⁸ Nevertheless, evaluation gives way to preferences and preferences result in choices. Preferring and choosing the comfort of the familiar over the alien of the different entails that any sign of difference will be regarded with suspicion as a violation of one's identity manifested in one's preferences and choices.⁹ In this respect "diversity may imply incompatibility (and)(...) conflict".¹⁰ On this basis, diversity is often associated with disunity, dissolution, and weakness conflicting with

¹ Pp. 2-3, Weeks: 1994.

² P. 27, Galston: 2002. Diversity is characteristic of reality, p. 173, Sacco: 2001.

³ *Ibid.*

⁴ See, p. 141, Hampshire: 1983; p. 39, Kekes: 1993.

⁵ P. 21, Galston: 2002.

⁶ Pp. 81-83, Walzer: 1994.

⁷ P. 1, Horton: 1992; p. 17, Thomas: 1994.

⁸ Pp. 171-172, Sacco: 2001.

⁹ The rejection of the other emanates from the discomfort people feel when they sense foreignness within themselves, p. 91, Curran: 1998.

¹⁰ P. 173, Sacco: 2001. See also, p. 52, Legrand: 1997.

the popular values of uniformity, unity, and power.¹¹ On the other hand, variety and difference do not have to induce fear. Provided that diversity is valued and preferred our choices might involve accommodating the different.

In law divergence is frequently referred to as the diversity of legal systems expressed in the differences between the units of different legal orders.¹² Divergence is regarded as a status reflecting the isolation of legal systems stemming from the conceptualisation of law in the framework of legal systems. Accordingly, legal systems are numerous and diverse; their diversity is complex, vast, endless, and versatile.¹³ They differ in their details; their concepts, institutional facts and theories are different.¹⁴ Merryman suggested that legal systems have different rules, procedures, and institutions.¹⁵

Difference can also be associated with law's context. Legal systems reflect various political, social, and economic expectations. They have distinct *mentalités* or styles. The legal system can be regarded as part of culture; the characteristics of a given society determine the features of its legal system. Law can be considered as local knowledge where differences are difficult to reduce to abstract commonalities.¹⁶ Divergence in law also appears as a dynamic concept. It is suggested that differentiation and the increase of individualism gradually introduce untidy diversity in place of neat uniformity.¹⁷ Merryman held that "with human progress, legal systems become more sensitive to nuance, to the interests of specific groups of people, and thus become more diverse."¹⁸

2. Approaches to divergence

It was argued that diversity could be confusing and discomforting. Otherness can be sensed as trespassing one's identity. Diversity can displace the observer from the comfort of the known and introduce the insecurity of the uncharted.¹⁹ The observer's self-perception might be disturbed by otherness, but his reactions are not determined alone by the sensation of difference. As suggested above, the reaction of rejecting or accepting difference stems from the identity of the observer. If one's identity is based

¹¹ P. 196, Tully: 1995.

¹² Real divergence is "where the outcomes of the application of principles diverge between legal systems", p. 405, Ogus: 1999.

¹³ P. 5, Husa: 2001. See also, p. 17, Mattei: 1997.

¹⁴ Pp. 65, 72-77, Schlesinger: Yntema.

¹⁵ P. 1, Merryman: 1985.

¹⁶ Pp. 215-216, Geertz: 1993.

¹⁷ Pp. 214-215, Merryman: 1978.

¹⁸ P. 231, *ibid.*

¹⁹ See in this respect, p. 234, Geertz: 1993, stating that it may cause intellectual entropy and moral paralysis.

on exclusivity insisting on isolating it from others, the reaction to difference will be refusal.²⁰ Conversely, when one's identity builds on borrowing from and interacting with others, difference is likely to be accommodated.²¹ On this basis two approaches to divergence can be identified.

2(a): Monism

The monist approach views divergence as the multiplicity of differing isolated units. It starts from the preconception that the 'other' is inferior.²² The 'self' is confined to its own territory from where the 'other' is rejected. The 'self' speaks with authority and imagines itself on the top of a hierarchy. In this dichotomy divergence provokes the monomaniac refusal of 'others' with the aim of preserving one's integrity and identity expressed in his preferences and choices.²³ Consequently, monism sees differences as deviations. It is inhospitable to differences and breeds the spirit of intolerance. Dialogue with others leading to critical self-assessment is excluded.

2(b): Pluralism

In contrast to monism pluralism does not consider isolation as the means of maintaining one's identity amidst the confusion of multiplicity.²⁴ It believes that maintaining relationships with 'others' comes naturally to the 'self' as one's identity is determined by embracing diversity. It accepts that difference leads to misunderstandings, but that alone is not a reason to get rid of diversity. Respecting, tolerating, and accepting the other means giving up our programmed selfishness.

Pluralism requires us to see ourselves amongst others as a case among cases.²⁵ Self-knowledge, self-perception, and self-understanding needs to be welded to other-

²⁰ See discussing such reaction, pp. 30-41 and 45, Glenn: 2000, stating that identity is about separation – it needs protection to maintain its distinctiveness; and pp. 119-120, Offe: 1998, stating that identity strives on the absence or isolation of other identities often producing aggressive denial.

²¹ Establishing the boundaries of the self takes place by way of interaction with the environment; only through difference could identity have a purchase point, pp. 351-353, Bankowski and Christodoulidis: 1998.

²² Pp. 129-130, Parekh: 1999.

²³ It assumes uniformity and similarities enjoy primacy over differences, pp. 130-131, *ibid.*

²⁴ With pluralism the idea of a single 'identity space' is abandoned, pp. 71-72, Friedman: 1997. Identity should not consider the vision of independent, closed, and homogenous spheres, pp. 13-14, Tully: 1995.

²⁵ P. 16, Geertz: 1993.

knowledge, other-perception, and other-understanding.²⁶ On this basis, one's identity is characterised by multiplicity and heterogeneity.²⁷ Provided that isolation is replaced by co-existence, monomania with pluralism, hierarchy with heter- or polyarchy, unity with fragmentation, and if difference becomes accepted instead of being rejected,²⁸ divergence loses its attribute of constituting a peril to identity.²⁹ Separation and exclusion are not inevitable reactions to divergence.

As it was demonstrated above divergence is a characteristic of the multiplicity of legal orders. Opinions on divergence in law can also be divided along the monist/pluralist line. Accordingly, the identity (the autonomy/validity) of legal systems either builds on the exclusivity of that legal system, or it is expressed in pluralistic terms such as coexisting legal spheres or interactive legal networks. Comparison as means of exploring difference in law follows similar paths. On grounds of the idea of legal uniformity it may attempt to reduce the menace of difference by emphasising similarities. Conversely, it may rely on multiplicity aiming to organise diversity around different forms and trying to grasp legal systems "diacritically"³⁰. It follows that two distinct approaches to divergence in law must be distinguished concentrating either on the exclusion of outsiders (monism) or aiming at apprehending the coexistence of the different many (pluralism).

2(c): Monism in law

The monist approach conceives law as a system the boundaries of which are determined by the boundaries of modern states.³¹ It promotes the isolation of national laws the exclusivity of which is ensured by rejecting other legal orderings from the legal space they occupy thus creating "nomopolies".³² According to Merryman

²⁶ Pp. 181-182, *ibid.* Recognition is due to the other as well, pp. 81-83, Walzer: 1994. We need access to others as they help us appreciate the uniqueness, the strengths, and limitations of our own, pp. 128-129, Parekh: 1999.

²⁷ Pp. 45-47, Tully: 1995.

²⁸ See in this respect, pp. 153-154, Teubner: 1997.

²⁹ See in this respect, pp. xx-xxi, Connolly: 1995, stating that there is no identity without difference and differences do not threaten identity.

³⁰ P. 123, Legrand: 1997a.

³¹ See in this regard, p. 133, van de Kerchove and Ost: 1994.

³² The term was borrowed from p. 614, Macdonald and Sandomierski: 2006.

(...) differences between legal systems have been regarded (...) as evils or inconveniences to be overcome. A Babel of laws seems divisive, confusing, and obstructive.³³

The difference of national legal systems gained emphasis when the nation state emerged in Europe.³⁴ The laws of the nation were seen as the building blocks of national identity.³⁵ Laws became isolated as the “root of diversity” inherent in the legal cacophony of feudal Europe had been thorn up.³⁶ As Fitzpatrick noted “law was seen as informed by and dependent on the peculiar characteristics of each national community.”³⁷ The unification of laws within nation states was the cause of “legal disunity” in Europe.³⁸ This isolation led to the breakdown of interaction between legal systems.³⁹

It is claimed that modern state law dislikes divergence as it is committed to uniformity. The creation of legal uniformity was a historical process in which the modern nation state struggled to diminish legal pluralism. The unification of law was rational and inevitable as modern societies are thought to require order, certainty, and formal equality.⁴⁰ Comparative law in observing the variety of human law is especially keen on emphasising the distinctiveness of legal systems⁴¹ attracting criticism from legal pluralists.⁴² In sum, monism in law assumes that reaction to other legal systems will be rejection. What cannot be attributed directly or indirectly to the legal system defined by state boundaries is alien and refused. Accommodating divergence is conceived as questioning the achievements of modern legal systems.

³³ P. 195, Merryman: 1978.

³⁴ See, pp. 198-199, Laski: 1989a.

³⁵ See in this respect, pp. 128, 131-132, Vinogradoff: 1920; pp. 785-789, Freeman: 1996.

³⁶ P. 161, Fitzpatrick: 1983. See also, pp. 91-94, Fitzpatrick: 1990 and p. 108, Baron: 1990. The autonomy of the state supports the autonomy of its legal system with respect to other legal systems; this suggests that legal systems differ because they were created by different states, pp. 728, 730, Valcke: 2004.

³⁷ P. 114, Fitzpatrick: 1992.

³⁸ Pp. 111-118, *ibid.* The state eliminated legal particularity and the systemic thinking of law separated legal systems as systems require boundaries, consistency, and identity, p. 146, Glenn: 2000.

³⁹ *Ibid.*

⁴⁰ See, pp. 218-222, Friedman: 1977.

⁴¹ See in this respect, *inter alia*, p. 44, Butler: 1985; p. 25, Sacco: 1991; pp. 477, 479, 481, Schlesinger: 1995; p. 701, Ewald: 1998; pp. 181, 184-187, Twining: 2000; pp. 685-686, Reiman: 2002. On the various visions of divergence in comparative law see the overview in pp. 408-410, Collins: 1997.

⁴² On urging comparatists to engage in an intensive empirical research of diffusion of law – on how laws interact in reception and transplants, Twining: 2005. Calling to reorganise comparative law according to the requirements of legal pluralism, pp. 100-101, Ladeur: 2004 and p. 254, Delmas-Marty: 2004.

2(d): Pluralism in law

Questioning the paradigms of monism⁴³ pluralism is concerned with the presence of non-state legal entities and alien legal systems in the legal space attributed to a single system of national law.⁴⁴ Pluralism in law brings about the idea of homeostatic coexistence of laws instead of separation. The identity of legal systems is built on a heterarchical relationship among legal systems where identity is found in interaction within the multiple and not in isolation.⁴⁵ Divergence in law may no longer be regarded as an epidemic, but as part of legal reality in need for accommodation.

Pluralism in law presumes divergence. Coexistence, interdependence, and acceptance are its keywords.⁴⁶ It appreciates complexity, therefore, the existence of other legal orders should not provoke a hedgehog like reaction, but accommodating difference is urged.⁴⁷

The pluralist vision of divergence in law appeared in several contemporary branches of legal thinking. Santos claimed that pluralism is essential to the post-modern understanding of law.⁴⁸ He argued that in the polycentric legal world, where legality is fragmented among various forms of legal spaces, divergence as difference between national legal systems has lost its meaning.⁴⁹ Others suggested that divergence is a value that needs to be managed and “polyjurality” helps the better understanding of legal complexity.⁵⁰ Generally, post-modern theory emphasises preference for difference

⁴³ Monism as an “(...) approach to legal diversity would hardly merit recognition and discussion, since it is little more than an expression of frustration at the fact that the world is complicated, disorderly and uncertain. (...) It is closely related to an exaggerated demand for certainty in the law.”, p. 204, Merryman: 1978.

⁴⁴ See in this respect, p. 216, Twining: 2000 and pp. 577-578, Davies: 2006. On global legal pluralism involving a proliferation of structures and processes outside the traditional sites of law, pp. 15-17, Snyder: 1999; pp. 166-167, Teubner: 1997 and pp. 655, 658, Buchanan: 2006.

⁴⁵ See, mm. pp. 303, 305, Verhoeven: 2002.

⁴⁶ Weiler (in another context) spoke of tolerance where by compromising one’s self-determination expresses toleration enabling bonding with others, pp. 217-218, Weiler: 2000. In his less harmonious ‘MAD’ theory the other legal order is tactically left undisturbed avoiding open conflict, pp. 320-321, Weiler: 2000a.

⁴⁷ Curran suggested that the categorisations of sameness/inclusion and difference/exclusion must be rejected: difference must be acknowledged and protected, and it must be recognised and celebrated, p. 87, Curran: 1998.

⁴⁸ Pp. 293-294, Santos: 1987. See also, p. 172, Petersen: 1995.

⁴⁹ Pp. 297-299, Santos: 1987; divergence is the acceptance of diverse multiplicity, pp. 132-136, Santos: 1992.

⁵⁰ Pp. 57, 59, 61, Legrand: 1997. A post-modern legal order strives on flexibility, innovation, experimentation, self-constraints, self-observation, evaluation, and learning, pp. 620, 628-629, Ladeur: 1997a.

over unity.⁵¹ It embraces the marginal, the different and the other; flux, dispersal, plurality and localism are in its centre of attention.⁵²

Globalisation theory also supports the pluralist vision of divergence in law. It was held that under the pressures of globalisation diversity is accentuated even more profoundly.⁵³ Teubner assumed that globalisation breaks the monist frame of unity between law and the state. The new framework of global law rejects the old hierarchies giving equal footing to new types of laws.⁵⁴ It was suggested that global law appears as discourses and communicative networks: a proto-law of specialised networks.⁵⁵

Legal pluralism is another discipline where tolerating divergence in law has gained ground. It reacts to the fact that there are competing and contradicting legal orders outside the state having mutually constitutive relations with state law.⁵⁶ New legal pluralism focuses on the interaction between coexisting legal orders.⁵⁷ It accepts the interconnectedness of multiple coexisting legal systems⁵⁸ and respects their legitimate differences.⁵⁹ Glenn's pluralistic theory of legal traditions builds on the assumption that legal traditions are externally open and internally accommodating; therefore, they are able to represent and preserve diversity.⁶⁰

The approach one might take towards divergence in law is decisive from the perspective of the present non-divergence claim. The assessment of divergence between ECHR and EC law will inevitably be influenced by opting either to reject the otherness of a legal system, or to regard the difference arising from the other as an opportunity for interaction. While rejecting difference simplifies, rationalises, and creates certainty making the authority of exclusiveness attractive, embracing divergence is able to express the complexity of relationships between legal orders. It protects the plurality of

⁵¹ Pp. 153-154, Teubner: 1997. See also, pp. 22, 35, Carty: 1990.

⁵² Pp. 15, 17, Douzinas and Warrington: 1991.

⁵³ See in this respect, pp. 132-136, Santos: 1992; pp. 48-49, Glenn: 2000; pp. 245-246, 258-262, Teubner: 2000; pp. 6, 89, Twining: 2000; p. 133. Baxi: 2002; pp. 57-65, 168-173, Delmas-Marty: 2002. It can be best described as "globalised localism" and "localised globalism", p. 263, Santos: 2002. See the term "glocalisation" at p. 251, Legrand: 2002.

⁵⁴ Pp. 158-159, Teubner: 1997 and pp. 1012-1014, Fischer-Lescano and Teubner: 2004.

⁵⁵ Pp. 1017-1018, *ibid.* The heterogeneity of legal relations under the pressure of globalisation is best reconstructed as a network, pp. 46-48, Ladeur: 1997 and p. 28, Snyder: 1999.

⁵⁶ P. 889, Merry: 1988. See also, pp. 220-221, Geertz: 1993, stating that under legal pluralism the immingled varieties of law can be better captured. For various definitions of legal pluralism reflecting its many stages of development: pp. 196-197, Friedman: 1977; pp. 4-5, Griffiths: 1986; p. 878, Merry: 1988; p. 899, von Benda-Beckmann: 1988; pp. 1-3, Arnaud: 1995; pp. 233-234, Chiba: 1998; p. 262, Walker: 2002. As means of describing the European legal space, pp. 203-240, Arnaud: 1991.

⁵⁷ P. 873, Merry: 1988. See also, pp. 159-160, Fitzpatrick: 1983.

⁵⁸ P. 360, Merry: 1992.

⁵⁹ P. 978, Burke-White: 2004.

⁶⁰ P. 142, Glenn: 2001.

opinions and it appreciates the diversity of reality. Presumably, the non-divergence claim fares better with the pluralist vision of divergence in law enabling it to regard the differences EC human rights protection may entail as welcomed within the framework of ECHR law. Nevertheless, in order to substantiate such choice the methods of managing difference in each vision of divergence in law must be ascertained.

3. *Managing divergence*

The two approaches on divergence have ready answers on how to manage difference as their attitude forms part of their action-plan on resolving the problems caused by divergence. The rejection of monists implies solutions eradicating difference by various means. The tolerance of pluralists presumes treatments that would accommodate difference, or lead to a pluralist choice if accommodation were impossible. The unbendingness of monism desires the extermination of divergence; it is not interested in managing divergence. Conversely, the flexibility of pluralism is aimed at embracing and sustaining difference.

3(a): Rejecting diversity

The solution monism offers aims at eliminating intrusions emanating from others by reducing divergence. Its method, rejection,⁶¹ signals that monism would fail to satisfy the premises of the present non-divergence claim. It would only accommodate the one claiming to be overriding, unique, and higher⁶² leaving the equal different out of consideration.

According to Tully the monistic vision of multiplicity in law excludes diversity and justifies uniformity;⁶³ its solution is to assimilate, integrate, or transcend.⁶⁴ Consequently, a claim of non-divergence between laws can only succeed by demonstrating similarity. However, this would hardly reflect reality. First, as it will be demonstrated below, in particular in Part II, laws are able to react flexibly to the difference of the other. Second, uncompromising demands of similarity are rarely

⁶¹ The reaction of modern law to multiplicity is rejection and violence against intrusion, p. 6, Arnaud: 1995.

⁶² P. 14, Kekes: 1993.

⁶³ Pp. 31, 38, 58, Tully: 1995.

⁶⁴ Pp. 43-44, *ibid.*

welcomed by the other legal system⁶⁵ both questioning the appropriateness of the monist strategy.

3(b): Accommodating diversity through flexibility

Idealist accounts of managing multiplicity

Preserving multiplicity as demanded by pluralism requires means of accommodating divergence. As Geertz phrased it “difference (in law) must be managed not abolished.”⁶⁶ For a non-divergence claim accommodating all differences would be the ideal solution as it would ease confrontation and conflict between legal orders. In this regard, the ability to react flexibly to the dissimilarity of the other could ensure a harmonious coexistence between legal systems.⁶⁷

Managing diversity could involve compromises and negotiations expanding flexibly the boundaries of living with divergence. The survival of multiplicity depends on compromises.⁶⁸ However, reaching compromises assumes dialogues (negotiations).⁶⁹ In this regard, intersection and collaboration between the multiple constituencies, infused by critical responsiveness and respect, are needed.⁷⁰

Similarly, accommodating divergence in law could be based on mutual recognition achieved by free participation in a continuous (repeated) legal dialogue or ‘multilogue’ among equals.⁷¹ Walker claimed that pluralism encourages flexible modes of bargaining and deliberate modes of dialogue between legal systems.⁷² According to Santos interaction between legal orderings prevents conflicts arising from divergence.⁷³

Almost complete harmony is depicted in Glenn’s vision of legal multiplicity. According to him legal traditions due to their complexity are programmed to deal with diversity

⁶⁵ Forced unity may lead to resistance, repression and disunity, p. 197, *ibid*.

⁶⁶ Pp. 215-216, Geertz: 1993. The coexistence of laws is punctuated by conflicts that should be discouraged by devising a way to manage coexistence, pp. 234-238, Chiba: 1998.

⁶⁷ Flexibility refers to an aptitude to thinking and ordering the multiple without reducing it to unity and abandoning it to dispersion, pp. 6-8, Arnaud: 1995.

⁶⁸ P. 6, Walzer: 1994.

⁶⁹ P. 134, Parekh: 1999. Compromise and discourse is more than simply tolerating the different, pp. 77-78, Walzer: 1994.

⁷⁰ Pp. xx-xxi, Connolly: 1995.

⁷¹ See, pp. 7, 15, 24-26, 53-55, 131, Tully: 1995. See in this respect Weiler’s constitutional tolerance thesis based on respecting the other; it concerns a voluntary and repeated acceptance and subordination – it is an act of liberty and emancipation, pp. 18-21, Weiler: 2003.

⁷² P. 263, Walker: 2002.

⁷³ Pp. 291-292, 299, Santos: 1987 (in his vision of coexisting legal spaces interaction defines law, see, p. 288). See also, pp. 1007-1008, Fischer-Lescano and Teubner: 2004.

and contradiction. Legal traditions do not consider separation and boundaries important; they accept difference and refuse to condemn or exclude.⁷⁴ He asserted that

*Legal traditions are (...) externally open and internally accommodating. They represent and preserve diversity, (...) (they are) characterized by the flow of information which they represent.*⁷⁵

Conceptualising legal traditions as sets of communicable information⁷⁶ makes communication essential in managing diversity.⁷⁷ Glenn suggested that information (of a legal tradition) can never be regarded as alien as it is information shared by all the legal traditions in interaction.⁷⁸ This means that the communication of information can resolve irreconcilable differences between legal traditions.⁷⁹

The coexistence of legal systems under the umbrella of European integration led to the emergence of various theories on managing the diversity of the participating legal orders. In his multi-level ordering of legal systems Joerges assumed a coexistence of laws accepting multiplicity.⁸⁰ The conflicts inherent in coexistence in this “directly-deliberative polyarchy” are eased by the conviction of the participants that coexistence must be maintained.⁸¹ It follows that maintaining and managing coexistence may depend on the commitment of the individual units towards maintaining the pluralist structure.

The multiplicity (multipolarity)⁸² of coexisting legal orders was regarded also as “a heterarchical network consisting of various levels with differentiated connecting patterns”.⁸³ This “network-like” relationship is managed by “co-operative, horizontal forms of relationships” keeping legal orders sensitive to external influences while preserving their identity.⁸⁴ This coordinative – cooperative interrelationship based on

⁷⁴ Pp. 322-330, Glenn: 2000.

⁷⁵ P. 142, Glenn: 2001.

⁷⁶ *Ibid.*

⁷⁷ Legal traditions are in constant and intensive communication, pp. 140-141, Glenn: 2001. Teubner asserted that legal pluralism is defined as a multiplicity of diverse communicative processes, p. 10, Teubner: SSRN: 2006.

⁷⁸ P. 142, Glenn, 2001.

⁷⁹ Pp. 42-44, Glenn: 2000. For criticism, see, pp. 98-105, Husa: 2006.

⁸⁰ Pp. 389-391, Joerges: 1997. Others conceptualised this multi-level ordering as a composite system which despite the plurality of sources forms unity as the system produces a single and ultimately binding solution, p. 20, Pernice and Kanitz: 2004.

⁸¹ Pp. 394, 396-406, Joerges: 1997. In contrast, in Pernice’s multilevel order conflicts must be resolved by establishing temporary hierarchies where no *a priori* hierarchies exist, pp. 514, 520, Pernice: 2002.

⁸² P. 108, Ladeur: 2004.

⁸³ Pp. 2, 3-4, Ladeur: 2002.

⁸⁴ Pp. 34-37, 50-51, Ladeur: 1997.

learning and mutual observation is thought to provide an adequate structure for managing diversity.⁸⁵

New ways of conceptualising European constitutional arrangements presented further visions of managed coexistence among legal orders.⁸⁶ In MacCormick's non-hierarchical constitutional ordering of plural legal systems harmony is ensured by (co-ordinated) interactive relations between the overlapping legal orders.⁸⁷ Maduro's "contrapunctual law" suggested a pluralist arrangement of European legal orders in harmony where conflicts are ruled out and gaining from diversity and from the choices it offers needs to be learned. Instead of conflicts emphasis is put on exchange and reflexivity.⁸⁸

In Walker's post-national constitutionalism⁸⁹ constitutional orders are not isolated and self-sufficient, and they do not purport to be comprehensive and exclusive. Overlapping is the norm and processes designed to address overlapping are central to the system.⁹⁰ Within this new framework the interaction of units is facilitated⁹¹ and there is a continuous process of negotiation entailing possibilities of mutual learning⁹² (mutual accommodation and reflexive learning).⁹³ Shaw described European post-national constitutionalism as a concept based on dialogue and process.⁹⁴ Harlow emphasised the need for mutual respect and a non-hierarchical method of mediating conflict.⁹⁵ Polycentricity also appeared as a model of a non-hierarchical and conflict avoiding

⁸⁵ Pp. 50-51, *ibid.* In connection with globalised legal networks, p. 1018, Fischer-Lescano and Teubner: 2004. This model shows similarities with a systems analysis of the relationship between EC and national laws, see, pp. 250-251, Maher: 1998.

⁸⁶ For an account of major attempts, pp. 588-595, Shaw: 1999; pp. 242-249, Bernard: 2002; pp. 592-599, Walker: 2005a.

⁸⁷ Pp. 118-119, MacCormick: 1999.

⁸⁸ Pp. 523-524, Maduro: 2006.

⁸⁹ Other designs: a stable compromise framework model in which coexistence can be managed by mutual respect and restraint exercised through interaction, pp. 325-328, Barber: 2006; an interactionist model emerging through a discursive on-going process between different subjects, p. 138, La Torre: 2000; on a 'pluralist global administrative law' creating stability through negotiation and compromise, pp. 269-274, Kirsch: 2006.

⁹⁰ P. 48, Walker: 2002a.

⁹¹ Pp. 48-50, *ibid.*

⁹² Pp. 51-52, *ibid.* It might also be described as an associative type of relationship between sites bargaining and competing in pursuit of their different interests, p. 26, Walker: 2000. Others also conceptualised the European legal space as interlocking normative spheres where the whole system is constituted in a continuous process of negotiation and renegotiation, p. 342, Bankowski and Christodoulidis: 1998.

⁹³ P. 26-28, Walker: 2000. See its similarity to the concept of deliberative coordination in the structure of a directly-deliberative polyarchy (another potential vision of European legal multiplicity) which stands for a deliberation directed by learning jointly from the different experiences participating units and improving the institutional possibilities for such learning, p. 326, Cohen and Sabel: 1997.

⁹⁴ Pp. 19-21, Shaw: 2000. See Weiler's term of constitutional conversation, p. 322, Weiler: 2000a.

⁹⁵ Pp. 222-223, Harlow: 2002. See also, p. 300, Barents: 2004, stating that only cooperation and mutual adjustment can resolve conflicts.

European constitutional constellation where coexistence is managed by ongoing dialogue and negotiation.⁹⁶

Ordered multiplicity

Either by means of dialogue, interaction, process, respect, exchange, communication, negotiation, free flow of information, learning, reflexivity, internal conviction, or cooperative relationship the approaches above held that reacting flexibly to the challenges of difference caused by multiplicity entails that divergence in law can be managed without reducing diversity.⁹⁷ They required flexibility in terms of opening up to other reasons and they were willing to sustain the equality of the many. On this basis, a non-divergence claim could assume that divergence in law is unproblematic because legal systems are able to address flexibly and effectively the problems caused by divergence.

However, not all propagators of a pluralistic vision of divergence in law share the idyllic account of legal multiplicity. Geertz suggested that the discourses required to accommodate diversity in law could only be abnormal as the opposing laws cannot agree upon common criteria and there is no accepted framework within which objective assessment is ensured.⁹⁸ Even Glenn was forced to acknowledge that diversity needs protection when the communication of information between legal traditions fails to deliver.⁹⁹ It appears that managing difference under the pluralist imagination may have to compromise diversity.

The pluralist choice is the solution offered in this respect. It is derived from the fact that multiplicity and conflict are often juxtaposed; difference and conflict are an item.¹⁰⁰ When conflict between the different many is inevitable, the necessity of choice can hardly be eliminated.¹⁰¹ It follows that the pluralist approach could entail selecting the different other eliminating any other options. It also follows that the choice necessitated by multiplicity may not always favour the different other as opting for the self or similar others could constitute the appropriate and reasonable decision. In this respect, the

⁹⁶ P. 122, Wind: 2003. Legal polycentricity is legal pluralism 'rebranded' mainly referring to law, legal sources engendered in many centres, pp. 189, 191, Zahle: 1995 and p. 88, Sand: 1995.

⁹⁷ Focusing on communication as means of governing the relationship between legal orders is the result of an increased emphasis on the role of judges in pluralist legal thinking, p. 124, Viola: 2007.

⁹⁸ Pp. 222-225, Geertz: 1993.

⁹⁹ Pp. 331-334, Glenn: 2000.

¹⁰⁰ See, pp. 19-21, Kekes: 1993 and pp. 30-31, Galston: 2002.

¹⁰¹ P. 10, Berlin: 1969; pp. 125, 147, Hampshire: 1983.

difference between monists and pluralists is that the choice is not restricted automatically to promoting the self, but it is made after considering a variety of equal options which includes the possibility of embracing the different other.¹⁰² From the perspective of divergence in law this means that sustaining legal plurality may not be possible because the conflicts inherent in legal multiplicity demand choosing from the equal many.

The pluralist choice, the ultimate option available to managing multiplicity flexibly, also appeared in pluralist theories of law. In Merry's organic legal pluralism, which describes a mutually constitutive (interactive) relationship between legal orders,¹⁰³ the relationship between the overlapping multiple legal spheres not only involves mutual support and understanding, but constant and inherent challenge, change, and conflict. It follows that rejecting the autonomy of the other is part of the pluralist imagination.¹⁰⁴ Delmas-Marty's ordered legal pluralism also accepts that although the old hierarchies between legal orders are deconstructed, the relationship between legal orders is not left undefined presuming harmony. Instead, tangled hierarchies made and unmade continuously between the participants¹⁰⁵ assuming temporary choices to the detriment of diversity. In another account of ordered legal pluralism, that is legal pluralism kept at bay through a set of common principles,¹⁰⁶ multiplicity is subjected to ordering by juxtaposition and co-ordination under overarching common principles in case establishing hierarchies is unavoidable.¹⁰⁷ This corresponds with La Torre's opinion that pluralism can only be operational with certain limits and, ultimately, it must be reducible to some form of monism.¹⁰⁸ It follows that ordered legal pluralism reconnects with monism in law suggesting that the non-divergence claim, apart from the flexible solution of managing diversity under the pluralist vision, needs to consider the reaction of monism to divergence in law which involves rejecting the different and accepting only the similar.

¹⁰² Plurality is valuable in that it enriches our possibilities by providing the opportunity of variety in choice (as opposed to monism), p. 140, Hampshire: 1983; pp. 11-12, Kekes: 1993; pp. 178-179, Stocker 1999.

¹⁰³ P. 358, Merry: 1992.

¹⁰⁴ Pp. 879-886, Merry: 1988.

¹⁰⁵ See further in Introduction to Part II. See also, pp. 756-757, 764-765, Delmas-Marty and Izorche: 2000. The idea of creating temporal hierarchies (priorities) while maintaining legal polycentricity was also utilised by Zahle, p. 196, Zahle: 1995; see also Pernice *supra* fn. 81.

¹⁰⁶ Pp. 291-292, Verhoeven: 2002.

¹⁰⁷ Pp. 296-300, *ibid.*

¹⁰⁸ Pp. 136-137, La Torre: 2000. Undifferentiated or endless pluralism includes dangers, p. 584, Davies: 2006. See also, Douglas-Scott's reasonable pluralism, pp. 523-530, Douglas-Scott: 2002; and p. 170, Berteau: 2005, on coherence as a requirement amidst the plurality of overlapping legal orders.

4. *Selecting the appropriate approach*

Having found the limits of the pluralist vision of divergence in the monist vision means that the problem of divergence culminated in ordering (reducing) diversity under the pluralist imagination. This raises the question whether the pluralist approach is capable of advancing the present non-divergence claim. After all, the more likely scenario of a flexible choice overshadows the idea of maintaining a peaceful coexistence of legal systems through reacting flexibly to difference. Such choice could possibly favour the legal solution of the other legal system, but it does not exclude the possibility of rejecting the different other or opting for a similar alternative. For the non-divergence claim this entails that beyond flexibly accommodating difference only the similarity of legal solutions could provide adequate support as advocated by ordered legal pluralism. Furthermore, similar to the requirement of overarching common principles suggested above by Verhoeven,¹⁰⁹ the non-divergence claim is prevented from incorporating a pluralist solution without setting the criteria of managing diversity within a flexible framework. There is no purpose to acknowledging that legal systems would react to the problem of divergence by means of accommodating difference, when the parameters of accommodating difference are not identified.¹¹⁰ Only by providing these parameters, labelled from now on as the benchmarks of flexibility, could the pluralist approach be of support to the non-divergence claim.

On this basis, it must be accepted that although the pluralist vision of divergence in law appears ideal to accompany the present scrutiny of non-divergence in European human rights laws, its applicability is subject to reservations. Human rights protection under ECHR and EC law may call for a pluralist imagination (these supranational legal orders are required to find their bearing amidst a jungle of national legal orders and negotiating their relationship with each other also raises the question of flexibility), however, the non-divergence claim must consider that accommodating difference has limitations. Flexibility may be an ideal premise, but the requirement of similarity will surface eventually. It follows that as proposed in the introduction of the present thesis the non-divergence claim must put forward two interconnected lines of argument: one of **flexibility** and one of **similarity**.

¹⁰⁹ *Supra* fn. 107. They determine to what extent can heterogeneity be tolerated, p. 319, Verhoeven: 2002.

¹¹⁰ Twining criticises legal pluralism in that it overly simplifies matters by failing to consider the complexity of interactions between legal systems leaving the relationship between legal systems with ambiguity and confusion, pp. 82-87, Twining: 2000.

The **flexibility argument** builds on the flexibility of the pluralist imagination in accepting the possibility that multiplicity can be managed by accommodating the difference represented by the other legal system. In turn, the **similarity argument** reflects upon the unavoidability of conflicts within the pluralist imagination of divergence in law. It considers that it must resort to choices/hierarchies in resolving those conflicts. It is informed of the fact that the pluralist imagination may have to resort to promoting similarity in consequence of the pluralist choice.

Furthermore, selecting ordered legal pluralism as the most appropriate vision of divergence in law requires that the non-divergence claim between ECHR and EC law must take into account the benchmarks of flexibility determining the bounds within which difference can be accommodated. Establishing criteria for accommodating difference means that only those differing legal solutions can be accommodated that have been constructed on the basis of similar benchmarks of flexibility. It follows that the viability of the **flexibility argument** depends upon the issue whether the benchmarks of flexibility are similar which in the present dichotomy of arguments falls under the **similarity argument**.¹¹¹

First, however, the claim of non-divergence between human rights protection in ECHR and EC law must embark upon exploring the possibilities the pluralist imagination of divergence offers in terms of accommodating divergence by means of flexibility. Part II will examine whether flexibility characterises the reactions of ECHR and EC law to difference and whether the potential differences in EC human rights protection can be accommodated under ECHR law neutralising the divergence claim in part. As predicted, Part II will have to consider whether the **flexibility argument** is impeded by limitations making it therefore unavoidable to switch to the **similarity argument** in Part III providing the ultimate support for the non-divergence claim.

¹¹¹ See Conclusions to Part II and Introduction to Part III connecting the flexibility and similarity arguments.

Part II: The flexibility argument: Accommodating difference in ECHR and EC law

Introduction

The non-divergence claim building on an ordered pluralist vision of divergence in law asserts that in countering the claim of divergence in human rights protection between ECHR and EC law the ability of both jurisdictions to accommodate difference within their flexible framework must be explored. To this end, the relationship between ECHR and EC law needs to be (re-)conceptualised within the **flexibility argument**.

The setting is the multidimensional legal space of European human rights laws where the legal orders of the ECHR and the EC interlock in a relationship characterised as symbiotic, incremental, and even messy and unpredictable.¹ In Delmas-Marty's reconstructed and redrawn European legal landscape the Europe of plurality and complexity accepts and organises differences.² The relationship between ECHR and EC law is characterised by temporary hierarchies³ where both legal orders are competent to determine the applicable legal norm.⁴ More importantly, as a result of the flexible approach of ECHR law to the difference of other legal systems the question of divergence between ECHR and EC law cannot be expressed in the terms conformity/non-conformity.⁵ Instead, the term compatibility must be used demonstrating that a non-divergent relationship between ECHR and EC law permits not only conforming but different yet compatible human rights solutions.⁶

It needs to be demonstrated now that ECHR and EC law are in fact capable of maintaining such non-hierarchical coexistence in which the issue of non-divergence can

¹ Pp. 664-665, Douglas-Scott: 2006, seeing it as a strong example of legal pluralism. Kirsch suggested that the functioning pluralism of European human rights laws does not necessarily concern legal arrangements, rather judicial politics leading to interaction between (supranational) courts that results in resolving conflicts between them, pp. 3, 29-33, Kirsch: 2007.

² P. 184, Delmas-Marty: 2002.

³ Pp. 59, 61, 64-66, 68-70, Delmas-Marty: 2002. See also, p. 205, Lenaerts: 1983, who saw the relationship between ECHR law and the legal orders of its Contracting States (one might include EC law) as an incomplete "*ordre juridique pluriforme*" appearing as a "*pyramide coupée*" separating the ECHR from the constitutive systems of the pluralist legal order; and p. 1431, Szczekalla: 2005, reporting that such coexistence could be envisaged as a non-hierarchical network with flexible coordination. Zampini saw it a more complex scheme: a coordinated mixture of horizontal and vertical relations, p. 706, Zampini: 1999.

⁴ Pp. 147-148, 171-172, Delmas-Marty: 2002, referring to the confrontation of Europe of merchants and human rights.

⁵ See, pp. 95-97, *ibid.*

⁶ Compatibility reflecting the flexibility of ECHR law requires only a sufficient proximity of norms, p. 177, *ibid.* The term proximity is used as due to the indeterminateness (flexibility) of norms their identity (being identical with the norm of the other system) cannot be determined, pp. 105-112, *ibid.*

be satisfied by mere compatibility. Practical manifestations of a pluralist (flexible) approach towards difference must be revealed in ECHR and EC law (Chapters 3 and 4 respectively) and it must be demonstrated that they have relevance in shaping their relationship. The quality of flexibility, which as mentioned in Chapter 2 enables that diversity can be managed, is essential in this regard. It will be presented below that mechanisms of flexibility are facilitated by both legal systems in negotiating their relationship with other legal systems, ultimately, with each other. It will be argued that these mechanisms of flexibility enable difference, in the present context the different human rights solution of EC law, to be accommodated through this neutralising the problem of divergence. However, as it has been predicted when considering a pluralist response to divergence in law in Chapter 2 the **flexibility argument** is of limited ability in supporting the present non-divergence thesis. In this respect, the limitations of the mechanisms of flexibility, particularly the benchmarks of flexibility as mentioned in the previous chapter, need to be explored. This will lead to introducing the **similarity argument** in Part III.

Chapter 3: The practical manifestations of flexibility in ECHR law

As mentioned when discussing the methodology of the present thesis for the present purposes ECHR law will be considered as the legal system to which EC human rights protection shall adhere. This places EC law into a position of the legal system of a Contracting State to the ECHR.⁷ Accommodating the human rights solutions of EC law will therefore be dependent of the mechanisms flexibility provided in ECHR law which are normally used to address the diversity of domestic human rights solutions by fitting them into the flexible framework of ECHR law. In this respect, the ability of the **margin of appreciation doctrine** and the mechanism labelled **flexibility of scope** to embrace diversity in human rights protection will be taken into account.

1. Flexibility under the margin of appreciation doctrine

1(a): The margin of appreciation doctrine and diversity in human rights solutions

⁷ Suggested at p. 7, Krüger and Polakiewicz: 2001 and p. 349, Pellonpää: Wildhaber. Their relationship is determined mostly by ECHR law, p. 98, Rideau and Renucci: 1997.

In ECHR law the margin of appreciation doctrine provides the primary mechanism of flexibility in accommodating difference.⁸ It signals the acknowledgement of the diversity of legal systems⁹ and it introduces flexibility into the ECHR system.¹⁰ In moulding the margin of appreciation doctrine the diversity of political, economic, cultural, and social situations in the Contracting States was recognised.¹¹ It serves as a lubricant in the working of the ECHR enabling the ECtHR to manage the great variety of situations that arise from the lack of legal homogeneity among the Contracting States.¹²

Its welcoming attitude towards difference originates from its very rationale(s). The ECHR, as suggested by its Article 1, envisioned compliance with its provisions primarily as a matter of obligation of its Contracting States to secure to everyone within their jurisdiction the rights and freedoms defined by the Convention. On this basis, the machinery of protection before the Strasbourg organs is subsidiary to national systems safeguarding human rights.¹³

In general, the ECHR requires the Contracting States to bring their laws to conformity with the ECHR. The substantive side of this obligation entails that the Contracting States protect the rights enlisted in the ECHR. The procedural side demands an effective recourse in protecting these rights.¹⁴ The role of the ECHR by defining rights and providing redress is to ensure that human rights protection on the national level is realised adequately.¹⁵

This was also considered as that the ECHR, instead of uniform solutions, lays down standards of conduct leaving the Contracting States a spectrum of choices in

⁸ See, p. 122, Macdonald: 1993. See also, p. 842, Mackay: Ryssdal; pp. 351-352, Evrigenis: 1978.

⁹ P. 754, Delmas-Marty and Izorche: 2000.

¹⁰ Instead of a strong autonomous language of interpretation, flexibility was chosen which is essential to ensure its survival amidst the constant injection of indeterminate elements introducing disorder into the system, pp. 308-309, 312, Ost: 1992. It is an "elastic constraint" maintaining limits that are not to be exceeded, pp. 12-13, Delmas-Marty and Soulier: 1992.

¹¹ See in this regard, *inter alia*, pp. 839-840, Mackay: Ryssdal; p. 83, Macdonald: 1993; p. 58, Petzold: 1993; p. 26, Ryssdal: 1996; pp. 217-218, Sudre: 2006. The recognition of legitimate variety is the ideological background of the margin of appreciation doctrine, p. 76, Matscher: 1993. It was adopted to reconcile the dilemma how far should human rights law go in encompassing variations, pp. 10-12, Case: 2004.

¹² P. 122, Macdonald: 1993 and p. 496, O'Donnell: 1982. Instead of uniformity, legal diversity is respected, p. 556, De Salvia: Wiarda and p. 31, Matscher: 1998.

¹³ *Inter alia*, para. 48, Handyside; para. 152, Kudła; para. 43, Sejdovic. On a federalist framework of functioning essentially meaning the same, p. 475, O'Donnell: 1982. Seeing it as a procedural relationship, p. 49, Petzold: 1993 and p. 200, Sudre: 2006; as partnership with domestic legal systems, p. 390, Gearty: 2000; or as means of dialogue, pp. 178-184, Andriantsimbazovina: 2004 and p. 213, Ritleng: 2004.

¹⁴ Pp. 344-345, Evrigenis: 1978.

¹⁵ P. 346, *ibid.*

implementing the various rights and guarantees.¹⁶ Generally, they are under an obligation to produce certain results irrespective of the way they have been achieved.¹⁷ More precisely, the Convention admits that rights can be subject to restrictions, limitations, and conditions, or they may call for regulation.¹⁸ It follows that the primary responsibility for implementing and enforcing the rights and freedoms of the ECHR is laid on the national authorities.¹⁹ The margin of appreciation doctrine is, therefore, a product of the principle of subsidiarity.²⁰

The subsidiarity of the Convention is a clear manifestation of state sovereignty demanding respect in the field of international human rights protection.²¹ Introducing the margin of appreciation of Contracting States into the assessment of Strasbourg was an attempt to address the problem of state sovereignty.²² As Macdonald put it “the doctrine of margin of appreciation illustrates the general approach of the (ECtHR)(...) to the delicate task of balancing the sovereignty of Contracting Parties with their obligations under the Convention.”²³ Accordingly, the margin of discretion allowed is needed to avoid damaging confrontations between the ECtHR and the Contracting States over their respective areas of authority.²⁴

Due deference to state sovereignty can be traced in the formula asserting that “by reasons of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to evaluate local needs and conditions.”²⁵ This means that state organs, the executive and the legislature, are better equipped than Strasbourg in terms of legitimacy and expertise

¹⁶ *Inter alia*, para. 10, Belgian Linguistics No2; para. 61, Sunday Times. The ECtHR is not to impose uniform solutions but to reconcile universality with diversity, point 2, DO Tulkens, Leyla Sahin.

¹⁷ Pp. 321-325, Tomuschat: Schermers. Only substantial compliance is important, the forms and methods selected are largely irrelevant, pp. 44, 61, Petzold: 1993.

¹⁸ P. 55, Petzold: 1993; p. 474, Sweeney: 2005. The margin of appreciation is given both to the national legislator and to the bodies that are called upon to interpret and apply the law, para. 48, Handyside.

¹⁹ *Inter alia*, para. 48, Handyside; para. 59, Sunday Times; para. 152, Kudła. It allows the national authorities to assess whether within their margin of appreciation a restriction could be imposed reasonably, DO Thór Vilhjálmsón et al, Barthold and DO Bernhardt, Hertel. Twofold duty: to bring national law in line with the ECHR and to ensure that the Convention is respected when in the application of law, p. 343, Vegleris: 1973.

²⁰ P. 59, Petzold: 1993; p. 152, Callewaert: Ryssdal.

²¹ Subsidiarity accepts officially that the Contracting States have better human rights protection leading to the ECHR to be more willingly invoked for derogations, exceptions, and restrictions, pp. 101-103, Delmas-Marty: 1992a. It was also conceptualised as an inverted hierarchy where the norm is determined by the lower level (domestic law) commanding the upper level (ECHR law), pp. 70-71, Delmas-Marty: 2002.

²² Pp. 640, 647, Hutchinson: 1999. See in this respect the maxim that in treaty interpretation doubt should be interpreted in favour of state sovereignty, p. 70, Bernhardt: Wiarda.

²³ P. 83, Macdonald: 1993.

²⁴ P. 123, *ibid*.

²⁵ *Inter alia*, para. 48, Handyside; para. 91, Jahn; para. 149, Broniowski. In other words, only the national authorities have direct democratic legitimacy, para. 97, Hatton; para. 117, Maurice.

to make difficult decisions in the areas of policy or technology. It is an approach that besides the inevitable link with sovereignty keeps practical reasons in view.²⁶

Practicality leads to another argument necessitating a leeway to states. It is assumed that a margin of appreciation doctrine should be intrinsic to any – national or supranational – system of human rights protection. The reoccurring need to resolve conflicts between the interests of the individual and the interests of the community (the state) requires discretion to make choices instead of being paralysed by absolute rules subject to unyielding policing.²⁷ This harmonises with the concept of a democratic society advocated by the ECtHR that regards public debate and discourse as primary means of reconciling private and public interest.²⁸

Furthermore, if compliance with Convention obligations is achieved principally through process, assessment, and decision on the domestic level and Strasbourg supervision is (therefore) limited to determining compatibility instead of engaging in a fresh decision, the margin of appreciation doctrine must include an element of judicial deference. When examining cases from the position of a review court and not as a court of fourth instance,²⁹ deference towards national (judicial) appreciation is inevitable. The margin of appreciation is, therefore, linked to the appropriate level of supervisory review by the ECtHR.³⁰

1(b): Strasbourg supervision and national margin of appreciation

As suggested above, the margin of appreciation doctrine does not confer a limitless leeway in manoeuvring between realising the interests of the state and complying with Article 1 ECHR obligations. State sovereignty is indeed set against the human rights requirements of the Convention. Consequently, the assessment within the domestic human rights solution cannot be the ultimate appreciation. After all, the idea of collective enforcement and supervision by Strasbourg was established for a reason and,

²⁶ It is a matter of functional necessity, p. 217, Sudre: 2006. It reflects the practical matter of the proximity to events of national authorities and the physical impossibility to operate as a tribunal of fact in the whole of Europe, p. 162, Wildhaber: 2002.

²⁷ It is an example of incorporating local discretion into international human rights law, p. 62, Carozza: 2003.

²⁸ See in this respect, *inter alia*, pp. 218-220, Marks: 1995; pp. 705-706, Mowbray: 1999; p. 217, Sudre: 2006.

²⁹ See in this respect, *inter alia*, pp. 50-52, Petzold: 1993; p. 596, Strasser: Wiarda; pp. 24-25, Ryssdal: 1996.

³⁰ See in this respect, *inter alia*, p. 379, De Salvia: Ryssdal; p. 475, O'Donnell: 1982; pp. 81-82, Mahoney: 1990; p. 84, Macdonald: 1993; p. 196, Yourow: 1996. The ECtHR exercises a genuine "judicial restraint", p. 210, Ganshof Van Der Meersch: Wiarda.

more importantly, the Convention was established to provide safeguards against the appreciation of states in human rights issues.³¹

Accordingly, the margin of appreciation doctrine is not only respectful of national susceptibilities, but it enables European supervision. Despite the possibility of domestic appreciation the ECtHR seeks to regain the ground given away to states.³² As Merrills phrased it, the margin of appreciation doctrine is not a no man's land between compliance and contravention, but an instrument helping the ECtHR to decide where state sovereignty ends and its supervisory powers begin.³³ Basically, a legitimate area of action is conferred upon the Contracting States paired with a legitimate area of review by the ECtHR. Therefore, the shared responsibility of enforcement is topped by the ECtHR's ultimate power of decision.³⁴

This functional arrangement is expressed in that the margin of appreciation of states goes hand in hand with European supervision.³⁵ Indeed, despite the reasons supporting state discretion in the area of human rights protection, the ECtHR is obliged to examine whether the national solution is compatible with the Convention.³⁶ Strasbourg makes its contribution to securing the rights and liberties of the ECHR by giving the final ruling in a contentious procedure in which the compatibility of the domestic human rights solution with the Convention is disputed.³⁷

In practice, this entails an examination whether the national position reached after exhausting domestic remedies was necessary in a democratic society by striking a fair balance between the competing interests or by imposing a proportionate restriction on

³¹ See in this respect, *inter alia*, pp. 55-56, Verdross: 1968; pp. 341-343, Vegleris: 1973; pp. 210-211, Marks: 1995. Emphasising that the Convention imposes a certain requirement of homogeneity with respect to which collective enforcement must be available – the margin of appreciation doctrine is domestic discretion subsumed to the control of the ECtHR, pp. 219-220, Ganshof Van Der Meersch: Wiarda. On the existence of a European public order set against the reason of state, *inter alia*, para. 75, Loizidou. On collective enforcement, *inter alia*, para. 154, Ireland v UK; para. 70, Sylla; para. 34, Golder.

³² Pp. 281-282, Delmas-Marty: 1992b.

³³ P. 174, Merrills: 1988. See, point 3, DO Tulkens, Leyla Sahin and point 2, SO Mosler, Handyside, suggesting that European supervision cannot be escaped simply by invoking the margin of appreciation of states.

³⁴ P. 81, Mahoney: 1990. There is only ever a margin of appreciation never an unchallengeable appreciation, p. 330, Delmas-Marty: 1992.

³⁵ *Inter alia*, para. 49, Handyside; para. 59, Sunday Times; para. 42, Rekvényi; para. 110, Leyla Sahin.

³⁶ Strasbourg supervision is based on an equilibrium of centrifugal forces of national discretion and centripetal forces of European control, pp. 305-306, Ost: 1992. The initial vast responsibility of states to implement and regulate the exercise of rights and freedoms is counterbalanced by a narrower supervisory competence of Strasbourg to ensure compliance with the standards of the Convention, p. 49, Petzold: 1993.

³⁷ *Inter alia*, para. 49, Handyside; para. 52, Vogt; para. 42, Rekvényi; paras. 107-108, Markovic. The ECtHR is empowered to deliver a final and binding judgment on the democratic processes of the Contracting States, p. 59, Mahoney: 1990.

the Convention right at issue.³⁸ It concerns whether in the light of the whole case the reasons justifying the domestic human rights solution were relevant and sufficient. The ECtHR must determine that the national authorities applied standards in conformity with the ECHR and that their decisions were based on an acceptable assessment of the relevant facts.³⁹

1(c): Placing the margin of appreciation doctrine within the pluralist imagination

Having examined the two sides of the margin of appreciation doctrine it must be ascertained whether it supports a pluralist imagination to divergence in law. This should not be difficult considering that its features are apparently similar to the concept of ordered pluralism, as described in Chapter 2, involving the possibility of accommodating difference flexibly subject to an ultimate requirement of similarity.

The above highlighted characteristics of the margin of appreciation doctrine are apparent in Delmas-Marty's conceptualisation of a legal landscape of plural and heterogeneous normative orders. In her opinion, the margin of appreciation doctrine is a pluralist concept as it leaves room simultaneously for multiple legal orders that are neither independent of, nor subordinate to the other. Strasbourg supervision under the margin of appreciation doctrine is conceived as a coordination of laws arranging legal orders with respect to the other. This entanglement, she assumed, binds distinct and non-hierarchical systems in real (ordered) legal pluralism.⁴⁰

The twinning of state sovereignty and Strasbourg supervision within the margin of appreciation doctrine appeared in her approach under the notions "controlled national sovereignty" and "relative European primacy". The former refers to extending European supervision to national practices, the latter means a self-limitation of European supervision.⁴¹ It follows that the margin of appreciation is ideal for the purposes of the

³⁸ See, Part III on the condition of necessity/proportionality. Suggesting that in case of human rights conventions the "fair balance" requirement between the interests of the community and the individual should be the maxim of interpretation, p. 70, Bernhardt: Wiarda.

³⁹ *Inter alia*, para. 96, Gorzelik; para. 36, Niemietz; para. 59, Sunday Times. The ECtHR is not allowed to substitute the assessment of national authorities with its own, but it may examine whether the decision was made within the power of appreciation of states, *inter alia*, para. 52, Vogt; para. 44, Grigoriades; para. 48, Elsholz; para. 49, Klass. For the legal basis of Strasbourg supervision see Articles 1, 13, 17, 18, 19 ECHR.

⁴⁰ P. 73, Delmas-Marty: 2002. It allows a pluralist organisation of norms making a level of harmonisation possible without compromising the existence of several sources of sovereignty, p. 333, Delmas-Marty: 1992.

⁴¹ Pp. 112-114, Delmas-Marty: 2002.

present non-divergence thesis opting for an ordered pluralist approach to divergence in law.

Other interpretations, however, were reluctant to discover the harmony of a pluralist vision. Some suggested that the margin of appreciation doctrine represents the supremacy of state interests over the objects and purposes of the ECHR.⁴² Renucci considered the principles of subsidiarity and margin of appreciation as “*principes étatiques*” only the proportionality element representing a “*principe européen*”.⁴³ The reason behind the strong *étatisme* of ECHR law was found in the limited powers of the international judge as opposed to the hardly questionable legitimacy of national decision-makers.⁴⁴ On this basis, it could be assumed that flexibility within the context of European human rights protection is hardly a post-modern/post-national concept of legal pluralism as maintaining legal diversity under the ECHR serves only the interests of modern nation states.

This approach is countered by the vision that the margin of appreciation doctrine is subject to the primary constitutional principles of ECHR law and not the reasons of state. According to Greer diversity in human rights solutions under the margin of appreciation doctrine is subject to confirmation on both national and European level. When accommodating the domestic human rights solution Strasbourg is not involved in upholding the domestic choice (the reason of state), but it maintains a typically judicial control by resolving tensions between fundamental rights and the public interest.⁴⁵

Irrespective where the emphasis is placed (sustaining legal pluralism, reinforcing *étatisme* or merely facilitating human rights adjudication), the basic characteristics of the margin of appreciation doctrine reaffirm that the doctrine of margin of appreciation is essential to understanding divergence from the perspective of ECHR law. The law of the Convention is equipped with a mechanism of flexibility that regards difference (the human rights solution offered by the legal system under the scope of the ECHR) as inevitable in the coexistence of (non-hierarchical) legal orders. The margin of appreciation doctrine is able to accommodate difference within the flexible framework of ECHR law providing support to the present non-divergence claim. As suggested above, its openness is not, however, without limits. Being subject to European supervision signals that despite the leeway provided to other legal systems in maintaining compatibility with the ECHR the ability of the margin of appreciation

⁴² P. 605, van Dijk and van Hoof: 1990.

⁴³ Pp. 521-524, Renucci: 2002.

⁴⁴ P. 524, *ibid.*

⁴⁵ Pp. 225-226, Greer: 2006.

doctrine to accommodate divergence is limited. The ensuing examination reveals the parameters of these limitations.

2. Fathoming the limits of flexibility under the margin of appreciation doctrine

2(a): Seeking an appropriate model

Only by constructing the appropriate model of the margin of appreciation doctrine can the boundaries of its ability to accommodate difference, in our case the (different) human rights solution of EC law, be ascertained adequately. It is a complex concept entwined with the issue of standards, and it appears to resist a comprehensive description. Nevertheless, an adequate model will be found below providing an insight into the capabilities of ECHR law in managing difference.

The minimum standard model

The ECHR could be considered as a set of absolute minimum standards the Contracting States must at any time respect.⁴⁶ In this respect, the margin of appreciation doctrine might be envisioned as being applicable only above those minimum standards enabling unrestrained discretion beyond the minimum threshold.⁴⁷ This model appears forgiving towards difference as above the minimum level any human rights solution could be implemented.⁴⁸

However, case law appears to contradict the absolute minimum standard model. First, the ECtHR is rather hesitant in defining those absolute minimums.⁴⁹ Second, the variable width of the margin of discretion, which will be discussed below, casts doubt

⁴⁶ Commonly used in the literature concerning the issue whether EC law fails to meet ECHR standards, *inter alia*, p. 230, Lawson: Schermers; pp. 657-659, Besselink: 1998; p. 779, Spielmann: 1999; p. 17, Canor: 2000; p. 45, Rossi: 2002; p. 101, Arnall: 2004. Certainly, from the perspective of Article 53 (former 60) ECHR it is a minimum standard, but it does not mean that an absolute and ultimate minimum level can be ascertained. For instance, Frowein saw it as a minimum standard in a sense that it must allow higher protection by the Contracting Parties and it must consider their sensitivities, p. 342, Frowein: 1986.

⁴⁷ See in this respect but not subscribing to such model, p. 642, Hutchinson: 1999 and p. 84, Macdonald: 1993.

⁴⁸ P. 642, Hutchinson: 1999.

⁴⁹ P. 643, *ibid* and p. 84, Macdonald: 1993.

upon the model that assumes that the implementation of the Convention is handed over to the Contracting States on the basis of clearly pronounced minimum standards.⁵⁰

In addition, when one considers that the scrutiny carried out by the ECtHR involves a balancing exercise with numerous variables it is unlikely that a fixed set of minimum standards could be offered. Furthermore, the absolute minimum appears to be caught between two other (minimum) standards. Supposing that an infringement of fundamental rights cannot be established the ECtHR's standard could relate to the fact that either no interference can be established or the interference can be justified. Consequently, the invariable minimum standard needs to be abandoned for a model that acknowledges the variability of ECHR standards.⁵¹

The variable standard model

The following area of compliance model could incorporate the varying width of margin of appreciation. It sets no minimum standards. Instead, the standards are variable as compliance is determined on the basis of a variable margin of appreciation.⁵² Consequently, compliance is determined by the ECtHR when policing the boundaries of the area of compliance.

The variable standard model successfully recognises the importance of the context of the case in what it identifies as setting an optimum central norm with respect to which the area of compliance could be defined.⁵³ However, it is difficult to adhere to the idea of a central norm.⁵⁴ It is more appropriate to conceptualise the variable standard as involving in each case a unique examination of the various requirements concerning whether the exercise of discretion was acceptable. Here, the only recurring element is the requirement of necessity/proportionality demonstrating no characteristics of a central norm. On this basis another model can be drawn up.

The 'contextualised' variable standard model

⁵⁰ P. 643, Hutchinson: 1999.

⁵¹ See in this respect, p. 123, Macdonald: 1993 and p. 384, De Salvia: Ryssdal.

⁵² Pp. 643-644, Hutchinson: 1999.

⁵³ P. 646, *ibid.*

⁵⁴ See in this respect, p. 431, Jones: 1995, asserting that the ECtHR does not expect compliance with the optimum solution in the circumstances but sets a range within which different options are permissible.

This model is also based on the premise that the requirements of the Convention embrace the flexibility of the margin of appreciation doctrine making, therefore, its standards variable.⁵⁵ As mentioned above, it sees the variable standard being defined by a great variety of elements. The applicability of these elements is ascertained by the circumstances of the given case, hence the widely used statement in case law that the outcome of the case depends on the factors derived from the facts and circumstances of that case.⁵⁶ The human rights solution under scrutiny is immersed into the pool of these elements and their interaction will be responsible for determining the bounds of compliance unique to the case.⁵⁷ The ability of ECHR law to accommodate a human rights solution is, therefore, determined indirectly by the uniqueness of the case allowing a penumbra of diverse solutions influenced by the actual context of the dispute.⁵⁸ Variation in the Convention standard is inevitable as the margin of appreciation doctrine is applied to different rights, different claims in respect of the same rights by applicants in different situations, and different justifications presented by states at different times.⁵⁹ Consequently, the flexibility ECHR law depends on the (wider and narrower) circumstances of the case.

This model also proposes that an initial width of margin of appreciation is to be distinguished from its actual width on the basis of which the final assessment of the case can be achieved. The initial width is predetermined on the basis of certain key circumstances of the case separable from the totality of circumstances considered under the actual width of margin of appreciation. This distinction will be relevant below in examining the limits of flexibility in ECHR law.

2(b): Exploring the limits of flexibility within the ‘contextualised’ variable standard model

As hinted above, the variable standard under ECHR law consists of two main parts, first, determining the initial width of the margin of appreciation, and second, setting the

⁵⁵ This corresponds to the model of margin of appreciation seeing compatibility as a matter of gradation of proximity determined by the reach of the margin of appreciation in the given case varying according to the circumstances, the demands, and the context, pp. 115-116, 120-123, Delmas-Marty: 2002.

⁵⁶ *Inter alia*, para. 70, Pretty; para. 67, Abdulaziz; para. 59, Ashingdane; para. 103, Hatton; para. 59, Sunday Times; para. 52, Dudgeon; para. 50, Handyside; para. 50, James; para. 151, Broniowski.

⁵⁷ There is not a required degree of considering the circumstances – it will also be unique to the case; see in this respect, pp. 78-80, Lester: 1998.

⁵⁸ See in this respect, pp. 192-193, Yourow: 1996, asserting that there is no immutable margin standard common or adaptable to all the cases. For similar conclusions see, pp. 59-67, Roland: 1990 and p. 321, Picod: 1998.

⁵⁹ P. 84, Macdonald: 1993.

proportionality requirement against the leeway allowed for the Contracting State. Although they appear distinct, the actual standard will be determined by virtue of their combined utilisation.⁶⁰ In other words, granting a margin of discretion is never a hands-off approach as the variable standard, having allowed discretion, determines how that discretion needs to be exercised. This corresponds with the assertion that the margin of appreciation includes the distinct questions of reviewability and justifiability which together define its true nature.⁶¹ On this basis, it is difficult to understand the recurring obsession with the abstract (initial) width of the margin of appreciation.⁶²

Setting the initial width of margin of appreciation

Case law suggests that determining the initial width, the question of reviewability, is treated distinctly from the requirement of proportionality, the issue of justifiability. Generally, having determined the initial width, scrutiny turns to the question of justifiability. This leads to deciding whether the exercise of discretion within the allowed margin was appropriate inducing a sensation that the initial margin is kept or narrowed.⁶³

Determining the initial margin serves autonomous purposes that underline the necessity to consider it separately within the variable standard. First, it determines the intensity of review by the ECtHR. Second, when setting the initial width evolution and change in attitudes of European societies can be embraced. Third, it prepares the premises for the application of the proportionality requirement. Fourth, it reaffirms the initial responsibility/liberty of the Contracting States under the Convention and provides justification for Strasbourg supervision.

⁶⁰ See in this respect, p. 203, Steiner and Bangert: 1998, suggesting that the proportionality test might reach the same result as determining the scope of the margin; p. 83, Lambert: 1998, and pp. 14-15, Arai-Takahashi: 2002, stating that the principle of proportionality corrects and limits the margin of appreciation.

⁶¹ P. 85, Macdonald: 1993 and pp. 158-159, Callewaert: Ryssdal. Letsas argued that these two aspects, the structural and substantive concepts of the doctrine, must be kept apart, pp. 708-709, Letsas: 2006, ultimately abandoning the structural concept (reviewability/initial width), p. 732, *ibid*.

⁶² Abstract width analyses, *inter alia*, pp. 479-493, O'Donnell: 1982; pp. 159-169, Merrills: 1988; pp. 438-444, Jones: 1995; pp. 257-293, Brems: 1996. On the paradox of the issue of abstract width: p. 166, Callewaert: Ryssdal. Questioning whether abstract width has a purpose, p. 68, Bernhardt: Wiarda.

⁶³ See in this respect, pp. 87-122, Macdonald: 1993 (he essentially examined the relevant case law emphasising this distinction). For the initial width predetermined separately on grounds of assessing the weight of the public interest, see, *inter alia*, para. 149, Broniowski; para. 91, Jahn; para. 84, Maurice. The importance of the public interest may attract initial judicial deference without much hesitation, pp. 155-158, Merrills: 1988.

The separability of the initial width can be associated with the consideration that the initial width concerns reasons that are for the Contracting States to assess.⁶⁴ Here, the sovereignty of Contracting States is given appreciation.⁶⁵ Conversely, within the framework of justifiability/proportionality the ECtHR engages in a judicial scrutiny of countervailing interests not hindered directly by the matter of sovereignty.⁶⁶

The factors influencing the initial width of margin of appreciation

There are two core elements that determine the initial width.⁶⁷ They are found in the formula measuring the public interest recalled by the Contracting State against the fundamental right the protection by/of which is claimed by the individual. In this the ECtHR engages in the supervision of that primordial ‘tug of war’ between state sovereignty and the requirements of the ECHR identified above as fundamental to the margin of appreciation doctrine.⁶⁸

In this framework, the public interest element includes the factors of the importance and the aim of the domestic solution. The fundamental right element covers the factors of the sensitivity and the importance of the fundamental right, and the existence of a European consensus connecting the law of the Convention to evolution and change in its social, economic and cultural context. The existence of a European consensus is included within the fundamental right element as in its own environment - that is determining the weight of the private interest, it appears simply as a well-aimed argument trespassing national boundaries underlining the need to shift the balance in favour of fundamental rights.⁶⁹ The initial width depends on how well the two elements are argued by the parties and what weight is given to each of the factors by the ECtHR.

Setting the actual width of margin of appreciation

⁶⁴ See in this respect, pp. 165-166, Merrills: 1988.

⁶⁵ Pp. 648-649, Hutchinson: 1999.

⁶⁶ See, in this respect, the distinction between questions belonging to the national or the supranational level, pp. 160-161, Callewaert: Ryssdal.

⁶⁷ The usual factors are as follows: degree of consensus among Contracting States on a given issue, the sensitivity of the fundamental right involved, the importance of the fundamental right in a democratic society and the underlying rationale of the interference.

⁶⁸ See in this respect, p. 31, Schokkenbroek: 1998, stating that determining the (initial) width clarifies the position of the ECtHR *vis-à-vis* the Contracting States.

⁶⁹ See in this respect, p. 207, Steiner and Bangert: 1998, they suggested abandoning this element as setting the margin and pursuing necessity can express the same considerations.

By setting the initial width the ECtHR not only determines the scope of its jurisdiction, but also projects its attitude concerning the intensity of judicial interference onto the subsequent examination of proportionality. The requirement of proportionality determines the actual margin of appreciation applicable in the case, in other words, the actual level of the variable European standard.⁷⁰

As mentioned above, the separability of initial width and proportionality is only relative⁷¹ as they determine the actual width of the margin of appreciation jointly. They involve the same consideration of establishing a fair balance between the competing public and private interests. It follows that the actual width of the margin of appreciation will also involve finding a fair balance between the needs for interfering with and preserving the rights and freedoms of the Convention.

The application of the proportionality test is a judicial function that reflects the characteristics of a democratic society. It stands for the requirement of being necessary in a democratic society involving choices between values in a pluralist society, and the reconciliation of alternatives and opposing interests.⁷²

Proportionality, however, does not manifest as a simple balance, but as an equation with many variables.⁷³ Cases are tested on the basis of a variety of requirements the applicability of which depends on the circumstances of the case as described in the contextualised variable standard model. These variables are regarded as the actual requirements towards the domestic human rights solution. They are the criteria separating compatibility and breach.⁷⁴ They determine what is truly expected from the Contracting States in complying with their obligations under Article 1 ECHR let that be avoiding interferences or implementing justifiable interferences with fundamental rights. Consequently, they provide the parameters according to which the flexibility of ECHR law in accommodating divergence can be determined. These parameters were labelled as the benchmarks of flexibility in Chapter 2 at Point 4.

More importantly, since these benchmarks demand compliance from the given human rights solution, the **flexibility argument** can only be realised within the **similarity**

⁷⁰ At the end proportionality gives shape to the variable standard, see in this respect, p. 20, Frowein: 1984 and p. 312, Ovey and White: 2002.

⁷¹ See in this respect, pp. 210-211, Steiner and Bangert: 1998.

⁷² See in this respect, pp. 216-218, Marks: 1995 and p. 214, Sudre: 2006.

⁷³ P. 43, Warbrick: 1998. On a summary of such variables, pp. 94-97, Emerson and Ashworth: 2001.

⁷⁴ This corresponds with the view that the proportionality test does not involve weighing different interests, but merely considers them and classifies them as important or less important; in this the circumstances of the case are essential as their assessment will determine the outcome of this classification of importance, pp. 89-90, Dembour: 2006. This means that the proportionality test is organised by the relevant circumstances of the case which constitute the benchmarks of (flexibility) proportionality.

argument. This makes establishing similarity the true limit of flexibility which corresponds with our general findings concerning the relationship of the two core arguments within the present non-divergence thesis. Therefore, the examination of the benchmarks of flexibility inherent in the actual width of the margin of appreciation will be due in Part III.⁷⁵

2(c): The prerequisites of exercising a margin of appreciation

The doctrine of margin of appreciation imposes two further requirements *vis-à-vis* the Contracting States. Lawfulness and serving a genuine public interest are conditions the domestic human rights solution must observe in order to enjoy the flexibility inherent in the margin of appreciation doctrine. This means as in case of the variables of proportionality (the benchmarks of flexibility) that, ultimately, they must be examined under the **similarity argument**.⁷⁶ Nevertheless, flexibility is an attribute familiar to them that needs to be assessed here.

The condition of lawfulness

Lawfulness requires that the measure in question is lawful as a matter of domestic law. This condition accepts compliance in the various ways lawfulness might be conceived in the Contracting States. Its flexibility stems from the formula according to which it is primarily for the national authorities, notably the courts, to interpret and apply domestic law.⁷⁷ Generally, the ECtHR concedes the question of lawfulness to the domestic courts.⁷⁸

However, the ECtHR can exercise supervisory powers as regards the requirement of lawfulness,⁷⁹ in particular, when it concerns the application and interpretation of ECHR law.⁸⁰ This right of control⁸¹ is derivative and indirect.⁸² It may not extend to a general

⁷⁵ See Part III/a on establishing similarity as regards the benchmarks of the proportionality test.

⁷⁶ See Part III/a on establishing similarity as regards the conditions of lawfulness and serving a general interest.

⁷⁷ *Inter alia*, para. 54, Waite and Kennedy; para. 86, Jahn; para. 54, Chappell; para. 108, Markovic.

⁷⁸ See, *inter alia*, para. 60, Rekvényi; para. 44, Gitonas; para. 79, Apicella; para. 49, Adam; para. 107, Markovic; para. 54, Chappell; para. 39, Yildiz. See in this respect, p. 462, van Dijk and van Hoof: 1990.

⁷⁹ See, *inter alia*, para. 55, Roemen; para. 53, Rotaru; para. 61, Panteleyencko; para. 78, Amman, paras. 697-699, Elci; para. 46, Barthold; paras. 35-36, Rekvényi; paras. 59-60, Open Door; paras. 58-63, Refah Partisi.

⁸⁰ Para. 80, Apicella; para. 82, Cocchiarella; para. 191, Scordino 1.

⁸¹ Paras. 62-63; Handyside; paras. 203-204, Mellacher; paras. 67-68, Gorzelik.

examination for errors of law,⁸³ but it demands certain qualities from domestic law such as being compatible with the principle of the rule of law, accessibility, preciseness, and foreseeability.⁸⁴ In other words, the effects of the interpretation of domestic law must be compatible with the Convention.⁸⁵ When the condition of lawfulness concerned the principles of EC law a detailed analysis was undertaken.⁸⁶

The condition of serving a legitimate interest

Demonstrating that the interference was in the public interest is also left to the Contracting States subject to a marginal review by Strasbourg.⁸⁷ Flexibility in this respect stems from the clause that the ECtHR is prevented from substituting the opinion of the Contracting States with its own in this regard.⁸⁸ Often, there is almost a presumption that the national measure serves the public interest the ECtHR practically never denying recognition from the legitimate policy considerations of a Contracting State.⁸⁹

However, there are obvious limits to the leeway afforded to the Contracting States. The choice of public interest is subject to Strasbourg supervision in that it is not manifestly without a reasonable foundation.⁹⁰ The legitimate aim is extensively tested within the proportionality requirement.⁹¹ The ECtHR showed much eagerness to interfere when the issue of general interest was attached to matters of Community law.⁹²

⁸² P. 33, Schokkenbroek: 1998.

⁸³ P. 462, Van Dijk and Van Hoof: 1990.

⁸⁴ P. 312, Ovey and White: 2002. In fact, the condition of preciseness within foreseeability allows flexibility as it does not demand absolute precision (para. 55, VgT; para. 35, Hertel; para. 34, Rekvényi) and its degree depends upon the circumstances (para. 34, Rekvényi; para. 25, Choherr; para. 48, Vogt; para. 68, Groppera Radio; para. 57, Refah Partisi; paras. 64-65, 68-69, Gorzelik).

⁸⁵ *Inter alia*, para. 50, Prince Hans-Adam; para. 34, Bellet; para. 104, Wos; para. 51, Ernst.

⁸⁶ See, paras. 143-148, Bosphorus, ECtHR.

⁸⁷ Pp. 460, 465, van Dijk and van Hoof: 1990.

⁸⁸ *Inter alia*, para. 46, James; para. 84, Maurice; para. 34, Podkolzina; paras. 110-114, Capital Bank AD.

⁸⁹ Pp. 312-313, Ovey and White: 2002 and p. 95, van Banning: 2002. See also, p. 62, Peukert: 1981, suggesting that control is limited as the ECHR was not created to promote specific policies.

⁹⁰ See, *inter alia*, para. 46, James; para. 74, Hirst; para. 91, Jahn; para. 47, Pinc; paras. 205-206, Mellacher. A review of facts is carried out in this respect, pp. 61-63, Peukert: 1981.

⁹¹ See, *inter alia*, paras. 77-78, Z/a; para. 37, Niemietz; para. 59, Leander; para. 40, Yildiz; paras. 44-45, Boulif.

⁹² See, paras. 55-58, Dangeville; para. 150, Bosphorus, ECtHR.

The margin of appreciation doctrine, as demonstrated above, entails a certain degree of flexibility enabling ECHR law to accommodate divergence (in the present context the particular human rights solution under its scope). Nonetheless, its flexibility is subject to limitations on grounds that the observance of the obligations undertaken by the Contracting States must be ensured. When it comes to the width and the prerequisites of the margin of appreciation the limits of flexibility are manifested in requiring compliance with certain benchmarks (of flexibility) or qualities making a case for the **similarity argument**. This fits into the premise of ordered legal pluralism, selected by the present thesis of non-divergence, where managing the coexistence of plural legal orders requires reaching beyond flexibility.⁹³ Before turning to the consequences of ordered flexibility as regards the claim of non-divergence between ECHR and EC law another mechanism of flexibility, the flexibility of scope, must be introduced.

3. The flexibility of scope

When discussing the ability of ECHR law to accommodate difference those fundamental rights and freedoms must also be taken into consideration that do not provide a margin of appreciation for the Contracting States. In this regard, only those fundamental rights will be considered which fall under the scope of the present thesis comparing the protection of human rights available in both ECHR and EC law.⁹⁴

3(a): Founding the flexibility of scope

Fair trial rights under Article 6 ECHR have a generally unyielding character governed by the principles of fairness and respecting the rights of the defence.⁹⁵ Even the right of access to a court, subject to the margin of appreciation doctrine, has anchored an ultimate principle, the prohibition of denial of justice.⁹⁶ The lack of submissiveness towards national discretion, with the partial exception of the right of access to a court,

⁹³ See Part I/Chapter 2/Point 4.

⁹⁴ These rights are discussed mostly in Part III/b within the similarity argument as rights with a prohibitive language. The flexibility of scope is their contribution to the flexibility argument.

⁹⁵ See Part III/b/Chapter 12 on fair trial rights. The requirement of fairness under Article 6 ECHR is very similar in its role to the requirement of lawfulness towards national interferences where a margin of appreciation is allowed, pp. 52-54, Petzold: 1993. This means that the requirement of lawfulness could be examined here.

⁹⁶ See, *inter alia*, para. 34, McElhinney; para. 44, Prince Hans-Adam; para. 57, Ashingdane.

results from the fact that fair trial rights are regarded as core values of the Convention.⁹⁷ Their detailed drafting prescribing specific procedural safeguards considerably reduce the possibility of accommodating different approaches.⁹⁸

Nonetheless, obligations under Article 6 ECHR do not demand unconditional submission from the Contracting States. Article 6 ECHR often leaves to the Contracting States the choice of means in ensuring that its requirements are secured in domestic law.⁹⁹ In order to connect Article 6 ECHR with the realities of domestic substantive and procedural law a wide discretion of the Contracting States has been acknowledged.¹⁰⁰

Under Article 4 Protocol 7 ECHR, containing the double jeopardy rule unyielding towards national discretion, the Strasbourg system also demonstrates sensibility and sensitivity towards domestic regulation by means of the flexibility of scope.¹⁰¹

Similarly, under Article 7 ECHR the Convention is required to accommodate a considerable number of diverse domestic approaches concerning the scope of the principle of legality. Since determining criminal law and criminal policy is a matter for the Contracting States, the scope of the principle of legality must be determined respecting their autonomy in this regard.¹⁰²

Accordingly, another mechanism of flexibility can be identified labelled the flexibility of scope. It allows a freedom of choice in ensuring compliance with the Convention, here, the obligations provided within the scope of fundamental rights. Generally, these limitations on Strasbourg's jurisdiction are derived from the fact that the Convention does not cover the appropriate areas¹⁰³ leaving their regulation to the Contracting States. It is also connected with the 'fourth instance doctrine' according to which the ECtHR refuses to engage in an examination that in areas governed by national law the law was applied appropriately.¹⁰⁴ It might be less yielding than the margin of appreciation doctrine, but there remains the possibility that certain differences within relevant legal systems (in our case EC law) can be accommodated under the Convention subject to the core requirements of the fundamental right concerned.

⁹⁷ Pp. 560-561, De Salvia: Wiarda.

⁹⁸ P. 34, Schokkenbroek: 1998. In the absence of such provisions case law will provide a list of requirements, pp. 328-329, Tomuschat: Schermers.

⁹⁹ See, *inter alia*, para. 94, Sejdovic; para. 95, Hermi; para. 67, Somogyi. On Article 6 ECHR containing general and flexible principles, p. 336, Buxton: 2000.

¹⁰⁰ *Inter alia*, para. 83, Sejdovic; para. 30, Colozza; para. 33, Hadjanastassiou.

¹⁰¹ See, p. 383, Trechsel: 2005, stating that the substance of *ne bis in idem* is banal with little substance as it is pressured to fulfil different aims and it is subject to different expectations in different jurisdictions.

¹⁰² *Infra*, Point 3(b) on Article 7 ECHR.

¹⁰³ P. 33, Schokkenbroek: 1998.

¹⁰⁴ Pp. 32-33, *ibid* and pp. 477-478, Emerson and Ashworth: 2001. See, *inter alia*, para. 37, Veeber; para. 51, Streletz; para. 40, Kokkinakis; para. 15, Telfner; para. 32, Boldea; para. 39, Borisova.

3(b): Manifestations of the flexibility of scope

Article 6 ECHR

Article 6 ECHR, while maintaining the general requirement of fairness, acknowledges that the law of evidence and the question of evidence in domestic proceedings are reserved to the Contracting States.¹⁰⁵ As regards hearing witnesses the general leeway allowed for domestic courts in connection with evidence applies in that it is normally for the national courts to decide whether it is necessary or advisable to hear witnesses.¹⁰⁶ Under the reasonable time requirement procedural arrangements and the conduct of procedures are not subject to an absolute time-limit requirement enabling ECHR law to accommodate procedures of different length.¹⁰⁷ Fair trial rights are subject to the flexible requirement of fairness and, in particular, to what the interests of the defence require allowing various domestic approaches as regards a due process.¹⁰⁸ They may also be subject to necessary restrictions supported by sufficient reasons in promoting countervailing interests.¹⁰⁹

Under Article 6(2) ECHR on the presumption of innocence a different manifestation of the flexibility of scope emerges. It was held that the enforcement of sanctions before determining the liability of the person concerned could be permitted, despite the fact that it implies a presumption of guilt. It must be confined within reasonable limits by striking a fair balance between the interests involved.¹¹⁰ A similar formula applies to presumptions in law.¹¹¹ These instances might be difficult to distinguish from the margin of appreciation doctrine. The sensation is reinforced by the formula that reversing the burden of proof by means of presumptions in law could be acceptable,

¹⁰⁵ *Inter alia*, para. 15, Telfner; para. 33, Unterpertinger; para. 69, Saunders; para. 62, Mattoccia; para. 84, Craxi; para. 43, Lüdi. Acknowledged in Community law, para. 75-76, Steffensen.

¹⁰⁶ *Inter alia*, para. 89, Bricmont; para. 46, Borisova; para. 21, De Sousa. Only exceptional circumstances could prompt the ECtHR to conclude that the failure to hear witnesses was incompatible with Article 6 ECHR, *inter alia*, para. 89, Bricmont; para. 179, Popov/a; para. 41, Destrehem.

¹⁰⁷ See Part III/b/Chapter 13 on the right to a hearing within a reasonable time; and p. 333, Van Dijk and Van Hoof: 1990, stating that Strasbourg applies fairly broad standards as regards a reasonable time-limit.

¹⁰⁸ See Part III/b/Chapter 12.

¹⁰⁹ See Part III/b/Chapter 12/Point 1(f).

¹¹⁰ *Inter alia*, para. 106, Janosevic; para. 118, Vastberga Taxi.

¹¹¹ *Inter alia*, paras. 40, 47, Phillips; para. 16, Telfner; para. 28, Salabiaku.

provided that the means employed are reasonably proportionate to the legitimate aim sought to be achieved.¹¹²

The presumption of innocence may appear as a qualified right,¹¹³ but the components of its flexibility resemble those under the margin of appreciation doctrine only partially. In fact, the approach under ECHR law towards presumptions in law and premature enforcement of sanctions is based on the recognition that domestic laws regulate these areas differently and provided that it stays within reasonable limits, the ability of the Contracting States in regulating the scope of the presumption of innocence must remain intact.¹¹⁴ Another similarity with general tendencies of flexibility under Article 6 ECHR is that the limits of flexibility are defined essentially by the requirements of fairness and the availability of safeguards.¹¹⁵

Article 7 ECHR

The flexibility of Article 7 ECHR containing the principle of legality in criminal law stems from respecting the choice of the Contracting States in regulating criminal law. The ECtHR refuses to determine the appropriateness of chosen methods.¹¹⁶ Provided that it complies with Convention rights, implementing criminal policy is a national choice outside Strasbourg control.¹¹⁷ When assessing a violation of Article 7 ECHR the ECtHR may also take into consideration the need to preserve a balance between the general interest and the fundamental rights of individuals.¹¹⁸ In particular, in connection with the foreseeability of penal provisions the Contracting States appear to enjoy a

¹¹² Paras. 101-102, 104, Janosevic; paras. 113-114, 116, *Vastberga Taxi*. On the reasonableness or proportionality of reverse onuses, pp. 917-918, Dennis: 2005; and pp. 404, 425, *Tadros and Tierney*: 2004, providing a strong critique of this approach at pp. 416-422.

¹¹³ It is not an absolute right, para. 40, Phillips; mm. para. 28, *Salabiaku*. The proportionality formula also suggests this, see, para. 101, Janosevic; para. 113, *Vastberga Taxi*. See in this respect, p. 902, Dennis: 2005, stating that the presumption of innocence can be qualified.

¹¹⁴ *Inter alia*, paras. 40, 47, Phillips; para. 28, *Salabiaku*; para. 101, Janosevic and para. 113 *Vastberga Taxi*.

¹¹⁵ *Inter alia*, para. 41, Phillips; paras. 119-121, *Vastberga Taxi*; paras. 107-119, Janosevic. For a similar approach under EC law, see, paras. 94-95, *IBP*, where the possible condemnation for the execution of the fines imposed by the Commission, a body that is not an independent and impartial tribunal, was excluded by highlighting that alternatives to premature execution were available and the sanction can be postponed until it would be affirmed by the appropriate judicial body (Community courts).

¹¹⁶ Para. 33, *Cantoni*.

¹¹⁷ Para. 51, *Achour*. As regards substantive criminal law, para. 44, *ibid*. See in this respect, p. 32, *Starmer*: 2001.

¹¹⁸ *Inter alia*, para. 145, *Coeme*; para. 26, *Airey*; para. 95, *Guzzardi*.

leeway when introducing changes to criminal law by way of legislation or judicial interpretation.¹¹⁹

Article 4 Protocol 7 ECHR

In a similar vein, as regards the double jeopardy rule Strasbourg leaves the assessment of certain factors to the Contracting States as means of respecting their autonomy in regulating criminal law. Particularly, by promoting the *Franz Fischer* line of case law leeway was given to the legal qualification of unity and multiplicity of criminal acts as provided by municipal criminal law.¹²⁰ The unity or separability of penalties and the issue of finality are also considered as dependent upon national qualification. The available ordinary domestic remedies, the exhaustion of remedies, time limits to employ remedies, or the force of *res judicata* are determined by national legal systems.¹²¹ In addition, acknowledging the possibility of reopening cases under Article 4(2) Protocol 7 ECHR can be regarded as a sign that ECHR law is informed that national legal systems generally provide such opportunity.¹²²

3(c): The limits of the flexibility of scope in accommodating difference

Despite granting due deference to national competences immune from the jurisdiction of an international court, Strasbourg manages to exert its supervision on the flexibility of scope by setting certain requirements. It is an obvious limit on domestic discretion that the result called for by the Convention must be achieved.¹²³ The general requirement of effectiveness can also be taken into account in that the domestic solution must ensure that the right provided by the ECHR can be exercised in a practical and

¹¹⁹ Foreseeability is a flexible concept making it possible to adduce arguments in defence of the national measure, p. 284, Emmerson and Ashworth: 2001. It was suggested that the ECHR has little to offer because it is difficult to discern any general principle above a very modest level and that ECHR law is distinctly undemanding, pp. 332-334, Buxton: 2000. In general, this prohibition is only relative where national courts have a margin of discretion as regards clarifying and adapting criminal law, p. 253, Tridimas: 2006.

¹²⁰ Para. 31, *Franz Fischer*. It is not for Strasbourg to interfere unless clear abuse, pp. 393-394, Trechsel: 2005.

¹²¹ See, *inter alia*, para. 72, *Sovtransavto*; para. 52, *Ryabykh*; para. 91, *Naumenko*; para. 46, *Asito*; para. 45, *Popov (2)*; para. 62, *Brumarescu*. See in this respect, pp. 388-390, Trechsel: 2005.

¹²² *Inter alia*, paras. 44-47, *Nikitin*; paras. 31-32, *Fadin*. As a result of an absence of European consensus on procedural issues the adoption of a uniform double jeopardy rule in international human rights law has been inhibited mostly as regards reopening, retrial, and *res judicata*, p. 304, Emmerson and Ashworth: 2001.

¹²³ *Inter alia*, para. 95, *Hermi*; para. 38, *Imbrioscia*; para. 67, *Somogyi*.

effective manner.¹²⁴ As mentioned above, ECHR law circumscribes the bounds of national discretion with terms such as a reasonable limit established by striking a fair balance between the interests involved, a leeway informed of the requirements of a fair procedure and the availability of safeguards, or the need of preserving a balance between the general interest and the fundamental rights of individuals.

It follows that although it provides an important mechanism of accommodating difference inherent in domestic (EC) human rights solutions, the flexibility of scope is subject to limitations dictated by the characteristics of the Strasbourg supervisory mechanism. In general terms, the leeway afforded to the Contracting States to act independently within the areas affected by these fundamental rights is delimited by the obligation of the Contracting States to secure the very same fundamental rights. Consequently, by making the leeway available under the flexibility of scope conditional upon meeting the requirements inherent in the scope of the given fundamental right the flexible coexistence of domestic (criminal) laws under the ECHR is again demarcated by the requirement of similarity.

4. Encroachment upon national discretion

The **flexibility argument** would not be complete without considering the invasion of ECHR law into areas thought to be reserved for the Contracting States. In contrast to flexibility afforded under ECHR law judicial interpretation as exercised by the ECtHR also resulted in extending the scope of the Convention best labelled as an encroachment upon the liberties of the Contracting States by creating further obligations under the ECHR.¹²⁵ In the first place, the autonomous concepts of the Convention, such as what constitutes a civil right under Article 6 ECHR,¹²⁶ have engulfed areas of domestic law considered to be immune to the requirements of the ECHR.¹²⁷ The dynamic or evolutive interpretation of the ECtHR has also contributed to broadening the frontiers of ECHR law.¹²⁸ The requirement that the Convention is to be interpreted in light of present day

¹²⁴ *Inter alia*, para. 95, Hermi; para. 38, Imbrioscia; para. 33, Artico; para. 35, Allenet de Ribemont.

¹²⁵ See, p. 58, Mowbray: 2005, stating that obligations under the ECHR have been expanding.

¹²⁶ See, *inter alia*, recalling the gradual expansion of the scope of Article 6 ECHR, paras. 27-28, Ferrazzini; paras. 59-67, Pellegrin; paras. 27-28, Martinie; paras. 43-63, Vilho Eskelinen.

¹²⁷ See in this regard, *inter alia*, pp. 415-418, Melchior: Wiarda; pp. 32-35, Ganshof van der Meersch: 1980; pp. 25-30, Matscher: 1998; pp. 281-285, 292-295, Letsas: 2004; pp. 234-236, Sudre: 2006.

¹²⁸ See in this respect, *inter alia*, pp. 69-70, Bernhardt: Wiarda; pp. 20-24, Ganshof van der Meersch: 1980; pp. 61-62, Mahoney: 1990; pp. 323-333, Picod: 1998; pp. 60-72, Mowbray: 2005. See for instance, paras. 60-61, Dudgeon; paras. 84-85, 89-93, Goodwin; para. 40, Cossey; para. 37, Rees; para. 101, Jane

conditions¹²⁹ means that ECHR law demonstrates sensitivity towards the evolving social, political, and economic context of human rights protection.¹³⁰

It follows that in ECHR law tendencies contrary to the general thrust of flexibility have appeared of which the non-divergence claim must take cognisance. However, their relevance in the present context is overshadowed by the fact they are often placed in the general framework of flexibility inherent in the Convention. New areas might be brought under Strasbourg supervision, but the Contracting States can still enjoy the possibilities provided by the flexibility of ECHR law.¹³¹

5. The flexibility of ECHR law and the (non-) divergence claim between ECHR and EC law

Having described the mechanisms of flexibility under ECHR law it must now be examined what possibilities and limitations they entail as regards the present non-divergence thesis that presumes that the difference represented by the EC human rights solution can be accommodated under ECHR law. In this respect, the consequences on accommodating difference in general and on accommodating the potential divergences in fundamental rights protection in EC law will be considered separately.

5(a): General consequences

The potentials of flexibility

It must be recalled that the ability of the ECHR system to manage diversity in human rights laws is essential to examining the issue of divergence in law. The flexibility of ECHR law is derived from the fact that compatibility with its requirements not only corresponds to finding no interference with fundamental rights, but it also stands for accommodating justifiable interferences with fundamental rights the latter

Smith. See, para. 148, Kudła, responding to the increasing epidemic of procedural delays by altering the relationship between Article 6 and 13 ECHR as regards the reasonable time requirement.

¹²⁹ *Inter alia*, para. 31, Tyrer; para. 82, *Vo. v France*; para. 75, Goodwin.

¹³⁰ Pp. 201-202, *Ganshof Van Der Meersch: Wiarda* and pp. 63-65, Mahoney: 1990. See, *inter alia*, para. 35, Cossey; para. 41, Inze; paras. 67-68, Stafford; para. 74, Goodwin; para. 54, Martinie.

¹³¹ Picod suggested that encroachment by autonomous concepts and flexibility by margin of appreciation are not in contradiction as they are not applied in the same domain meaning that encroachment does not affect flexibility, p. 316, Picod: 1998.

acknowledging the particularity of the domestic human rights solution. In other words, difference is not associated automatically with non-compatibility under ECHR law. Whereas non-compatible differences are rejected, differences that can be accommodated within the flexible framework of ECHR law are accepted as compatible with ECHR law. As predicted at the outset of the present thesis, flexibility requires the reassessment of the problem of divergence in law as difference between laws, accommodated by means of mechanisms of flexibility available in the legal order at issue, could qualify as non-divergence in law.¹³²

Fundamentally, the law of the Convention is forgiving towards difference.¹³³ Difference is permitted not only as a matter of the human rights solution implemented in the given case, but also in regulating human rights in the Contracting States.¹³⁴ As demonstrated above the underlying structural principles of the Convention system favour human rights protection within the national context.¹³⁵ The margin of appreciation doctrine, being a principle of justification,¹³⁶ enables the ECtHR to show adequate respect towards difference embodied by the human rights solution produced on the national level.¹³⁷ Diversity is inherent in the concept of proportionality¹³⁸ and the flexibility of scope enables the Contracting States to comply with the core requirements of the ECHR in diverse ways. The ECHR was constructed to be capable of managing problems arising from the coexistence of autonomous human rights regimes.

This corresponds with Convention rights conceptualised by Weiler as reflecting societal choices often differing from polity to polity.¹³⁹ More importantly, he held that the difference in societal choices cannot be understood as divergence in levels of human rights protection. They only reflect difficult compromises peculiar to the given polity.¹⁴⁰ He added that the ECHR by acknowledging state sovereignty (state boundaries are the boundaries of societal choices) subject to observing the core of Convention rights is essential in maintaining such cross-national differentiation.¹⁴¹ In this context, the

¹³² See, Introduction to the thesis.

¹³³ P. 373, De Salvia: Ryssdal.

¹³⁴ See, Point 1(a) and Point 3 of the present chapter. The originally hesitant control of positive obligations also led commentators to believe that the ECtHR consciously allowed states a choice of means in making the exercise of rights effective, see, p. 56, Petzold: 1993 and pp. 214-222, Steiner and Bangert: 1998.

¹³⁵ See, Point 1(a) of the present chapter.

¹³⁶ P. 123, Macdonald: 1993.

¹³⁷ See in this respect, p. 35, Warbrick: 1998, stating that the margin of appreciation doctrine admits the possibility of the different treatment of similar situations in different jurisdictions; and p. 67, Bernhardt: Wiarda, stating that international human rights standards partially depend on domestic standards.

¹³⁸ P. 43, Warbirck: 1998.

¹³⁹ P. 102, Weiler: 2000a.

¹⁴⁰ Pp. 105-106, *ibid.* One would have to add that these are constantly evolving/changing compromises.

¹⁴¹ P. 104, *ibid.*, describing the relationship between sovereignty and supervision "like wolf and sheep".

margin of appreciation of states stands for the possibility of having different constitutionalised societal choices. Weiler concluded that by allowing a margin of appreciation the ECHR elects difference as part of its identity, as part of its fundamental values.¹⁴²

The grounds of the margin of appreciation doctrine imply that Strasbourg supervision is to encounter disputes in which the various human rights solutions adopted in the Contracting States have already been subject to objections, assessment, and balancing except when no effective domestic remedy was provided as required under Article 13 ECHR.¹⁴³ The requirement to pursue claims by means of national remedies under Article 35(1) ECHR means that, in principle, the domestic human rights solution has been achieved by giving consideration to the requirements of the Convention. It follows that the difference of the domestic human rights solution may well be the result of complying with obligations under Article 1 ECHR. Consequently, difference in ECHR law can be considered as inherent in the functioning of the Convention's human rights protection system and it can be regarded as the outcome of an attempt to comply with its requirements. Compliance under the ECHR, on this basis, starts out from difference. From the perspective of the present non-divergence claim this entails a great potential. The ability of ECHR law to accommodate difference provides a 'safety-valve' for the non-divergence claim. It is an assurance that difference may not necessarily be treated as divergence in a context where divergence holds an equivalent meaning with outright breach or unjustified interference. Although the flexibility of ECHR law does not provide for a watertight conclusion that the domestic human rights solution will be accepted by Strasbourg, it indicates that the domestic appreciation of the human rights dispute may not be refused under ECHR law. This latter possibility is particularly important in taking the wind out of the sails of the divergence claim which is required to provide conclusions of absolute certainty as, in part, it puts forward allegations of non-compliance.¹⁴⁴ The credibility of the divergence claim can be undermined (this is the primary aim of the non-divergence claim) by the feasibility that the domestic human rights solution is the legitimate product of discretion allowed by the ECHR.

¹⁴² P. 107, *ibid.* This might be characterised as a utilitarian approach to fundamental rights involving trade-offs between opposing interests, p. 70, Dembour: 2006; or a rule-utilitarian, interest-based or reason-blocking approach, pp. 716-720, Letsas: 2006.

¹⁴³ See, Point 1(a) of the present chapter on the subsidiarity of the ECHR mechanism.

¹⁴⁴ See, Part I/Chapter 1/Point 1(b).

The limitations of flexibility

Although difference may be regarded as inherent and inevitable in ECHR law, its accommodation by means of flexibility is not an automated mechanism, but subject to a final assessment by Strasbourg as indicated above in the present chapter. While setting the initial width of the margin of appreciation may determine the area of compliance within which choosing different human rights solutions is acceptable, its actual width will determine the flexibility available under ECHR law in the given instance. As it has been claimed, the true ability of the margin of appreciation doctrine in accommodating difference can only be determined by taking account of the various requirements set against the individual human rights solution.

In particular, the specific magnitude of the initial width and the benchmarks of the proportionality requirement (of flexibility) are imposed on the domestic human rights solution demanding compliance. The requirements of lawfulness and putting forward an adequate general interest oblige the Contracting States to observe these conditions despite the leeway afforded in this respect. In cases outside the margin of appreciation doctrine the national human rights solution enjoying the flexibility of the scope is subjected to compliance with the requirements inherent in the corresponding Convention right. The element of encroachment upon domestic discretion also signals the invasion of uniformity limiting the prospects of difference under ECHR law. It follows that difference is only allowed to strive within the flexible framework of ECHR law, if similarity is ensured as regards the appropriate elements of the human rights solution. Where the ability of the **flexibility argument** in countering the divergence claim ends, the **similarity argument** begins.

5(b): Potential consequences for EC human rights solutions

The margin of appreciation doctrine by affording a variable standard under ECHR law provides for the potential accommodation of human rights solutions of EC law. Treating the alleged difference of EC human rights protection as part of the range of acceptable solutions under ECHR law entails that difference does not qualify automatically as divergence. Both the initial and the actual width of margin of appreciation, supplemented with the flexibility of scope, represent flexibility that should dispel the threat of divergence between human rights protection under ECHR and EC law.

The initial width of margin of appreciation and accommodating EC human rights solutions

Addressing the issue of divergence by referring to the possible implications of the initial width of margin of appreciation is alluring. Drawing conclusions as to non-divergence from the abstract widths of the leeway provided does not appear as a daunting task. In case of Convention rights that attract a wide margin of appreciation, such as the right to property,¹⁴⁵ the right to free elections,¹⁴⁶ and the right to family life¹⁴⁷ the assumption could be permitted that Community law could be granted a similarly relaxed control allowing an independent assessment of interferences with these fundamental rights on the Community level.

With respect to property rights it appears that the Contracting States are entitled to implement sweeping reforms and programmes in the public interest that may cause distress to many and lead to disagreements in society. It is suggested that they (in our case the EC) can do anything in this field that is not unreasonable.¹⁴⁸ The broad discretionary powers imply that hardly any right to property solution of Community courts could be held inconsistent with ECHR law. EC interests of general economic policy could be accepted by Strasbourg as a reform of a common market organisation is practically indistinguishable in terms of what is permitted in the general interest from regulating national economic sectors.

Similarly, as regards family life the solutions adopted in Community law could no doubt be accommodated in ECHR law.¹⁴⁹ It is suggested that Community law creates obligations for its Member States corresponding to or reaching beyond the requirements of Article 8 ECHR.¹⁵⁰ The conclusion that the EC human rights solution could be accommodated within the flexible ECHR framework can be repeated in connection with

¹⁴⁵ See in this regard, pp. 38-42, 78, Peukert: 1981; p. 594, van Dijk and van Hoof: 1990; pp. 92, 98, van Banning: 2002. See, *inter alia*, para. 60, Gasus Dossier; paras. 205-206, Mellacher; para. 149, Broniowski.

¹⁴⁶ See, *inter alia*, para. 115, Zdanoka; para. 63, Matthews; paras. 61-62, Hirst; para. 201, Labita.

¹⁴⁷ See in this respect, pp. 42-43, 46-51, Sudre: 2002; pp. 208-212, Duffy: 1993; p. 219, Opsahl: 1973.

¹⁴⁸ Pp. 591-592, van Dijk and van Hoof: 1990. Article 1 Protocol 1 ECHR is "broadly framed and the permissible restrictions are very widely drawn", p. 300, Ovey and White: 2002.

¹⁴⁹ P. 55, Massias: 1992, on the strict approach of Community courts being accommodated by the relaxed attitude of the ECtHR.

¹⁵⁰ Pp. 43-44, *ibid*.

the broad margin of appreciation areas of freedom of speech or the right to free elections.¹⁵¹

There are fundamental rights where the width of the margin is best characterised as variable.¹⁵² They include the right to private life,¹⁵³ freedom of association,¹⁵⁴ freedom of speech,¹⁵⁵ and the right of access to a court.¹⁵⁶ Presumably, nothing implies that the interferences with fundamental rights imposed in Community law would upset the ECHR system due to their harrowing erroneousness and that Community law would impose restrictions of unexpected gravity and nature.¹⁵⁷ Interferences imposed under Community law would be fairly commonplace under any human rights protection regime. The Community specific interferences are not unprecedented as restrictions in the public interest to implement general policies are often relied upon in the Contracting States. Interferences such as (coercive) search and seizure, restrictions on trade, obligations to undergo medical examinations, and obligations to disclose information of personal nature in the public interest are not alien from legal systems maintaining a system of fundamental rights protection.

Moreover, it is arguable that Community interests served by the interference are in fact domestic interests common to the Member States as, after all, they willingly undertook facilitating the common project of European (economic) integration. Community interests as detached national constitutional interests demand treatment under the ECHR similar to that of domestic general interests allowing Community law independence in implementing and assessing restrictions on fundamental rights.¹⁵⁸

In this respect, it must also be mentioned that the requirements of lawfulness and being in the public interest, the prerequisites of exercising a margin of appreciation, usually

¹⁵¹ For similar conclusions although in a different context, see, p. 212, van den Berghe: 1982.

¹⁵² Generally speaking the width of the margin of appreciation is variable, pp. 192-193, Yourow: 1996 and pp. 645-646, Hutchinson: 1999.

¹⁵³ *Inter alia*, para. 77, Evans; para. 65, Leyla Sahin; para. 45, Camenzind; para. 116, Maurice; para. 100, Hatton. See in this respect, p. 44, Warbrick: 1998, accusing it of unpredictability, lack of legal certainty, incoherence, and arbitrariness at pp. 32-34; and p. 11-12, Ovey: 1998.

¹⁵⁴ Wide: *inter alia*, para. 44, Wilson; para. 45, Gustafsson; para. 113, Chassagnou; para. 48, Rekvényi. Reduced: *inter alia*, para. 58, Sørensen and Rasmussen; para. 39, SEDU; paras. 88, 94-95, Gorzelik; para. 51, Tsonev.

¹⁵⁵ Larger categories of different widths can be established on grounds of the nature of the opinion expressed, p. 207, van Dijk and Van Hoof: 1990. Civil servants and military personnel: wide, *inter alia*, para. 61, Ahmed; para. 53, Vogt; para. 100, Engel. Commercial speech: wide, *inter alia*, para. 33, Markt intern Verlag; para. 30, Krone Verlag. Demonstrations: fairly wide, *inter alia*, paras. 101, 105-107, Steel, Court; paras. 31, 33, Choherr.

¹⁵⁶ *Inter alia*, para. 59, Ashingdane; para. 71, Fayed. Wider margin, *inter alia*, paras. 75-76, Fayed; para. 197, Lithgow; paras. 54-55, Stubbings. Narrower, *inter alia*, para. 63, Cordova 1; para. 63, Stefanelli.

¹⁵⁷ See in this respect, p. 173, Beaumont: 2002, stating that human rights values under the ECHR may be far narrower than traditional public (Community) policy.

¹⁵⁸ See, Introduction to the thesis/Methodology/Point 2.

attract a wide margin of appreciation.¹⁵⁹ Considering the reluctance of the ECtHR to interfere when nothing suggests the unlawfulness of the national measure it is unlikely that Strasbourg would contradict the judgment of Community courts finding the measure at issue lawful. This, however, does not mean that the ECtHR would not fulfil its duty examining the lawfulness of the measure cleared by Community courts.¹⁶⁰ Similarly, the reluctance of the ECtHR to interfere with the choice of the general interest, except for manifest unreasonableness, enables the assumption that the execution of Community policies would not be questioned in this respect. The ECtHR has accepted that the duty of Member States to fulfil their Community obligations is in the general interest.¹⁶¹ It appears that even the predominantly economic nature of Community interests could be accommodated in ECHR law subject to review by Strasbourg.

Parallel with the different initial widths of margin of appreciation different degrees of flexibility could be distinguished. A wide margin of appreciation attracts a higher degree of flexibility which, in a comparative sense, renders highly problematic ascertaining that a human rights solution adopted in one jurisdiction is not in compliance with that of another. The degree of flexibility may be lesser when domestic discretion is subject to a more profound supervision by the ECtHR. Establishing the appropriate degree of flexibility would enable determining the ability of Community law to manoeuvre within the framework of ECHR law.

These conclusions are, however, unconvincing when one considers that it is nearly impossible to fathom the initial width of margin of appreciation precisely.¹⁶² As held above, only the actual width of margin of appreciation, determined by combining the examination of the initial width and the proportionality test, will enable ascertaining the flexibility allowed under ECHR law for the purpose of accommodating EC human rights law.¹⁶³ Furthermore, a (wide) margin of discretion does not necessarily imply that equally highly restrictive measures could be introduced. This prompts a distinction between the width and depth of margin of appreciation where width refers to the palette of different acceptable human rights solutions and depth to the allowed severity of

¹⁵⁹ See, Point 2 (c) of the present chapter.

¹⁶⁰ Paras. 143-148, *Bosphorus*, ECtHR.

¹⁶¹ Paras. 55-58, *Dangeville*; para. 150, *Bosphorus*, ECtHR and Chapter 4/Point 2 on international cooperation as an interest acknowledged by ECHR law.

¹⁶² Even within a generally wide width its magnitude can vary considerably: in property cases the normal balancing exercise between colliding interests provides more intensive control than a scrutiny based on a 'threshold of hardship' which does not regard every imbalance disproportionate, para. 192, *Velikovi*.

¹⁶³ See Point 2(b) of the present Chapter.

interferences with fundamental rights. This reaffirms that flexibility is not only a matter of initial widths of margin of appreciation.

The actual width of margin of appreciation and accommodating EC human rights solutions

As mentioned above, the ability to accommodate EC human rights solutions can only be determined by relying on both the initial margin (width) and the proportionality element of the variable standard (depth) under ECHR law. In this regard, the effects of the proportionality requirement must be taken into account. However, speculating about the possible advantages of the proportionality test for the non-divergence claim remains problematic. As argued under the general consequences of flexibility under ECHR law, utilising the proportionality test, which consists of benchmarks on how discretion allowed by the ECHR can be exercised, in fitting EC human rights solutions within the flexible ECHR framework entails an examination whether the benchmarks of the proportionality of human rights interferences in EC law meet the benchmarks of the proportionality test under ECHR law. It follows, as highlighted on several occasions in this chapter, that accommodating the ostensible differences of EC human rights solutions is subject to the condition that the requirements on exercising the margin of appreciation under ECHR law, in particular the benchmarks of flexibility, are observed. This, however, belongs to the **similarity argument** within the non-divergence claim.

The flexibility of scope and accommodating EC human rights solutions

The flexibility of scope available under the ECHR may also provide for accommodating the human rights solutions of EC law.¹⁶⁴ The leeway accorded to matters on evidence and double jeopardy, the reasonable time requirement, early enforcement of sanctions, presumptions in law, and the legality of criminal law could be of significance in areas of Community law which involve similar considerations such as Community competition law.¹⁶⁵ However, its relevance is affected by the limitations placed on this form of

¹⁶⁴ See in this respect, p. 175, Beaumont: 2002, asserting that Article 6(1) ECHR (providing a flexibility of scope) should not be considered in EC law as applying a uniform solution but welcoming a healthy divergence.

¹⁶⁵ See the corresponding chapters in Part III/b.

flexibility.¹⁶⁶ These restraints entail that the non-divergence claim must also refer to the similarity of ECHR and EC human rights solutions in this regard.

5(c): Conceptualising the potentials of flexibility within the pluralist imagination

Something akin to the overlap of the **flexibility** and the **similarity argument** was recognised in the pluralist vision of the European legal landscape by Delmas-Marty. In her view, the non-hierarchical (flexible) coexistence of ECHR and EC law is governed ultimately by the super-determination of norms by the ECHR.¹⁶⁷ This means that apart from maintaining the autonomy and specificity of (human rights protection in) EC law in relation to the ECHR, abiding the norms of the ECHR (similarity with ECHR human rights solutions) remains part of the pluralist order between ECHR and EC law.¹⁶⁸

This corresponds with Lenaerts' model of a pluralist constitutional order where hierarchies are imposed from time to time by the supranational jurisdiction of the ECtHR by means of interpreting norms by which the corresponding legal orders abide.¹⁶⁹ De Wet's *Verfassungskonglomerat* model is fairly similar where the juxtaposition of flexibility and similarity appears in conceptualising the resolution of inter-regime conflicts between the participating constitutional orders by setting up temporary hierarchies where the binding nature of ECHR law is the starting point.¹⁷⁰

The themes of flexibility and similarity were also expressed when discussing the subsidiarity of international regimes of human rights protection. Carozza suggested that the paradox of legal pluralism, that in part it needs to build on similarity, is recognised by the principle of subsidiarity that mediates between the binding nature of international human rights law and its sensitivity towards diversity. Basically, subsidiarity integrates international, domestic and subnational levels while encouraging and protecting pluralism among them.¹⁷¹

Fundamentally, these descriptions confirm the (ordered) pluralist premises of the **flexibility argument** and its conclusions reached by examining the potentials of mechanisms of flexibility in ECHR law in accommodating difference manifested in the EC human rights solution. In line with our conclusion that the non-divergence claim

¹⁶⁶ See Point 3(c) of the present chapter.

¹⁶⁷ Pp. 186-187, Delmas-Marty: 2002.

¹⁶⁸ See, pp. 192-195, *ibid.* Similarity does not compromise but contributes to the vision of a pluralist legal landscape where differences are coordinated through dialogue, confrontation and opposition, p. 199, *ibid.*

¹⁶⁹ Pp. 196-197, Lenaerts: 1983.

¹⁷⁰ Pp. 612-613, De Wet: 2006.

¹⁷¹ Pp. 38-39, 45, 57-58, Carozza: 2003.

cannot alone rely upon the **flexibility argument** they accept that, eventually, sustaining a pluralist coexistence must face the requirement of similarity. This is recognised as the paradox of the pluralist vision of European human rights laws. Therefore, it must be acknowledged that similarity is as important as flexibility in depicting/designing pluralist normative spaces.

Chapter 4: The flexibility of EC law and other issues of the flexibility argument

Besides the main thrust of the **flexibility argument** that Community human rights solutions can be accommodated within the flexible framework of ECHR law, other matters related to the effect of flexibility on the (non-) divergence claim must also be considered. Despite its inherent limitations, the mechanism of flexibility in place in Community law, by means of which divergence can be avoided, is an important contribution to the **flexibility argument**. Strasbourg's position on Community human rights protection also needs to be included examining whether it corresponds with the general idea of flexible coexistence of ECHR and EC law as defined in the previous chapter. Finally, it must be explored whether the issue of divergence can be appropriately expressed in terms of human rights standards commonly utilised by the divergence claim.

1. The flexibility offered under Community law

On account of its specific position as regards the legal systems of its Member States EC law provides its own specific mechanism of flexibility. It contributes to the success of the non-divergence thesis less than the flexibility of ECHR law, nevertheless, in appropriate circumstances it can be essential in consolidating the potential conflicts arising from the fact that a human rights dispute falls under multiple human rights jurisdictions.

The flexibility of EC human rights law stands for the ability of Community courts to remit the conclusion of the fundamental rights solution to the courts of the Member States.¹ This way Community law is relieved from the pressure of avoiding human rights solutions that diverge from ECHR law.² Practically, it will be the responsibility of national courts to ensure the compatibility of the human rights solution under EC law

¹ Craig affirmed this construction, but he called for a coherent approach like the margin of appreciation under ECHR law, pp. 515-516, Craig: 2006. In contrast, Peers rejected the idea of a margin of appreciation doctrine, pp. 168-169, Peers: 2004 (see also, pp. 609, 622, Kühling: 2003) that led him to reject that the EUCFR could fully copy the ECHR formula on limitations, *ibid*. In our view the margin of appreciation doctrine could be applicable *vis-à-vis* the Community institutions, but as regards the Member States it would be problematic.

² It is not regarded as not taking rights seriously, but providing adequate protection to fundamental rights, p. 71, Weiler and Lockhart: 1995; we suggest that the reason for this is that the human rights solution can be placed under the scope of the ECHR. Not seen as practical or desirable, *inter alia*, p. 46, De Búrca: 1995; p. 182, Niamh Nic Shuibhne: 2002; and p. 177, Peers: 2004.

with the ECHR.³ It is regarded as a manifestation of the principle of subsidiarity in international human rights protection as it affirms the need for local interpretative autonomy.⁴

Some argued that it would not eliminate divergence, although it enables Community law to avoid conflicts with ECHR law.⁵ Others claimed that it would lead to divergence in domestic laws.⁶ Nevertheless, it remains an effective component of the **flexibility argument**.

Generally, in such instances Community law refrains from determining the direct outcome of the human rights dispute, although the interpretation given by the ECJ could influence the assessment of national courts. Since competence to apply the ECHR is regained by national courts, the ordinary courts of the ECHR, Community law makes a seamless connection to the network of human rights protection under the ECHR characterised by structural subsidiarity.⁷ The ECtHR also acknowledged this when stating that by deferring the fundamental rights solution to national courts that operate in legal systems into which the ECHR has been incorporated Community law establishes a more direct connection with the ECHR.⁸ More importantly, the issue of divergence between ECHR and EC law is overshadowed by the possibility of the subsidiary application of ECHR law by the national courts.

The relevant cases all involve the interpretation of Community law within the preliminary ruling procedure. Equipped with the competence under Article 234 TEC of guiding national courts in interpreting Community law the ECJ opted to implement different degrees of independence the national courts may enjoy when providing the final human rights solution. In some instances, while maintaining that it is for the domestic courts to provide a final assessment, the ECJ laid down a detailed guidance for that purpose.⁹ The ECJ would ponder over the factors and circumstances the national court must take into account¹⁰ that might include principles established in ECHR law.¹¹

³ See in this respect, p. 322, Bonichot: 1991, stating that instead of EC logic in human rights protection the logic of the ECHR would be applied. For a similar construction outside this mechanism of flexibility see the deference of responsibility argument as to the right of access to court in Community law in Part III/a/Chapter 11/Point 1(e).

⁴ Pp. 55-56, Carozza: 2003.

⁵ Pp. 677-678, Zampini: 1999.

⁶ P. 395, Woods: 2006.

⁷ See in this respect, paras. 166-172, Sison and para. 121, OMPI. This is the solution advocated by Besselink with respect to resolving the dilemma faced by domestic courts which requirements to apply: EC human rights law as influenced by ECHR law or ECHR law; this way the pieces of the puzzle fit together: national courts have jurisdiction as regards EC human rights protection, ECHR human rights protection and national human rights protection, pp. 661-662, Besselink: 1998.

⁸ Paras. 163-164, Bosphorus, ECtHR.

⁹ Para. 42, ERT, mentioning that all the criteria of interpretation must be provided.

¹⁰ See, *inter alia*, paras. 20-22, Wachauf; paras. 39-50; 52, 54-70, Roquette; paras. 27-34, Familiapress.

A lesser interference is apparent when the ECJ entrusts the national courts with ascertaining whether the interference with the fundamental right was necessary and proportionate,¹² or ensuring that the fundamental right is observed.¹³ Those cases can also be mentioned in which the fundamental right was referred to as a mere interpretative principle the domestic court is required to consider.¹⁴ Upholding the domestic human rights solution is the most serious form of flexibility.¹⁵ The ECJ declining jurisdiction also leaves the domestic court unfettered discretion in resolving the human rights dispute.¹⁶

However, remitting the conclusion of the human rights dispute to national courts is not the only practice followed by the ECJ under Article 234 TEC. In specific circumstances the ECJ opted to rule on the compatibility of national measures with fundamental rights providing the human rights solution domestic courts are required to follow.¹⁷ The limitations of this form of flexibility manifest more clearly when one considers that with respect to a number of fundamental rights the ECJ was not placed in a position to avoid the burden of producing the human rights solution.¹⁸

Considering the limitations of flexibility offered under EC law it follows, as in case of flexibility under ECHR law, that it cannot alone support the non-divergence claim. Although it places (EC) human rights solutions into the subsidiary structure of the Convention, it is capable of influencing human rights protection in EC law only in a narrow area. With respect to human rights solutions outside the reach of the flexibility of EC law the non-divergence claim must rely on the argument exposing the ability of ECHR law to accommodate EC human rights solutions and, ultimately, the **similarity argument**.

¹¹ The Boultif principles: para. 96, Orfanopoulos and para. 60, Akrich; the requirement of fairness (Article 6 ECHR): para. 60, Pupino; the adversarial principle and fairness (Article 6 ECHR): paras. 75-80, Steffensen.

¹² See, paras. 88-90, ORF, the requirement of foreseeability was also remitted, paras. 76-79; paras. 66-69, Promusicae; paras. 89-90, Lindqvist.

¹³ *Inter alia*, para. 43, Mobistar (must ensure the protection of confidentiality while ensuring that the right of the defence are observed); para. 68, Eurofood (a sufficient opportunity to be heard must be provided); mm. paras. 38-39, Fisher (the protection of personal data in balancing the respective interests); para. 35, KPN (the national interpretation must be established in the light of the strict interpretation based on the right to privacy).

¹⁴ *Inter alia*, para. 32, Rutili; para. 45 ERT; para. 83, Barkoci; para. 85, Gloszczuk; para. 90, Kondova; para. 48, Templeman; para. 27, Panayotova; para. 90, Peerbooms; para. 35, Greenham; para. 48, Inizan; para. 85, Müller-Fauré. See in this respect Part III on the language of fundamental rights. The principle of effective judicial protection must also be mentioned here the status of which as a right or principle is discussed in Part III/a/Chapter 11/Points 1(a) and 2 on the right of access to a court.

¹⁵ See, paras. 39-40, Omega Spielhallen.

¹⁶ *Inter alia*, para. 28, Demirel; para. 42, ERT; para. 26, Cinèthèque; para. 31, Grogan. It was seen as a form of divergence by others, see Part I/Chapter 1/Point 1 (b).

¹⁷ *Inter alia*, paras. 89-92, Booker; paras. 56-59, NFFO; paras. 22-26, Bosphorus, ECJ.

¹⁸ In the human rights cases not mentioned above the flexibility of EC law was not offered.

2. Strasbourg's vision of ordering the coexistence of ECHR and EC law

Having established its jurisdiction over the Contracting States' affairs under Community law¹⁹ the Strasbourg court was enabled to clarify its position as regards the relationship of the European Community with the law of the Convention. In this respect, it needs to be explored whether the *Bosphorus* judgment of the ECtHR supports the present thesis in which flexibility and similarity simultaneously govern the issue of (non-) divergence between ECHR and EC law.

In *Bosphorus* the ECtHR described the relationship between ECHR and EC law by means of the (at least) equivalent protection principle. This principle covers both the substantive guarantees offered and the mechanisms supervising the observance of those substantive guarantees. It demands fundamental rights protection that is comparable but not identical.²⁰ More precisely, the qualitative principle of equivalent protection, constructed as a rebuttable presumption, operates with a threshold of manifestly deficient protection.²¹ This means that provided that in a particular case a manifestly deficient protection of Convention rights can be established, the (general) presumption that fundamental rights protection in Community law is equivalent will be withdrawn. In such case, Community law (the human rights solution in Community law) will be subjected to the requirements of the Convention on the basis of the responsibility of its Member States under the ECHR when fulfilling Community obligations.²²

Having identified the extremes of the equivalent protection principle (comparable protection/manifestly deficient protection) the general conditions of accepting that Community law provides equivalent protection need to be recalled. In terms of

¹⁹ See in this respect, *inter alia*, paras. 152-154, *Bosphorus*, ECtHR; paras. 144-145, *M&Co*; paras. 29, 31-34, *Matthews*.

²⁰ Para. 155, *Bosphorus*, ECtHR. The requirement of an identical protection would run counter the interest of international cooperation which influences how the ECtHR envisages the relationship of the ECHR with other international organisations, see in this respect, para. 150, *ibid*; paras. 63, 72, *Waite and Kennedy*; para. 54, *Al-Adsani*. For an earlier version of the equivalent protection requirement, see the *Commission in M&Co*, stating that the transfer of powers by a Contracting State to an international organisation is not incompatible with the ECHR provided that within that organisation fundamental rights will be given equivalent protection.

²¹ Para. 156, *Bosphorus*, ECtHR. See in this respect, p. 647, *Cohen-Jonathan and Flauss: 1999*, stating that under Article 53 (former 60) ECHR the Convention gives way to national or international protection more favourable for the individual which is expressed in the equivalent protection rule.

²² From the perspective of Community law determining the responsibility of the Contracting State is only relevant when it concerns acts performed under strict Community obligations. When the domestic measure can be detached from Community obligations, the responsibility of the state will be determined under the normal conditions and not according to the equivalent protection principle, para. 157, *Bosphorus*, ECtHR.

substantive provisions the existence of a consistent practice of human rights protection and the potential for a more resolute manifestation of fundamental rights will suffice. In *Bosphorus* the ECtHR confidently approved the practice of Community courts and constitutional developments such as the EUCFR affirming the key role of the ECHR in EC human rights protection.²³ With respect to procedural arrangements while accepting that (direct) access to judicial protection could be problematic,²⁴ the ECtHR maintained that the interaction between national courts and the ECJ by means of preliminary references satisfies the procedural condition of an equivalent protection.²⁵

Though the generosity of the ECtHR's general approach can be criticised,²⁶ it must be realised that the essence of the equivalence requirement is found in the application of the manifest deficiency test in individual cases.²⁷ Indeed, considering the significance of the international cooperation argument in establishing the relationship between the ECHR and other international commitments of its Contracting States²⁸ it is scarcely imaginable that the ECtHR would launch a ferocious attack on the fundamental principles and structures of the international organisation in question (the EC).²⁹ As it appears from the ECtHR's reasoning enhancing the international cooperation of states matches the significance of fulfilling the obligations arising from the ECHR requiring these countervailing interests to be measured against each other.³⁰ Provided that European economic integration under the EC Treaty forms part of the European public order as conceived by Strasbourg (and all national public orders), leaving the general structure of EC human rights protection intact is difficult to question.³¹

²³ Para. 159, *ibid.*

²⁴ Paras. 161-163, *ibid.*

²⁵ Para. 164, *ibid.*

²⁶ See, point 1, CO Ress, *Bosphorus*.

²⁷ The equivalent protection principle must be understood as applicable in reviewing a given EC human rights solution, JCO Rozakis et al, *Bosphorus* and points 2-3, CO Ress, *Bosphorus*. It entails a case-by-case control compatibility, pp. 18-19, Canor: 2000; pp. 103-105, 107-108, Costello: 2006; pp. 638-639, Douglas-Scott: 2006.

²⁸ *Supra* fn. 20.

²⁹ The presumption of equivalence appears to be the presumption upon which the ECHR system is based; it manifests, in particular, in the concepts of subsidiarity and the effectiveness. To be accommodated within this structure, as judge Ress pointed out, the EC must receive the same treatment the Contracting States normally receive when their case is heard in Strasbourg, point 4, CO Ress, *Bosphorus*. By translating the conflict between the interest of international cooperation and abiding the law of the Convention into the usual conflict between the general interest and individual rights the threat that the EC as a supranational organisation, the product of international cooperation, would receive special treatment is largely diminished.

³⁰ Paras. 150-151, 156, *Bosphorus*, ECtHR. See in this regard, point 5, CO Ress, *Bosphorus*, considering that this assertion could lead to interpretations that the interest of international cooperation prevails over the Convention, and p. 230, Wildhaber: 2007.

³¹ See, p. 184, Scheuner: 1975, stating that Community interests in human rights protection are considered by the Member States as national interests, since national constitutional values and interests had to be transformed for the sake of integration.

As to the application of the equivalent protection principle in individual cases, in *Bosphorus* the question of manifestly deficient protection was decided by examining whether the application of Community law by the national authorities constituted a justifiable interference with the right to property under Article 1 Protocol 1 ECHR.³² The ECtHR examined factors such as the nature of the interference, the general interest served by the interference, and the general scheme that led to the interference. It also considered whether the judgment of the ECJ, carrying out a full scrutiny, managed to reconcile the interference with the fundamental right to property appropriately. On this basis, the ECtHR found no dysfunction in the EC mechanism controlling the observance of Convention rights.³³

Such application of the equivalent protection principle questions whether it can be conceived as general deference to fundamental rights protection in Community law.³⁴ The problem of double standards and the need to remain vigilant are valid concerns,³⁵ however, it must be realised that the individual application of the equivalent protection principle aims exactly at dealing with them.³⁶ Although the larger portion of the judgment addressed general equivalence, the essence of Strasbourg's position was (is) the application of the manifestly deficient rule in the given case.³⁷ This also follows from the assertion by the ECtHR that the principle of equivalence is a dynamic concept

³² Para. 151, *Bosphorus*, ECtHR. See this in Part III/a/Chapter 9 on the right to property in ECHR and EC law.

³³ Para. 166, *ibid.* In *M&Co* the solution provided by the ECJ with respect to the right to a fair hearing was considered. Although the acceptance of the EC human rights solution depended on upholding the interest of international cooperation suggesting that manifest deficiency was not present, it is apparent that generally it was built on the same considerations as *Bosphorus*.

³⁴ See, pp. 15, 24, Bultrini: 2002, suggesting that it relieves the EC from all responsibilities.

³⁵ JCO Rozakis et al, *Bosphorus*.

³⁶ Although the principle of equivalent protection has been equated with the *Solange II* doctrine of the German constitutional court (BVerfG) (*inter alia*, p. 656, Besselink: 1998; pp. 641-642, Cohen-Jonathan and Flauss: 1999; pp. 53-54, Tulkens: 2000; p. 15, Bultrini: 2002), it is clear that it provides a more intensive control (p. 254, Douglas-Scott: 2006a; pp. 765, 767, Jacqu e: 2005). They both include a rebuttable assumption of substantially equivalent protection that does not demand identical protection, however, the BVerfG will refuse to address individual cases, and its jurisdiction will only be activated in case of a general breakdown in human rights protection (pp. 13-15, Everling: 1995; pp. 336-337, Limbach: 2000; pp. 90-91, Kokott: 2003). Giegerich stated that the EC is considered by the ECtHR and the BVerfG as an equivalent partner through their requirements of equivalent protection, pp. 857-863, Giegerich: 1990. It resembles more the attitude of the French *Conseil Constitutionnel* which opted to maintain individual control whether Community law contradicts an express provision of the French Constitution including fundamental rights (see, pp. 865-867, Dutheil de la Roch re: 2005 (less flexible than the German approach at p. 868); see also, pp. 877-878, Azoulai and Ronkes Agerbeek: 2005 (the German and the French positions are poles apart at p. 883)).

³⁷ See, point 3, *CO Ress*, *Bosphorus*. The ECtHR judgment in *Matthews* included a solution where the presumption of compatibility was rebutted on the basis of examining compliance with ECHR provisions, p. 623, De Wet: 2006 and p. 64, De Schutter: 2000. For an interpretation of *M&Co* that Strasbourg resumes control when the ECJ fails to meet the requirements, see, p. 97, Cohen-Jonathan: Schermers and p. 112, Harmsen: 2001; such interpretation could be created, p. 54, Tulkens: 2000.

maintaining that finding equivalence is not final and it is susceptible to be reviewed in case of changes in fundamental rights protection.³⁸

Separating the reasoning on the equivalence of the general framework and the individual human rights solution bears importance from the perspective of the present thesis. While the general discussion on the substantive and procedural arrangements of fundamental rights protection in EC law enables the ECtHR to accommodate the EC human rights system, the individual application of the manifest deficiency test provides the ultimate conclusion as to compatibility.³⁹ This corresponds with the structural subsidiarity of human rights protection under the ECHR.⁴⁰ It entails that Strasbourg refrains from engaging in a general criticism of domestic human rights arrangements as its mandate is limited to examining the specific human rights solution as suggested by the equivalent protection principle.

It follows that the equivalence requirement towards EC human rights protection is not unprecedented in ECHR law. It fits into the general scheme of how ECHR law envisages its relationship with other legal systems and it is subject to Strasbourg's subsidiary supervision of individual instances of human rights violations. From the perspective of the non-divergence thesis the principle of equivalent protection reaffirms that divergence is managed under ECHR law by means of juxtaposing the opportunity provided by flexibility and the requirement of similarity.

Consequently, it is not surprising that the equivalent protection principle has been conceptualised as moderate legal pluralism where the EC is enabled to maintain an autonomous system of human rights protection subject to supervision under the ECHR. It was held that their coexistence is not pre-ordained, but it is the contingent product of their interaction manifested in the requirement of equivalent protection.⁴¹ De Wet suggested that it enables ECHR law to impose its normative superiority when inter-systemic conflict threatens.⁴² Such temporary requirement of similarity within a flexible

³⁸ Para. 155, *Bosphorus*, ECtHR.

³⁹ Its future implications are not necessarily clear as it could urge for integrated and harmonious interpretation of human rights, or it might emphasise divergent interpretation and inconsistent application, p. 20, Canor: 2000. In contrast, Verhoeven saw it as a well-established constitutional principle, the condition for the acceptance of the autonomous EU human rights solution, pp. 340-342, Verhoeven: 2002.

⁴⁰ *Supra* fn. 29. See Part II/Chapter 3/Point 1(a) on the ECHR's principle of subsidiarity allowing different structures of human rights protection to prevail in the Contracting States.

⁴¹ Pp. 333-336, Verhoeven: 2002. The moderate legal pluralism of the ECHR system is clearly apparent in how the ECtHR envisions the resolution of conflicts between competing international obligations (ECHR and EC), p. 625, De Wet: 2006. See also, p. 17, Canor: 2000, drawing up a similar scheme outside the pluralist imagination.

⁴² Pp. 628-629, De Wet: 2006. In a less demanding formulation the ECtHR has chosen an attitude of cooperation rather than subordination with respect to the ECJ, p. 56, Tulkens: 2000. In a more animated formulation it is "living apart together", pp. 310-311, Curtin: Slynn.

framework of coexistence corresponds with the tenor of the present non-divergence thesis.

3. *The question of standards*

The question of standards of human rights protection in the arrangement of “*juridictionnalisation croissante*”⁴³ at issue is of significance for the divergence claim. It speaks of EC human rights standards falling short of ECHR standards inducing a sensation of a readily available ranking between isolated legal systems as a consequence of non-compatibility.⁴⁴ From this perspective, ECHR human rights standards appear as constant and absolute allowing no deference to local approaches and neglecting the circumstances of individual human rights disputes. Therefore, the non-divergence thesis cannot avoid addressing the issue of standards.

Speaking of standards might be problematic when one considers the flexibility of human rights protection under the ECHR. As argued in Chapter 3 the standards recognised by the non-divergence claim are variable.⁴⁵ Their content is only determinable in individual instances depending on the relevant circumstances. The variability of standards also comes from the margin of appreciation doctrine. The recurring element of proportionality provides for the assessment of countervailing interests as the core of the variable standard. This questions whether the term standard is applicable within the context of modelling flexibility under the margin of appreciation doctrine.

It must be recalled that Weiler considered that levels of human rights protection (in the ECHR) are in reality the result of compromises between competing goods expressing core values and choices.⁴⁶ German authors based on the *Grundrechtsdogmatik* familiar to them expressed a similar view. Accordingly, one cannot speak of standards, but of concept(s) of human rights protection (*Schutzkonzept*) and of system(s) of limitations to fundamental rights (*Schrankensystematik*).⁴⁷ When human rights protection is conceived as setting a correct balance between competing interests, it is inappropriate to speak of

⁴³ P. 1447, Spielmann: 2004.

⁴⁴ See Part I/Chapter 1.

⁴⁵ See Part II/Chapter 3/Point 2(a).

⁴⁶ See Part II/Chapter 3/Point 5(a). It is only a partially valid description of human rights protection, at least under the ECHR, considering that there are rights not allowing a margin of discretion for states. See also, pp. 278, 280, Maduro: 2003a, asserting that there are no lighter standards but differently applied proportionality tests in different circumstances.

⁴⁷ Pp. 254-255, Pauly: 1998.

standards of human rights adjudication.⁴⁸ Kühling suggested that divergence is not a matter of standards, but of mechanisms of realising (protecting) human rights (*Konkretisierungsprozess*) enabling the assessment of the particularities of EC human rights protection in relation to other systems of human rights protection.⁴⁹ Scheuner claimed that the respective level of human rights protection in the EC cannot be expressed in terms of high or low standards, rather as acceptable limitations to fundamental rights in the interest of the Community.⁵⁰ Streinz mentioned “relativised” EC standards depending on the possible limitations to human rights shifting the focus from standards to the system of limitations (*Schrankendogmatik*).⁵¹

On this basis, it is not surprising that Peers approached ECHR and EC human rights standards from the perspective of limitations and derogations to fundamental rights.⁵² However, equating standards of human rights protection with the respective general formulas on human rights limitations in ECHR and EC law⁵³ sheds doubts upon the appropriateness of his argument.

Accordingly, the relationship between ECHR and EC human rights protection can hardly be expressed in terms of standards. Requiring minimum, medium, or maximum standards from the Community will not do justice to the actual process of human rights adjudication.⁵⁴ Moreover, when the ECHR is characterised by flexibility towards the human rights solution under scrutiny, it is not practical to refer to hypothetical standards of human rights protection.⁵⁵ As Frowein suggested, the functioning of transnational courts cannot be understood from the perspective of standard-setting (of domestic courts) when the transnational standard is required to appreciate differences between the participating legal orders.⁵⁶

For the same reasons, the question of an abstract maximum standard in Community law applied *vis-à-vis* domestic human rights standards needs to be reconsidered. The

⁴⁸ P. 1324, von Bogdandy: 2000.

⁴⁹ Pp. 590-591, Kühling: 2003. See also, pp. 255-256, Pauly: 1998, stating that divergence can only be expressed as a matter of the application of the proportionality test and not as standards.

⁵⁰ P. 184, Scheuner: 1975. See in this respect, p. 44, Lenaerts and Van Nuffel: 1999, stating that EC human rights protection is more like an administrative jurisdiction based on balancing rights with EC interests.

⁵¹ P. 142, Streinz: 2003.

⁵² P. 141, Peers: 2004. See Part I/Chapter 1/Point 1(b) discussing Peer’s position.

⁵³ Pp. 142-143, *ibid*, ECHR: prescribed by law, legitimate aim, proportionality, necessity and margin of appreciation, EC: not absolute prerogatives, subject to restrictions, do not constitute with regard the aim disproportionate and unreasonable interference undermining the substance of the right.

⁵⁴ P. 688, Zampini: 1999.

⁵⁵ It is equally impractical to highlight a solution (which otherwise fits well into the general scheme of the relationship between ECHR and EC law) which speaks of a high standard in EC law that goes beyond the ECHR core and does not fall below the minimum ECHR standard; on this solution, p. 17, Canor: 2000.

⁵⁶ P. 342, Frowein: 1986.

maximum standard was propagated by those that consider that any other standard would jeopardise the interests of Member States.⁵⁷ The critics of the maximum standard⁵⁸ suggested that only an optimal medium standard can be distilled from national laws⁵⁹ or only minimum protection would be attainable.⁶⁰ The next option of a substantive maximum standard incorporated dynamism as it was described as a decisional principle providing the best protection in the concrete case.⁶¹ The question of human rights protection involving a balancing of interests was swept under the carpet by claiming that human rights must be protected in EC and rather be protected at highest level than not at all.⁶²

Without attempting to resolve the issue of potential conflicts between Community and national human rights solutions it must be pointed out that setting lower or higher standards, either constant or dynamic, fails to grasp the genuine nature of human rights protection. Even by relying on Weiler's schematic model⁶³ it appears that opting for a certain human rights solution, a certain balance of interests struck in the circumstances of the given case, can hardly be measured against another human rights solution of a different jurisdiction on scale of levels of human rights protection. The balance might be found inappropriate, but that does not translate into providing a lower standard of protection.⁶⁴

Standards might not be appropriate in expressing the relationship (of difference) between overlapping legal orders, but this does not mean that legal orders do not formulate requirements against others as a matter of fundamental rights protection. The element of compatibility is not extinguished by giving up the term standard. It has been constantly voiced within the **flexibility argument** that the balance struck between

⁵⁷ *Inter alia*, p. 79, Pescatore: 1972; p. 149, Hilf: 1976; p. 109, Toth: 1978; p. 164, Mendelson: 1981. Clapham claimed that it is necessary from the perspective of citizens, p. 101, Clapham: 1991.

⁵⁸ The paradox of the maximum standard rests in that the EC must provide the maximum standard by relying on the minimum common standards of the ECHR, p. 91, Cohen-Jonathan: Teitgen; see also in this respect, p. 239, Young: 2005; p. 881, de Witte: 1999.

⁵⁹ P. 46, Kutscher: 1982; pp. 880, 886, 894, Lenaerts: 2003.

⁶⁰ P. 226, Young: 2005.

⁶¹ Pp. 670-671, Besselink: 1998. The other solution he suggested, if the dynamic maximum standard is unacceptable, was the subsidiarity of EC human rights protection, meaning that the national courts would apply the higher (maximum) local standards when the EC standard was insufficient, pp. 676-678, *ibid*; this appears as turning the original idea upside down, making the national court and not the ECJ to apply the highest possible standard in a given case. Besselink's idea appears to be similar to that of an earlier contribution suggesting a "*critère flexible maximum*", pp. 722-724, Marcoux: 1983.

⁶² P. 674, Besselink: 1998.

⁶³ *Supra* fn. 46.

⁶⁴ This is demonstrated clearly by the *Solange I* judgment of the BverfG. Its part B-I was keen on emphasising difference in the levels of human rights protection; however, its part B-III with respect to the EC human rights solution under scrutiny could only go on to examine its appropriateness without considering high or low standards, or levels of protection finding eventually that the EC solution was adequate.

competing interests in human rights adjudication (representing the model preferred to the term standard) does not linger in limbo, but it is subject to normative requirements set within the mechanism(s) of flexibility which will eventually demand compliance, in other words, similarity. Flexibility might question expressing divergence as a matter of standards, however, the non-divergence of the EC human rights solution still demands support from the **similarity argument**.

Conclusions to Part II

The pluralist vision of coexistence between ECHR and EC law and its practical manifestation in mechanisms of flexibility entail that the issue of (non-) divergence must take into account flexibility in human rights protection under ECHR and EC law. The **flexibility argument** has held that ECHR law is capable of accommodating different human rights solutions regarding them as compatible with the requirements of the Convention. In addition, EC law by giving way to the domestic appreciation of human rights disputes can avoid conflicts with ECHR law. Consequently, divergence claims failing to appreciate the flexibility of ECHR and EC law are rendered inadequate.

However, limitations to the **flexibility argument** have emerged. First, the mechanisms of flexibility in ECHR and EC law are applicable only in a limited domain. The margin of appreciation doctrine cannot be utilised in the non-divergence thesis with regard to Convention rights that do not acknowledge the discretion of the Contracting States in protecting/regulating those rights. The flexibility of scope is only applicable to certain fundamental rights and the flexibility offered by EC law leaves the majority of human rights disputes unaffected.

Second, the margin of appreciation doctrine incorporates (normative) elements that require compliance. These parameters, governing the application of the doctrine, determine the limits of flexibility under ECHR law.¹ The elements of lawfulness and serving a legitimate aim are independent hurdles a human rights solution must pass. The actual width of the margin of appreciation (the proportionality requirement) incorporates benchmarks the human rights solution under scrutiny must satisfy.² Consequently, as it has been repeated above on numerous occasions the opportunity provided by flexibility for the non-divergence claim can only be fathomed by means of establishing similarity as to the benchmarks of flexibility.³

Third, irrespective of the impact of flexibility the human rights solution will be subject to a judgment on its compatibility with human rights requirements. ECHR (and EC) law is a normative system the supranational nature of which only emphasises that it strives

¹ De Salvia mentions three requirements: lawfulness, finality and necessity, pp. 382-383, De Salvia: Ryssdal.

² On proportionality being a normative requirement as to the human rights solution, pp. 448-449, Jones: 1995.

³ It may seem odd that a question of difference can turn into an issue of similarity. However, when one considers the indeterminateness of the variable standard of ECHR law, the only way to tame such requirement within the non-divergence claim is to translate it to the language of non-divergence, the language of similarity.

on compliance. Flexibility does not approve of just any human rights solution. Instead, it delimits an acceptable range subject to a final judicial authorisation transforming the domestic human rights solution into the product of ECHR law. Similarity must, therefore, be established as regards the remaining elements of the human rights solution besides the benchmarks of flexibility.

It follows that the non-divergence claim must concentrate on the element of compatibility as well. Similarity must be established along the parameters of flexibility and those elements of a human rights scrutiny that do not recognise flexibility. Although the non-divergence claim can build on the uncertainty⁴ caused by the flexibility of ECHR law by casting doubt upon the validity of the divergence claim, it must as well dwell upon the certainty of establishing similarity.

Even the pluralist descriptions of the coexistence between ECHR and EC law have accepted that uncompromised pluralism is inaccurate. Their moderate or coordinated pluralism concedes to the fact that temporary orderings of hierarchy might be necessary to resolve the tensions of coexistence.⁵ This corresponds with the predictions of the pluralist approach to divergence in law in Chapter 2 according to which resolving conflicts inherent in difference may give rise to a reduction of multiplicity.⁶ It follows that that (these) normative systems have (only) a limited ability to maintain diversity in law.

Nevertheless, the pluralist and flexible vision of divergence in law retains important functions useful for the purposes of the present thesis. First, the reduction of multiplicity as mentioned above will be the result of a pluralist choice among equals. This means that any assessment of divergence will have to consider the merits of both human rights solutions. Consequently, the EC human rights solution cannot be regarded inadequate *ab initio*. Second, the pluralist approach is essential to how ECHR and EC law construct their identity as human rights regimes. Rejecting to identify themselves as ultimate and unchallengeable will enable maintaining variety in human rights solutions in both

⁴ Uncertainty is inherent in ECHR law as its rules depend upon judicial appreciation based on the facts and circumstances of cases. Eradicating uncertainty could have serious implications as the legitimacy of ECHR law depends on judicial reasoning taking into account the particularities of every case and carrying out the balancing of interests. It was stated that the margin of appreciation is a concept that is built on and deals with uncertainty, p. 641, Hutchinson: 1999. Alder suggested, however, that by rationalising human rights adjudication, by means of indicating certain considerations judges must take into account, uncertainty could be reduced and certainty would provide for more acceptable human rights solutions (value choices), pp. 714-717, Alder: 2006.

⁵ See Part II/Chapter 3/Point 5(c) and Chapter 4/Point 2.

⁶ See Part I/Chapter 2/Point 4.

jurisdictions.⁷ Third, (moderate) legal pluralism remains a valid description of the coexistence of multiple human rights systems. It may not determine the source(s) of validity in a plural legal landscape convincingly, but its efforts in describing and conceptualising interactions within this complex legal arrangement must be appreciated. Finally, despite its apparent limitations, **flexibility** is an essential line of **argument** within the non-divergence claim. It keeps a vital ‘buffer zone’ for a **similarity argument** that may not provide a watertight evidence of similarity.

It is appropriate to close Part II by drawing attention again to the fact that the necessity to move onto discussing the **similarity argument** is the result of the conclusions reached within the **flexibility argument**.

⁷ Not only flexibility can be mentioned here, but the tendency in EC/ECHR law to follow ECHR/EC law. It is an important sign that EC/ECHR law do not consider themselves as perfect human rights regimes.

Part III: The similarity argument: Establishing the similarity of ECHR and EC human rights jurisprudence

Introduction

Having experienced the limited competence of the **flexibility argument** in supporting the non-divergence claim our attention must turn now to the **similarity argument** bringing the non-divergence claim to a successful issue. The ensuing analysis will concentrate on the judgments of the Strasbourg and Luxembourg courts as the divergence claim feasts on individual cases of alleged judicial misdirection leading to discordance.¹ The divergence claim must be countered on home turf – that is contrasting individual judicial solutions from different jurisdictions, where differences are abundant and where, however, nothing excludes introducing a system of scrutiny that involves a comparison more comprehensive than that carried out under the divergence claim.

In this context, confounding the divergence claim is enabled by the faults inherent in its analysis. The divergence claim is driven to concentrate disproportionately on the obvious differences. It is to its advantage to blur factors that would potentially impede its success. It assumes certainty where uncertainty dominates and stultifies uniqueness where individuality is omnipotent. In particular, the divergence claim fails to establish convincingly the commensurability of the judgments it compares.² Neglecting the particularity of individual cases that stems from their specific circumstances and peculiar contexts prevents adequate assessment of divergence.³ Comparability also remains uncertain when judicial assessment is dominated by elusive principles such as fairness under Article 6 ECHR.⁴

Indeed, it is more prudent to presume in examining divergence in law that the comparison of individual cases from different jurisdictions (ECHR and EC law) is burdened by incommensurability.⁵ The unmatched specificity of interferences under EC law could provide an adequate basis for distinguishing individual cases from those

¹ See Part I/Chapter I/Points 1(a) and (b).

² See Methodology/Point 3.

³ See the ‘contextualised’ variable standard model in Part II/Chapter 3/Point 2(a) where the actual requirement of ECHR law can only be determined by taking into account the circumstances and the context of individual cases.

⁴ See the flexibility of scope in Part II/Chapter 3/Point 3 appreciating diversity within the substantive scope of fundamental rights.

⁵ Incommensurability is when the units (of legal orders) are incomparable, immeasurable, or cannot be ranked, p. 136, Glenn: 2001 and p. 698, Alder: 2006.

under ECHR law.⁶ The specific factual circumstances of the case,⁷ providing a highly developed regulatory background,⁸ or the specific judicial approach taken⁹ could all be relevant in this respect. Community courts have already rejected to follow Strasbourg cases when they were distinguishable on their facts and circumstances.¹⁰

Nonetheless, the non-divergence claim cannot avoid engaging in a comparison (of incommensurable cases). Consequently, it is expected from the **similarity argument** to establish a form and quality of scrutiny that avoids the inconsistencies of the analysis under the divergence claim. To comprehend fully the uniqueness of the ensuing analysis of similarity the concept of ‘decontextualisation’ must be introduced.

1. Decontextualisation

Coining the term ‘decontextualisation’ is justified by the problem of incommensurability in the (non-) divergence claim. Having considered that incommensurability can prevent the correct assessment of similarity/difference, for the purpose of reducing the risks it may entail the peculiarity of individual cases must be excluded (the judgments must be decontextualised) from the premises of examining similarity. The similarity argument must not be jeopardised by incomparability.

Decontextualisation forms the basis of a system of analysis in which cases are stripped of their individuality enabling them to be moulded into a complex and neutral body of law. It will reveal the general judicial approaches characterising ECHR and EC human rights law.¹¹ It allows the comparison of an immense and greatly varied mass of law without making the errors of the divergence claim. By decontextualisation human rights solutions can be unhinged from their local circumstances, from those variables that bend and influence their judicial assessment. Gaining such purity is not an objective of the

⁶ See, for instance, the technicalities of managing a Community specific common market organisation, specific EC trading and industry regulatory systems, and Community competition investigations.

⁷ For specific Community element in cases see, *inter alia*, Travelex; Belbouab; Vittorio Testa; Connolly; Cwik; E; Schmidberger; De Gaulle; Carpenter; Danzer.

⁸ For instance, paras. 79-85, Generics, demonstrating that Community law has a more developed system of intellectual property rights protection.

⁹ EC: examining the right to property, paras. 24-26, Bosphorus, ECJ (Part III/a/Chapter 9); ECHR: Bosphorus, ECtHR: establishing the principles of accommodating EC law under the ECHR (Part II/Chapter 4/Point 2).

¹⁰ See, paras. 42-43, Salzgitter Mannesmann, refusing to rely on cases from ECHR law concerning criminal proceedings as opposed to the procedure under Article 81 TEC. See also, distinguishing ECHR cases involving the element of coercion and EC cases where the persons concerned decided to cooperate as regards the protection of business premises, Part III/a/Chapter 5/Point 1(a).

¹¹ The distinctiveness and incommensurability of one aspect (individual cases) does not exclude the comparability and similarity of another aspect (general judicial approaches): separating sameness and difference is misleading, pp. 720-721, Valcke: 2004.

similarity argument on its own right. It is only required to avoid the methodological difficulties associated with assessing difference and similarity in law.

Basically, decontextualisation renders a system of analysis of similarity that involves the comparison of the style of human rights protection in ECHR and EC law.¹² Here, style refers to the general perceptions of Strasbourg and Luxembourg as regards reaching human rights solutions. It can be conceived as the totality of factors relevant in human rights disputes that are best labelled as the components of the style of human rights protection. Similarity in style will demonstrate that judicial approaches in the two systems of human rights protection share common symptoms.

However, decontextualisation does not exclude completely from the examination of similarity the variables resulting from the particularity of individual cases. Indeed, the style of human rights protection is the imprint of those variables that affect judicial assessment in individual cases. The style of human rights protection derives its components by compiling the peculiarity of individual cases into a common set of features. The components of style, introduced next, will inevitably return to what has been sacrificed for the purposes of decontextualisation.

2. The components of style

The components of style are the scope, the language, the functioning, and the flexibility of human rights protection.¹³ The **similarity argument** will demonstrate that judicial approaches in ECHR and EC law correspond in assessing these components. The component of flexibility is of special significance in the present context. As suggested in concluding Part II the **flexibility** and **similarity arguments** merge in the examination of the parameters of flexibility. Demonstrating that ECHR and EC law agree that the given fundamental right permits justifiable interferences to a similar extent and apply similar benchmarks of flexibility not only closes the **similarity argument**, but it also enables the conclusion that the protection of the fundamental right at issue in Community law could be accommodated within the flexible framework of ECHR law. This justifies the premises of the present non-divergence thesis.

¹² Comparing styles is supported by that the ECtHR does not require compliance with specific case law but with the obligations under Article 1 ECHR (para. 27, Weixelbraun) which means that the ECHR demands compliance as a matter of obligations defined by general judicial approaches.

¹³ For a similar attempt in comparison taking into account scope and weight (functioning and flexibility), p. 373, Woods: 2006. See also, pp. 594-595, 597, Kühling: 2003, asserting that the key to non-divergence is the similarity of the systems of limitation (*Schränkensystematik*) in ECHR and EC law (which is examined within Part III).

2(a): The scope of rights

The similarity of scope refers to the resemblances found in the scope of the given fundamental right. It is essential that the relative poverty of EC law in terms of the breadth and depth of scope should not influence our perception. Complete overlap is not aimed; the similarity of scope needs to be established only in the corresponding areas of human rights protection.

EC law offers a narrower perspective for a number of reasons. First, the general scope of EC law *ratione materiae, loci* and *personae* is more limited than that of the ECHR. Second, there are obvious differences between the jurisdiction of Strasbourg and Luxembourg. While the ECtHR has a duty under Article 19 ECHR to ensure that the obligations under Article 1 ECHR are fulfilled, the Luxembourg courts' competence is specifically limited to ensuring that Community law is observed (Article 220 TEC). Strasbourg is bombarded with incessant applications restricted to the human rights implications of a specific case (Articles 32, 34, 35 ECHR). In contrast, Community courts concentrate on the validity and interpretation of Community law irrespective whether it is a matter of general Community law or fundamental rights. In EC law it might not be necessary to address the fundamental rights aspect of a dispute when it can be resolved on grounds of substantive law. Therefore, cases before Community courts tend to exploit the available legal arsenal among which fundamental rights are but one of possible means.

Positive obligations in human rights protection is a specific area within the scope of rights where ECHR and EC law demonstrate similarity. The positive obligation of Contracting States to contribute to the protection of fundamental rights has been widely accepted in ECHR law.¹⁴ In particular, it demands from the Contracting States to provide procedural safeguards and remedies,¹⁵ to pay compensation or damages,¹⁶ or to secure an effective right of access to courts.¹⁷ Legal aid under Article 6(1) ECHR is among the most eloquent manifestations of positive obligations.¹⁸ Community law also

¹⁴ *Inter alia*, para. 33, Botta; para. 37, Gaskin; para. 155, Roche; para. 37, Öllinger; para. 67, Abdulaziz. See in this respect, *inter alia*, pp. 198-200, Duffy: 1993; pp. 572-575, Connelly: 1986; pp. 163-165, Coban: 2004.

¹⁵ *Inter alia*, para. 37, Niemietz; para. 60, Chappell; para. 143, Broniowski; para. 83, Anheuser-Busch.

¹⁶ Pp. 463-464, van Dijk and van Hoof: 1990.

¹⁷ *Inter alia*, para. 25, Airey; para. 59, Kreuz.

¹⁸ Under Article 6(3)c ECHR legal aid is a minimum right. On its conditions: para. 26, Airey; para. 59, Kreuz.

acknowledges that fundamental rights may entail positive obligations.¹⁹ They may be derived from Community legislation,²⁰ or refer to the obligation established under ECHR law.²¹ It burdens Community institutions,²² and national courts and authorities.²³ The provision of legal aid is accepted as a specific obligation in proceedings before Community courts.²⁴

2(b): The language of rights

In this regard, similarity depends on whether EC law associates a permissive or a prohibitive language with the given fundamental right in accordance with ECHR law. While a permissive language of rights emphasises the possibility of imposing restrictions on fundamental rights, a prohibitive language stands for fundamental rights allowing no exemptions or interferences. Accordingly, absolute fundamental rights entail a prohibitive language and qualified rights attract a permissive language.

Discordance stems from addressing rights in the wrong language: absolute rights in a permissive language, qualified rights in a prohibitive language. It might be problematic when in Community law fundamental rights are utilised as principles guiding the interpretation of domestic courts and in such instances qualified rights appear to produce a prohibitive language. In such circumstances demanding a permissive language (or to be informed of the requirement of attracting an appropriate language) would be misguided as the case must be considered as involving the application of interpretative principles and not fundamental rights.²⁵

The language of the fundamental right will determine the course of the ensuing examination of similarity. In case of a permissive language comparison can proceed to the remaining components of functioning and flexibility. However, when a prohibitive language is associated with the right, no further scrutiny will be possible entailing that

¹⁹ See in this respect, pp. 532-534, Egger: 2007.

²⁰ As regards the right to family life: Article 1(1) Directive 95/46/EC; Article 1 Decision 94/90/ECSC, EC, Euratom; Article 4 Regulation 1049/2001/EC.

²¹ Para. 92, Schmidberger.

²² See, *inter alia*, para. 37, Staebelow; paras. 40-43, T-Port, C-68/95. See in this respect, p. 882, de Witte: 1999.

²³ See, *inter alia*, para. 39, Fisher; paras. 52-54, 60, C-540/03.

²⁴ See, paras. 22-23, Othman; paras. 12-13, Hassan, Order, referring to Article 94 (1-3) Rules of Procedure of the CFI. See also, paras. 83-87, Irving.

²⁵ There is nothing objectionable in the use of rights as interpretative principles in EC law as the specificity of the jurisdiction of EC courts and the specific nexus between EC and domestic law necessitates such utilisation of rights. This is also addressed within the flexibility allowed under EC law discussed in Part II/Chapter 4/Point 1.

similarity needs to be established only as regards the scope and the language of the right in question.

2(c): The functioning of rights

This component covers similarity in the scrutiny performed in ECHR and EC law determining whether the interference with the fundamental right is permissible. It may be problematic that while ECHR law provides neatly distinguished requirements both in the text of the Convention and in case law, Community law relies on a complex mixture of scattered legal provisions to provide for a similar scrutiny. Nevertheless, as a result of growing reliance on the case law of the ECtHR by Community courts the functioning of fundamental rights in Community law increasingly imitates that under the ECHR.²⁶

It is arguable that Community law is not required to adopt the system of examination of ECHR law as it is specific to that legal system. However, it is evident that for the present purposes the human rights scrutiny in Community law must correspond to that of ECHR law. Provided that the elements of the functioning of rights, such as lawfulness, pursuing a legitimate aim, and necessity, are observed in EC law, the conclusion of similarity in this regard will be inevitable.

Lawfulness

The component of being in accordance with the law reflects the minimum requirement of legality demanding that the application of the law must not be erroneous or arbitrary.²⁷ Often, this matter is not raised independently in Community law. However, fundamental rights cases before Community courts, in one part, address the legality of Community measures by means of procedures for annulment (Article 230 TEC), for damages (Article 288 TEC) and for preliminary ruling on validity (Article 234 TEC), in the other, they deal with the lawfulness of national measures falling within the scope of Community law through requests for preliminary ruling on interpretation (Article 234 TEC).²⁸ In enforcement actions (Article 226 TEC) the illegality of the Community

²⁶ See the corresponding part of all Chapters in Part III/a.

²⁷ It also refers to qualities such as accessibility and preciseness within the requirement of foreseeability, the examination of which depends upon the circumstances of the case. As a result, Community law will only have to provide a scrutiny in this regard when these issues are raised in the given case.

²⁸ Articles 220 (on the duty of Community courts to ensure that the law is observed in applying the provisions of the EC Treaty) and 230 TEC (interpreted together as founding the principle of legality in EC law) provide the legality of Community action, p. 185, Franchini: 2004.

measure in question can also be raised. Lawfulness will be decided on grounds of lack of competence, misuse of powers, infringement of essential procedural requirements, or infringement of the law including fundamental rights.²⁹ When the procedure before Community courts concerns fundamentally the legality of the Community or national interference with a fundamental right, similarity as a matter of the general condition of lawfulness appears to be satisfied.

Pursuing a legitimate aim

This element requires that the interference with the fundamental right serves the general interest. It may not always receive a separate heading in judgments of Community courts, but it is a requirement taken into consideration either within the framework of a proportionality test including the examination of proportionality of the interference with the fundamental right or under other heads of review.³⁰ In both jurisdictions examining the legitimate aim within proportionality is a logical consequence of that requirement involving striking a fair balance between the countervailing interests (served by the legitimate aim and the fundamental right).³¹

Necessity

The final requirement of necessity concerns whether interferences with fundamental rights can be justified. Basically, it is a bargaining process in which the parties attempt to convince the court that their respective interests enjoy priority which in turn examines whether a fair balance has been established between the competing interests. It will be argued that in both jurisdictions necessity entails a similar scrutiny of proportionality. However, this can only be proved with certainty within the subsequent component of flexibility covering the parameters of proportionality, the benchmarks of flexibility.

²⁹ It is widely accepted that the EC is based on the rule of law which means that neither its Member States nor its institutions can avoid the review of their acts under the basic constitutional charter, the EC Treaty, that established a complete system of legal remedies and procedures designed to enable Community courts to carry out a review of legality, *inter alia*, para. 23, *Les Verts*; para. 16, *Foto-Frost*.

³⁰ Misuse of powers, exceeding powers, the lack of competence, the choice of the correct legal basis and adequate reasoning are heads of review in EC law which may ascertain that the choice of the legitimate aim was not manifestly arbitrary.

³¹ See the legitimate aim as a benchmark of flexibility in all chapters in Part III/a.

2(d): The flexibility of rights

As mentioned above, this component of style will provide the ultimate conclusion to the **flexibility** and **similarity argument** by demonstrating similarity in the parameters of flexibility, in particular, in the general approaches to flexibility and the benchmarks of flexibility. The **similarity argument** cannot avoid considering the component of flexibility as it will demonstrate that ECHR and EC law produce similar patterns in justifying interferences with fundamental rights.

Essentially, this requires identifying the appropriate benchmarks of flexibility that are understood as the grounds of justification of interferences with fundamental rights advanced in individual cases. After examining a considerable amount of cases relating to a given fundamental right the various grounds of justification relied upon in those cases can be grouped into a few general categories.³² Accordingly, the benchmarks of flexibility provide a standardised list of the factors that have influenced the assessment of the proportionality of interferences with fundamental rights before the Strasbourg and Luxembourg courts.

Similarity within the component of flexibility also involves finding similarity in the general judicial attitudes towards justifiable interferences with fundamental rights. This has been considered within the **flexibility argument** as the measure of the initial width of the margin of appreciation in Chapter 3.³³ It is argued that the initial width constitutes an important requirement of compatibility with the ECHR, therefore, the **similarity argument** cannot be complete without examining similarity in this regard.

Having set the framework of analysis the ensuing chapters will advance the **similarity argument** by demonstrating that human rights protection in ECHR and EC law is similar as a matter of style. Similarity will be established as regards the scope, language, functioning, and flexibility of overlapping fundamental rights. Relying on the distinction utilised under the component of language of rights Part III/a will examine fundamental rights that permit limitations in the general interest necessitating, therefore, the examination of all components of style. The rights not permitting limitations will be

³² The major arguments of justification are/can be distilled from the circumstances of individual cases, pp. 218-220, Ganshof van der Meersch: Wiarda.

³³ See Part II/Chapter III/ Point 2(b).

examined in Part III/b their scrutiny extending only to the elements of scope and language of rights.

Part III/a: The similarity argument: Rights with a permissive language

Chapter 5: The right to respect for private life in ECHR and EC law

Within the general system of analysis of similarity particular emphasis will be placed upon exploring the similarity of protecting business premises under the right to private life, an area often targeted by the divergence claim. In this respect, similarity as a matter of scope and as a matter of justifiable interferences will be separated distinguishing, in particular, the issues of coercion and the conditions of executing searches in business premises. Other key areas include data protection, protecting gender-change and homosexuality, and protecting human dignity and integrity under the scope of the right to private life. The course of the **similarity argument** in this regard is affected by the limited availability of comparable cases in EC law.

1. Similarity in the scope of the right to private life

The scope of Article 8 ECHR covers one's private life, home, and correspondence the latter two being specific aspects of private life.¹ Private life is an open-ended notion² resisting an exhaustive definition.³ It is not restricted to an inner circle,⁴ but involves the ability to establish and develop relationships with other human beings.⁵ It includes activities of professional and business nature⁶ and encompasses aspects of a person's physical and social identity including personal autonomy.⁷ It covers elements of the personal sphere such as gender identification, name, personal data, sexual orientation and sexual life, physical and moral integrity, and human dignity.⁸

¹ Para. 72, Petri Sallinen; para. 33, Buck.

² *Inter alia*, p. 309, Doswald-Beck: 1983; p. 178, Loucaides: 1990; p. 217, Ovey and White: 2002. See for recent attempts to circumscribe private life, para. 57, Peck; para. 95, Smirnova; para. 61, Pretty.

³ Para. 29, Niemietz; para. 47, Bensaid.

⁴ Para. 29, Niemietz. Acknowledged in EC law at para. 114, Bavarian Lager.

⁵ See, App. 6825/74, *X v Iceland*; App. 6959/75, *Brüggeman and Scheuten*. Acknowledged in EC law at para. 114, Bavarian Lager and para. 48, *Varec*.

⁶ Para. 29, Niemietz; para. 43, Rotaru; para. 65, Amman. Acknowledged in EC law at para. 114, Bavarian Lager. In ECHR law private life covers work (para. 53, Campagnano; para. 47, Vitiello). The fact that EC law would require distinguishing information relating to official duties and private life (para. 30, *Pflugradt*) does not contradict this. *Pflugradt* concerned information to be submitted for appraisal, a possibly justifiable interference with privacy in work, from which private information could be excluded.

⁷ Para. 61, *Pretty*; para. 29, *Odièvre*; para. 53, *Mikulič*. See in this respect in EC law, para. 42, *Danzer*, where business data were claimed to enjoy the protection of the principle of private autonomy.

⁸ For more complete catalogues see, p. 92, *Velu*: 1973; pp. 265-266, *Feldman*: 1997; pp. 153-154, *Jarass*: 2005.

The right to private life in Community law appears less comprehensive, nonetheless, driven by similar considerations.⁹ It is accepted that as under ECHR law private life is a broad concept that does not lend itself an exhaustive definition.¹⁰ It covers the intrusion of competition investigations into private premises associated with business activity.¹¹ Besides data protection¹² and medical confidentiality, Community law addresses the issues of gender identity, name, sexual orientation, moral and physical integrity, and human dignity, although not necessarily within the very framework of the right to private life. The right to private life is protected as a fundamental right and a general legal principle in the Community legal order inspired among other sources by Article 8 ECHR.¹³

The right to a name does not require examination here as Community courts have not recognised it in their judgments as a fundamental right.¹⁴ Although legal professional privilege could be discussed under the right to respect for correspondence, due to the fact that in Community law it is more relevant under fair trial rights belonging to Article 6 ECHR examination will be due in that context.¹⁵ The financial aspects of private life involve common considerations with the right to family life, therefore, they will be discussed there.¹⁶

1(a): The protection of business premises

Premises serving professional or business activities are covered by Article 8 ECHR¹⁷ including the right to respect for the registered office of a company run by a private individual and a juristic person's registered office, branches, and other business

⁹ Such important areas are left out as prisoners, environment and media intrusion.

¹⁰ Para. 114, Bavarian Lager

¹¹ See Point 1(a) *infra*; see also para. 48, Varec, stating that it covers participation in a contract award procedure.

¹² See also Article 8 EUCFR on the protection of personal data.

¹³ *Inter alia*, paras. 18-19, National Panasonic; paras. 17-18, Hoechst; paras. 23-29, Roquette; paras. 122-123, ANH; para. 56, Vonier; para. 126, Hassan. See Article 7 EUCFR providing that everyone has the right to respect for private life, home, and communications.

¹⁴ It was recognised by Advocate General Jacobs in Konstantinidis, at 1209, in a sense of providing an element of personal identity. Nevertheless, it was accepted by EC courts that names could be protected by confidentiality, para. 40, Ismeri, ECJ. In ECHR law it is also linked with one's identity, para. 24, Burghartz.

¹⁵ See Part III/a/Chapter 12/Point 1(g). ECHR law has connected legal professional privilege under Article 8 ECHR to Article 6 ECHR at para. 37, Niemietz.

¹⁶ See Part III/a/Chapter 6/Point 1(d). In this respect the decision in Grant, ECtHR, may be relevant as it concerned entitlement to pensions and private life. However, the judgment concentrated on the traditional argument in transsexual cases, paras. 40-43.

¹⁷ *Inter alia*, paras. 27-33, Niemietz; paras. 70-71, Petri Sallinen; mm. para. 50, Kopp and para. 44, Amman.

premises.¹⁸ Its essence is to protect the individual against arbitrary interferences¹⁹ and abuse by public authorities.²⁰ The right to respect for correspondence is often recalled in this context influencing the ECtHR's assessment.²¹

Similarly, the right to the inviolability of business premises providing protection against the intrusions of (Community and national) public authorities is considered as an important aspect of privacy in Community law. Although the general principle may mention protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of natural and legal persons,²² in reality, it covers the inviolability of private and business premises belonging to natural or legal persons.²³

In EC law (competition) investigations in business premises have been considered under the right to private life from relatively early on.²⁴ In *Hoechst* although the ECJ denied that the right to the inviolability of the home should be recognised in regard to undertakings,²⁵ it asserted that protection must be provided against interferences with the private sphere of natural and legal persons.²⁶ This was reaffirmed in subsequent judgments that rejected that taking into account developments under Article 8 ECHR would have entailed a different assessment of merits.²⁷ In *Roquette*, however, although keeping the established formula, the ECJ deliberately took notice of the case law under Article 8 ECHR according to which the protection of the home may in certain circumstances extend to business premises.²⁸

It follows that as a matter of scope the right to the inviolability of business premises has always enjoyed protection in Community law irrespective of the legal situation under the ECHR. As regards the alleged divergence between *Hoechst* and the *Chappell* case under the ECHR, preceding the ECJ's judgment, it must be pointed out that the latter was not a clear indication that Article 8 ECHR would extend to business premises. First,

¹⁸ Paras. 40-41, SCE; para. 70, Petri Sallinen; para. 109, Ernst. The position in Community law was also referred to, although there are no visible traces of influence on the Strasbourg approach ((*Hoechst*, *Dow Iberica* and *Benelux* in para. 22, *Niemietz* and para. 26, SCE)(*Limburgse* in para. 27, SCE)).

¹⁹ Para. 45, *Camenzind*.

²⁰ Para. 31, *Niemietz*; para. 82, Petri Sallinen.

²¹ Para. 32, *Niemietz*; para. 71, Petri Sallinen. See in this respect, point 12.95, Clayton and Tomlinson: 2001.

²² *Inter alia*, para. 19, *Hoechst*; para. 27, *Roquette*; para. 252, *Limburgse*, ECJ.

²³ *Inter alia*, paras. 18-19, *San Michele*; para. 27, *Roquette*; paras. 249-252, *Limburgse*, ECJ.

²⁴ Para. 19, *National Panasonic* (the ECJ expressed doubts concerning the applicability of Article 8 ECHR in disputes concerning legal persons).

²⁵ Para. 17, *Hoechst*. See in this respect, p. 1483, Lienemeyer and Waelbroeck: 2003, stating that the ECJ would have followed ECHR case law if there had been relevant decisions.

²⁶ Para. 19, *ibid*.

²⁷ Paras. 420-421, *Limburgse*, CFI; paras. 249-252, *Limburgse*, ECJ.

²⁸ Paras. 27, 29, *Roquette*.

the ECtHR was not preoccupied with the question of distinguishing private and business premises, but with how the search was conducted in private premises that were also used for professional activities.²⁹ Second, *Chappell* can be distinguished on grounds that it did not involve searches in the course of an administrative or criminal procedure, but the protection of the rights and interests of other individuals assisted by a court order issued in a civil case. Lastly, it must be recalled that at that time there was some doubt that business premises were covered by the right to private life in all national legal systems as some clearly excluded them and others were hesitant to ensure constitutional protection.³⁰

Although Community courts have been hesitant in accepting that it is inherent in the right to private life, protection has not been denied from business premises.³¹ Hesitation on the part of Community law to fully subscribe to ECHR case law can be explained by referring to the concern expressed by Community courts that as opposed to cases under ECHR law the relevant cases under Community law did not involve the element of coercion.³² In *Hoechst*, *Dow Iberica*, *Dow Benelux* and *Limburgse* the undertakings involved did cooperate³³ which excluded the necessity of coercion.³⁴ Under the then applicable Community rules on competition investigations coercion could not have been used.³⁵ It appears well established for Community courts to distinguish between

²⁹ Paras. 62-65, *Chappell*. See, p. 378, van Dijk and van Hoof: 1990, stating that although the search was directed against business activities, it indirectly impinged private life in a sense that it affected a private sphere of items. Moreover, it was suggested that distinction is difficult to attain as the rationale of including business premises was to protect the homes of members of the liberal professions whose workplace is their home, pp. 265-266, Feldman: 1997 and p. 1485, Lienemeyer and Waelbroeck: 2003.

³⁰ Pp. 31-32, Harding: 1993. Also, at that time there were diverging approaches by the Strasbourg organs concerning the scope of private life, pp. 287-301, Doswald-Beck: 1983 and p. 178, Loucaides: 1990.

³¹ Conformity of EC law with ECHR law in this respect was accepted at fn 10, p. 279, Benoît-Rohmer: 2003 and p. 343, Tridimas: 2006. Conformity was not excluded conclusively at p. 246, Lawson: Schermers.

³² See, paras. 420-421, *Limburgse*, CFI, stating that the lack of coerciveness and open cooperation of undertakings negated the plea of undue interference; upheld by paras. 249-252, *Limburgse*, ECJ. In EC anti-trust law one of the available investigatory procedures was based entirely on the principle of cooperation subject to the consent of the undertaking. In such case the powers and extent of investigation was determined solely by the undertaking: the investigation would be halted when the undertaking expressed its opposition, see, para. 31, *Hoechst* (the investigation will be unlawful if the Commission goes beyond the cooperation offered by the undertaking, para. 422, *Limburgse*, CFI). The right of the undertaking to halt the search is relevant enough to distinguish the EC cases from those under the ECHR.

³³ The cooperation element was also apparent in *Roquette*, but, generally, it involved different considerations.

³⁴ Coercion can be applied in the other investigative procedure, when the undertaking opposes the investigation. However, searches in business premises in such cases will be determined by national law and will be subject to national safeguards (see, paras. 23-24, *Hoechst*) which will be considered among the benchmarks of flexibility.

³⁵ Article 14 of former Regulation No 17.

Community cases involving cooperation and the relevant cases under the Convention where search and seizure was executed by way of coercion as a matter of scope.³⁶

1(b): The protection of personal data

The protection of information relating to one's private life is an important aspect of Article 8 ECHR.³⁷ Although the Convention is silent on the protection of personal data, the concept of private life has been extended to personal information.³⁸ Personal data is defined as any information relating to an identified or identifiable individual that also covers information, that are public.³⁹ Storing,⁴⁰ processing,⁴¹ releasing,⁴² and using⁴³ personal information amount to interferences.⁴⁴ Failure to provide the opportunity to refute personal information⁴⁵ and to advise individuals of the full extent on what information is kept about them⁴⁶ are also considered as interferences.

Similarly, privacy in Community law is associated with the protection of personal data.⁴⁷ It was held that the right to the protection of personal data might constitute an aspect of the right to respect to private life.⁴⁸ In *Promusicae* information relating to identified or identifiable natural persons was defined as personal data.⁴⁹ According to the sparse sources data pertaining to an individual's professional income is held to be an aspect of private life since activities of a professional nature are not excluded from the notion of private life.⁵⁰ In principle, bank secrets could also be protected.⁵¹ Personal

³⁶ Cooperation: Chappell (but it can be distinguished on other grounds). Coercive measures: Niemietz, SCE, Petri Sallinen, Buck, Van Rossem, Ernst, Roemen, Elci, Mihailhe and Crèmieux.

³⁷ See, para. 43, Rotaru; para. 48, Leander; para. 2, PDO Bonello, Rotaru. On the concept of informational privacy see, p. 255, Laurie: 2002.

³⁸ *Inter alia*, paras. 57-58, Panteleyenکو; para. 43, Rotaru referring to Article 1 of the CAPPD; para. 65, Amman; para. 70, von Hannover. See in this respect, p. 371, Van Dijk and van Hoof: 1990; pp. 250, 253, Bygrave: 1998; pp. 768-771, Andenas and Zletpnig: 2003; pp. 4-8, di Martino: 2004.

³⁹ Para. 43, Rotaru; para. 65, Amman; para. 72, Segerstedt-Wiberg.

⁴⁰ Para. 65, Amman; para. 59, Peck; para. 48, Leander; para. 43, Rotaru; para. 72, Segerstedt-Wiberg.

⁴¹ Paras. 59-60, P.G. and J.H. v UK.

⁴² Para. 43, Rotaru; para. 48, Leander; para. 58, Panteleyenکو; para. 62, Peck.

⁴³ Para. 46, Rotaru; para. 56, Panteleyenکو; paras. 41-43, Perry.

⁴⁴ See in this respect in EC law, para. 45, *Promuscae*.

⁴⁵ Para. 46, Rotaru; para. 48, Leander.

⁴⁶ Para. 99, Segerstedt-Wiberg.

⁴⁷ The judgment in *Stauder* can be regarded as the basis for the modern data protection principles in EC law as it contained principles such as purpose specification and data anonymity, and it is the starting point for the development of the right to informational self-identification, p. 13, di Martino: 2004. In line with ECHR law Article 8 EUCFR asserts the principle of fair processing of personal data for specified purposes and on the basis of the consent of the person concerned or of a legitimate aim provided by law. It also covers the right of access to stored personal data and the right to have the data rectified.

⁴⁸ Para. 118, Bavarian Lager.

⁴⁹ Para. 45, *Promusicae*.

⁵⁰ Para. 73, ORF; para. 45, Danzer.

data of legal persons, which encompasses fiscal-business secrecy, may enjoy some form of protection.⁵² Transmitting personal information of Community officials to persons outside the Community administration may be capable of constituting interference.⁵³ The use of internal correspondence of Community officials may also be problematic.⁵⁴ The protection of personal data appeared in diverse circumstances in Community law.⁵⁵ They include disclosing the identities of culprits to the holder of the violated intellectual property right,⁵⁶ access to personal data stored in a national computerised database obtained from other individuals,⁵⁷ a report mentioning persons by name,⁵⁸ loading the name, telephone coordinates, working conditions, injuries and hobbies of other persons onto the internet,⁵⁹ and making certain data of subscribers available to a third party competitor in the telecommunications sector.⁶⁰

In a recent case the CFI held that not all personal data fall within the concept (scope) of private life.⁶¹ In particular, public access to the names of the participants of an official meeting is not capable of undermining the protection of the privacy and the integrity of the persons concerned.⁶² In this regard, it was of relevance that divulging the names of the participants was not capable of establishing any personal involvement and attributing individual opinions to those persons.⁶³ This meant that disclosure was not capable of actually and specifically affecting the privacy and integrity of the persons concerned.⁶⁴ The CFI also found that this position is not in contradiction with the concept of private life in ECHR law covering business and professional activities. It held that not every aspect of professional activity is covered; in particular, the mere participation of a representative of a collective body in an official meeting does not fall

⁵¹ Paras. 67-74, N, where opening a disciplinary procedure on grounds of information given to the Commission by breaching bank secrecy was not held violating the right to private life.

⁵² Para. 44, Danzer (although the CFI refrained from considering whether a fundamental right to the protection of personal data exists for legal persons).

⁵³ Para. 59, D.

⁵⁴ Paras. 28-32, Pflugradt. See with respect to e-mails, paras. 55-61, Esch-Leonhardt.

⁵⁵ Pleas in law concerning privacy and data protection were presented in a case involving the obligation of providing higher detail telephone bills, para. 23, C-411/02; and in the case concerning the controversial obligation of processing and transfer of air passenger personal data by air carriers to the US government, C-317 and 318/04. The breach of the right of private life was alleged in a case involving the method of payment of remuneration of Community officials in Scaramuzza.

⁵⁶ Adidas.

⁵⁷ Fisher.

⁵⁸ Ismeri, ECJ; Ismeri, CFI.

⁵⁹ Lindqvist.

⁶⁰ KPN Telecom.

⁶¹ Para. 118, Bavarian Lager (by their nature not all personal data are capable of being associated with privacy, para. 119, *ibid.*).

⁶² Paras. 120, 123, *ibid.*

⁶³ Para. 125, *ibid.*

⁶⁴ Para. 126, *ibid.* (the mere disclosure of the participation of a physical person, acting in professional capacity as the representative of a collective body at an official meeting, where the personal opinions expressed cannot be identified, is not an interference with the right to private life, para. 128, *ibid.*).

within the sphere of one's private life.⁶⁵ Considering that Article 8 ECHR intends to protect certain intimate aspects of one's life including professional activities which "form part and parcel of his life",⁶⁶ excluding from the protection afforded to personal data the mere fact of participating in an event which has no bearing on the fulfilment of one's personality (life) appears to be compatible with the notion of private life under ECHR law.⁶⁷

Medical confidentiality, including information relating to mental state and the medical treatment received,⁶⁸ medical records,⁶⁹ and medical data in general,⁷⁰ also enjoys the protection of Article 8 ECHR. The disclosure of medical data and the communication of medical records are regarded interferences⁷¹ that may involve communicating the information to another public authority.⁷² The use of medical data for purposes different from those originally assumed by the individual is another example.⁷³ The protection of medical confidentiality as a key element of privacy has also been explored in Community law.⁷⁴ It includes, in particular, a person's right to keep his state of health secret.⁷⁵ It has also been held that attaching the medical assessment to a decision as a statement of reasons may be a matter of medical secrecy.⁷⁶

1(c): The protection of gender-change

The protection provided to transsexuals has common characteristics in the two jurisdictions. Although the approach in Community law is based exclusively on the principle of equality,⁷⁷ the reasoning of the ECJ and its conclusions resemble those of the ECtHR under Article 8 ECHR. In *P v. S* concerning the equal treatment men and women in employment the ECJ ruled that the failure to respect the new sex of a person having undergone gender reassignment would result in a violation of the person's

⁶⁵ Para. 131, *ibid.*

⁶⁶ Para. 29, Niemietz.

⁶⁷ Although in ECHR law personal data is defined as any information relating to an identified or identifiable person, *supra* fn. 38, it must be interpreted as information relating to one's private life as dictated by para. 43, Rotaru.

⁶⁸ Paras. 57-58, Panteleyenko.

⁶⁹ Para. 35, M.S.

⁷⁰ Para. 41, *ibid.*; para. 95, Z/a.

⁷¹ Para. 32, M.S.; para. 71, Z/a; mm. para. 53, Éditions Plon.

⁷² Para. 35, M.S.

⁷³ *Ibid.*

⁷⁴ Para. 50, Lindqvist.

⁷⁵ Para. 17, X, ECJ; para. 31, K.

⁷⁶ Paras. 27-38, Gaspari.

⁷⁷ See in this respect, pp. 104-111, Tridimas: 2006; p. 195, Ellis: 1999; p. 221, Barnard: 2000.

dignity and freedom.⁷⁸ In *K.B.* it was held that transsexuals are entitled to have their new gender recognised by law.⁷⁹ Under ECHR law after a period of rejecting the violation of Article 8 ECHR on grounds of the wide margin of appreciation of Contracting States to recognise for legal purposes a new sexual identity,⁸⁰ the attitude of the ECtHR changed when in two similarly reasoned cases it held that there was no overriding public interest which could prevent the Contracting States from providing legal recognition of a person's new sex.⁸¹

1(d): The protection of homosexuality

In Community law the prohibition of sex discrimination has not been extended to sexual orientation in this way denying indirect protection of one's sexual life.⁸² This may well be unacceptable in general terms, but such approach within sex equality law is difficult to criticise as sexual orientation is not an attribute of one's sex.⁸³ In another case the ECJ maintained the exclusion of sexual orientation from non-discrimination law when it found that it was not sexual orientation on the basis of which the infringement of the equal treatment principle was to be assessed.⁸⁴ This may be contrasted with the developments under the ECHR extending the notion of private life to sexual life which includes one's sexual orientation.⁸⁵ However, the limitedness of (EC) sex equality law must be accepted in determining the ECJ's approach towards sexual orientation that originated from cases involving circumstances different from those under ECHR law. Furthermore, regard must be had of Article 21 EUCFR and Article 1 of Directive 2000/78/EC on establishing a general framework for equal treatment now prohibiting discrimination on grounds of sexual orientation in Community law that will certainly influence judicial attitudes in the future.⁸⁶

⁷⁸ Para. 22, *P v S* (in para. 16 the ECJ suggested that gender-change was associated with identity); paras. 24, 38, Richards.

⁷⁹ Paras. 30-34, *KB*.

⁸⁰ Para. 46, *Rees*; para. 42, *Cossey*; para. 61, *Sheffield and Horsham*.

⁸¹ Para. 93, *Goodwin*; para. 73, *I*.

⁸² Para. 42, *Grant*, ECJ

⁸³ See in this respect, p. 107, Tridimas: 2006. The exclusion of sexual orientation is acceptable although it may collide with the assumption of an inherently progressive nature of the rights, pp. 74-84, Stychin: 2003.

⁸⁴ Para. 47, *D*.

⁸⁵ *Inter alia*, paras. 40-41, *Dudgeon*; paras. 20-24, *Modinos*; paras. 70-75, *Smith and Grady*.

⁸⁶ See, para. 36, *Karner*, ECtHR, where the position of the ECtHR finding a violation of Article 8 ECHR, here respect for the home, on grounds of sexual orientation discrimination was influenced by the Directive.

1(e): The protection of human integrity

ECHR law accepts that the concept of private life covers the physical and moral integrity of a person. Although it had been established in cases involving some form of physical assault on a person,⁸⁷ the protection of Article 8 ECHR was extended “incidentally”⁸⁸ to medical treatments that were executed against the patient’s will under domestic law.⁸⁹ According to the general principle medical treatments can take place only on the basis of the free and informed consent of the patient⁹⁰ which is associated with the right to self-determination.⁹¹

Community law also acknowledges human integrity as a fundamental right.⁹² Corresponding to ECHR law, in the context of medicine and biology it requires the free and informed consent of patients derived from their right to self-determination.⁹³ The physical integrity of a person requires that the informed refusal to undergo a medical examination for the purposes of protecting medical secrets must be respected in its entirety.⁹⁴

Reputation and honour as attributes of a person’s moral integrity are also protected in ECHR law. Although Article 8 ECHR lacks express references to moral integrity, it was argued that the concept of private life extends to one’s reputation.⁹⁵ Likewise, Community law protects the moral integrity of a person, in particular, the professional reputation and standing of a person in professional circles.⁹⁶ In *Hassan* the CFI affirmed that arbitrary interferences with the right to a reputation are prohibited.⁹⁷

1(f): The protection of human dignity

⁸⁷ *Inter alia*, para. 49, Costello-Roberts; para. 61, Stubbings; para. 63, Raninen.

⁸⁸ P. 297, Michalowski: 2004.

⁸⁹ *Inter alia*, para. 2, Tirado Ortiz; paras. 61-63, Pretty; para. 95, Smirnova; para. 86, Jalloh.

⁹⁰ Pp. 298-299, Michalowski: 2004.

⁹¹ Pp. 313-314, 316, Wheatley: 2001.

⁹² Para. 70, C-377/98; mm. para. 120, Bavarian Lager. The integrity of a person’s status: paras. 42-44, D.

⁹³ Paras. 78-80, C-377/98. It corresponds to Article 3 EUCFR.

⁹⁴ Paras. 20-24, X, ECJ. Taking blood constitutes an interference with the physical integrity of a person and can only be carried out with his informed consent, para. 58, X, CFI. See also the decision in A where the applicant agreed to undergo the examination and supplied medical data voluntarily, para. 51, A, CFI.

⁹⁵ P. 369, Van Dijk and Van Hoof: 1990; p. 92, Velu: 1973. See also, para. 59, Von Hannover and para. 55, Gourguenidze. Reputation is a recognised limit to freedom of expression in Article 10(2) ECHR.

Under Article 8 ECHR reputation and honour were considered with respect to the collateral effects of search and seizure proceedings at para. 37, Niemietz and para. 45, Buck.

⁹⁶ Para. 123, Tillack.

⁹⁷ Para. 126, Hassan, referring to Article 12 UDHR.

The issues of medical treatment and death connect EC and ECHR law in relation to human dignity. It is common ground that respect for human dignity forms the very essence of the ECHR⁹⁸ expressed, in particular, under Article 3 ECHR.⁹⁹ The protection of human dignity was brought under Article 8 ECHR in connection with medical treatments interfering with the physical integrity of a person.¹⁰⁰ The corresponding Council of Europe Convention on Biomedicine regulates biomedicine from the perspective of protecting human dignity;¹⁰¹ or rather it examines the possible implications of biomedicine on human dignity as its Article 1 asserts with authority that states shall protect the dignity and identity of human beings. Respect for human dignity is also observed in Community law.¹⁰² As in ECHR law it is associated with physical and moral integrity.¹⁰³ In connection with biotechnology it includes the obligation to ensure that the human body effectively remains unavailable and inalienable.¹⁰⁴

Although developed mainly from internal and often contingent sources, it appears that as a matter of scope Community law provides protection similar to that under the corresponding elements of the right to private life in ECHR law. There are a number of areas where further examination of similarity is not warranted due to the lack of comparable cases in EC law. In cases involving homosexuality and transsexuals Community law addressed the issue from the perspective of equality. With respect to human integrity and human dignity, with the exception of *Omega Spielhallen*, judicial

⁹⁸ *Inter alia*, para. 90, Goodwin; para. 65, Pretty. On dignity and Article 8 ECHR, pp. 322-323, Wheatley: 2001.

⁹⁹ *Inter alia*, para. 52, Pretty; paras. 24-30, Price; para. 117, Valasinas; para. 82, Herczegfalvy. It is also associated with Article 4 ECHR, para. 142, Siliadin and Article 2 ECHR, Ataman (46252/99).

¹⁰⁰ Para. 63, Pretty, the choice to avoid an undignified and distressing end to life was considered under the right to respect for private life, paras. 65, 67, *ibid*.

¹⁰¹ P. 396, Millns: 2004.

¹⁰² Para. 34, *Omega Spielhallen* (as regards imitated killing); para. 69, C-377/98 (fundamental right to human dignity). In *Ayadi*, a freezing of funds case, although the applicant claimed degrading treatment and denial of respect for human dignity on grounds of Article 3 and 8 ECHR, the CFI decided the case on the basis of the right to property claim also paying some attention to human dignity, paras. 116, 120-121, 126-133, *Ayadi*.

¹⁰³ Pp. 298-299, 301-307, Michalowski: 2004, referring to the case C-377/98. See also Article 1 EUCFR on human dignity and Article 3(2) EUCFR prohibiting eugenic practices, the commercialisation of the human body and the reproductive cloning of human beings. Human dignity also appeared in a procedural context when the ECJ affirmed that Member States must ensure that vulnerable victims must be protected in criminal proceedings, para. 52, Pupino. It was also suggested that human dignity underlines the key judgments in EC non-discrimination law, pp. 16-17, Tridimas: 2006.

¹⁰⁴ Para. 77, C-377/98. In this case the ECJ found no interference as Directive 98/44/EC on biotechnology excludes the patentability of the human body, of processes for cloning and for modifying the genetic identity of human beings, and the use of human embryos for industrial or commercial purposes, paras. 71-76, 78-80, *ibid*.

assessment either found no interference,¹⁰⁵ or it examined the specific question whether the refusal to give consent was respected in its entirety.¹⁰⁶ The right to reputation claim will be addressed in a different chapter.¹⁰⁷ In *Promusicae* although the ECJ provided important guidance as to the functioning of the right to private life (and the rights in collision with it), the human rights solution was remitted to the national court.¹⁰⁸

2. Similarity in the language of the right to private life

In both jurisdictions the language of the right to private life is permissive. Article 8(2) ECHR assures the Contracting States that subject to conditions interferences may be allowed. This equally applies to the protection of information relating to private life.¹⁰⁹ In Community law the right to private life permits justifiable interferences in the general interest.¹¹⁰ Community courts have held that restrictions may be imposed on the right to private life as it does not constitute an unfettered prerogative.¹¹¹ When freedom of expression collides with the right to private life, the collision can be resolved in both jurisdictions by promoting freedom of expression which reaffirms the permissiveness of the right to private life.¹¹²

The protection of personal data and privacy has been relied upon also as a principle aiding the interpretation of Community measures.¹¹³ In such cases the requirement of a permissive language is inapplicable as they do not concern a genuine human rights dispute. In *Omega Spielhallen* the language of human dignity is irrelevant as the ECJ opted to affirm the domestic human rights solution resisting to engage in actual human rights adjudication.¹¹⁴

¹⁰⁵ *Ibid.*

¹⁰⁶ Paras. 20-24, X, ECJ.

¹⁰⁷ Hassan on the reputation claim is analysed within the right to property in Chapter 9 due to the influence of Yusuf and Kadi, see, para. 128, Hassan. Ayadi on human dignity is also examined within the right to property.

¹⁰⁸ Para. 66-69, *Promusicae*.

¹⁰⁹ *Inter alia*, para. 47, Rotaru; para. 71, Amman; para. 49, Leander; para. 35, M.S; para. 71, Z/a.

¹¹⁰ See Articles 7 and 8 EUCFR read together with Article 52 EUCFR. In both jurisdictions human integrity, when considered as respecting the informed consent of the patient, by its nature, does not acknowledge permissible restrictions. In contrast, human integrity in the context of medicine and biology may provide permissible restrictions the extent of which is subject to heightened debate, in this respect see, para. 68, Evans (chamber), on use of genetic material for *in vitro* fertilisation.

¹¹¹ *Inter alia*, para. 33, K; para. 73, N; para. 56, Vonier; para. 123, ANH; para. 19, Hoechst; para. 252, Limburgse, ECJ; paras. 71-72 and 76-90, ORF; paras. 43-44, Danzer.

¹¹² See Chapter 7.

¹¹³ See, para. 32, KPN; paras. 28-33, Adidas; paras. 23-39, Fisher.

¹¹⁴ Para. 39, *Omega Spielhallen*.

3. Similarity in the functioning of the right to private life

3(a): Establishing a common general approach

Article 8(2) ECHR provides that interferences must comply with the conditions of being in accordance with the law, of pursuing the legitimate aims set out in that paragraph, and of being necessary in a democratic society. In Community law the different formulas available suggest a similar approach. In early case law the excessiveness of the interference was analysed on grounds of proportionality with the general aim in view.¹¹⁵ Another formula held that the interference must have a legal basis, must be justified on grounds laid down by law, and must not be arbitrary or disproportionate all addressing the question whether the interference was excessive.¹¹⁶ The ECJ would also claim that the right to private life could be subject to restrictions, provided that they correspond to objectives of general Community interest and that they do not constitute, with regard to the objectives, a disproportionate and intolerable interference that would infringe the very substance of the right.¹¹⁷ Article 8(2) ECHR has also been considered as an authoritative source.¹¹⁸ In particular, in *K and Bavarian Lager* the three elements of the ECHR formula were regarded as important points of reference.¹¹⁹

3(b): Lawfulness

In ECHR law interferences must be based on a provision of domestic law¹²⁰ and comply with substantive and procedural law.¹²¹ It also refers to the quality of the law requiring that it should be accessible, foreseeable in its effects and consequences, and it must be compatible with the rule of law.¹²² The latter requires that a minimum degree of protection must be provided against arbitrary interferences.¹²³

Foreseeability requires that national law must be sufficiently clear to give citizens an adequate indication as to the circumstances in and the conditions on which public

¹¹⁵ San Michele. See also, para. 41, *Iseri*, ECJ, mentioning necessary and proportionate to the aim.

¹¹⁶ Paras. 339-341, *ADM*, T-224/00; para. 19, *Hoechst*; para. 27, *Roquette*; para. 252, *Limburgse*, ECJ.

¹¹⁷ Para. 23, *C-62/90*; para. 56, *Vonier*; para. 73, *N*; para. 44, *Danzer*; para. 73, *K*.

¹¹⁸ Para. 19, *National Panasonic*; para. 71, *ORF*; para. 123, *ANH*; para. 26, *K*; para. 113, *Bavarian Lager*.

¹¹⁹ Para. 33, *K*; paras. 113, 115, *Bavarian Lager*.

¹²⁰ *Inter alia*, para. 35, *Niemietz*; para. 43, *SCE*; para. 60, *Panteleyenکو*; para. 52, *Rotaru*; para. 50, *Leander*.

¹²¹ Para. 49, *Panteleyenکو*.

¹²² *Inter alia*, para. 76, *Petri Sallinen*; para. 37, *Camenzind*; para. 52, *Rotaru*; para. 73, *Z/a*.

¹²³ Paras. 91-92, *Petri Sallinen*; para. 57, *Chappell*; para. 699, *Elci*.

authorities are empowered to impose interferences¹²⁴ and to enable any individual, if need be with appropriate legal advice, to regulate his conduct accordingly.¹²⁵ In case of search and seizure the law must be particularly precise and it is essential to have clear and detailed rules.¹²⁶

In Community law the condition of being in accordance with the law is rarely raised as a separate issue. Nevertheless, the requirement of lawfulness is observed as the relevant cases concern the issue of legality under Community law. They include actions for annulment or failure to act (Article 232 TEC),¹²⁷ requests for preliminary rulings on the validity or the interpretation of Community law,¹²⁸ enforcement actions,¹²⁹ and actions for damages¹³⁰ all examining the validity of measures imposing interferences with the right to private life.

The lawfulness of Community measures is contested on several distinct grounds such as misuse of powers,¹³¹ exceeding powers,¹³² errors of reasoning,¹³³ infringement of important requirement of form,¹³⁴ infringement and abuse of EC law including fundamental rights, the general principles of law and equality,¹³⁵ procedural irregularity,¹³⁶ failure to assess facts correctly,¹³⁷ lack of evidence,¹³⁸ lack of legal basis,¹³⁹ and breach of legitimate expectations and good faith.¹⁴⁰ Proportionality also appeared as a separate head of review,¹⁴¹ however, on occasion it supplemented the reasoning under the fundamental rights claim.¹⁴² It is often the case that lawfulness is decided on grounds of the justifiability of the interference.¹⁴³

¹²⁴ Para. 82, Petri Sallinen; para. 29, Huvig.

¹²⁵ Para. 55, Rotaru. Absolute foreseeability is not required as it might prejudice the effectiveness of the interference, para. 51, Leander.

¹²⁶ Para. 90, Petri Sallinen; para. 56, Chappell (a substantive body of case law setting the basic terms and conditions of searches can meet this requirement).

¹²⁷ San Michele; A di Brescia; National Panasonic; Hoechst; Dow Iberica; Dow Benelux; Limburgse; A; X, CFI.

¹²⁸ Roquette; ORF.

¹²⁹ C-62/90.

¹³⁰ Danzer.

¹³¹ San Michele; A di Brescia; Limburgse; X, CFI.

¹³² Hoechst, the violation of the principle of the inviolability of the home was analysed under this head.

¹³³ San Michele; National Panasonic; Hoechst; Dow Iberica; Dow Benelux; Limburgse; A.

¹³⁴ A di Brescia; Limburgse.

¹³⁵ San Michele; A di Brescia; National Panasonic; Dow Iberica; Limburgse; Danzer; A; X, CFI.

¹³⁶ Hoechst; Dow Iberica; Limburgse.

¹³⁷ Dow Iberica; Limburgse; A.

¹³⁸ Dow Benelux; Limburgse.

¹³⁹ Danzer.

¹⁴⁰ X, CFI.

¹⁴¹ National Panasonic; Dow Iberica; Limburgse.

¹⁴² Paras. 29-30, National Panasonic.

¹⁴³ San Michele; National Panasonic; Hoechst, Dow Iberica; Dow Benelux; Limburgse; Roquette; C-62/90; Danzer; A; X, CFI; para. 80, ORF.

The question of legality also extends to the implementation of Community measures.¹⁴⁴ In *Roquette* the interpretation of Community law by the ECJ determined the legality of actions taken by national authorities in a Community competition investigation.¹⁴⁵ In *ORF* the interpretation of the ECJ was required to ascertain whether the individual measure based on national law was in conformity with fundamental rights.¹⁴⁶ Moreover, Community law involves considerations similar to those in ECHR law.¹⁴⁷ It includes the requirement of having a legal basis that entails determining on which provision of Community law was the contested measure based.¹⁴⁸ The adequateness of the legal basis can also be examined.¹⁴⁹ Foreseeability raised the question whether the provision was formulated with sufficient precision to enable the citizen concerned to adjust his conduct accordingly.¹⁵⁰ As in ECHR law, in search and seizure cases accessibility and a clear and precise determination of investigatory powers were demanded.¹⁵¹

3(c): Pursuing a legitimate aim

This condition, which refers to a pressing social need within the competence of the Contracting States,¹⁵² is rarely given consideration under Article 8 ECHR as in most cases it is not contested or the ECtHR acknowledges the choice of the defendant.¹⁵³ In Community law the legitimate aim has always formed part of the judicial scrutiny under the right to private life.¹⁵⁴ Community courts would accept the legitimate aim offered, and its close relationship with necessity yields that separate examination is often neglected. Nevertheless, in itself, within necessity, under other heads of review,¹⁵⁵ or in an independent examination of proportionality¹⁵⁶ the choice of legitimate aim can be put under scrutiny.

¹⁴⁴ Paras. 417-426, *Limburgse*, CFI; paras. 254-256, *Limburgse*, ECJ.

¹⁴⁵ Para. 21, *Roquette*.

¹⁴⁶ Para. 90, *ORF*.

¹⁴⁷ See in this respect, p. 75, Riley: 2002.

¹⁴⁸ *Inter alia*, para. 20, *Hoechst*; para. 254, *Limburgse*, ECJ; para. 34, *Roquette*; para. 89, *ORF*.

¹⁴⁹ Paras. 35-37, *K*.

¹⁵⁰ Para. 77, *ORF*.

¹⁵¹ Para. 44, *Roquette*.

¹⁵² Para. 30, *Keegan*; para. 44, *Buck*; para. 44, *Camenzind*.

¹⁵³ See, *inter alia*, para. 36, *Niemietz*; para. 44, *SCE*; para. 112, *Ernst*; para. 49, *Leander*.

¹⁵⁴ See the general formulas, *supra* point 3(a). As regards competition procedures see, p. 75, Riley: 2002. In *K* closely following the requirements of Article 8(2) ECHR an examination was warranted, paras. 38-39, *K*. See, mm. para. 113, *Bavarian Lager*, listing the legitimate aims of Article 8(2) ECHR.

¹⁵⁵ Eg.: misuse of powers or lack of legal basis.

¹⁵⁶ Paras. 29-30, *National Panasonic*.

The diversity of legitimate aims in Community law may be problematic as Community courts would consider aims that might be difficult to fit into the catalogue of Article 8(2) ECHR. By acknowledging that these concepts under ECHR law are flexible¹⁵⁷ the problem appears less acute. In EC competition cases aims such as ensuring that competition rules are observed and that competition is prevented from being distorted¹⁵⁸ can be regarded as the legitimate aim concerning the economic well-being of the state.¹⁵⁹ The protection of health could be recalled in EC cases on medicine.¹⁶⁰ The protection of the rights of others was considered in a number of cases.¹⁶¹ In *ORF* the aim of ensuring the economic well-being of the country was chosen under the influence of Article 8(2) ECHR.¹⁶²

3(d): Necessity

Necessity under Article 8(2) ECHR seeks to ascertain whether a proportionate relationship between the interference and the legitimate aim was established. It demands that the interference must be necessary (in a democratic society) to pursue the legitimate aim effectively.¹⁶³ It refers to striking a proper or fair balance between the relevant interests¹⁶⁴ or that the interference must be justified by an overriding public interest.¹⁶⁵ Correspondingly, in Community law the formula adopted from ECHR law demands that interferences must be necessary in a democratic society.¹⁶⁶ In *ORF* the ECJ held that necessity implies that a pressing social need is involved and that the measure employed is proportionate to the legitimate aim pursued. The legitimate aim must be balanced against the seriousness of the interference, and must be appropriate and sufficient.¹⁶⁷ On other occasions necessity referred to a tolerable relationship between the interference and the legitimate aim¹⁶⁸ or that the measures are appropriate realise the legitimate

¹⁵⁷ Pp. 306-307, Doswald-Beck: 1983.

¹⁵⁸ Para. 20, *National Panasonic*; para. 25, *Hoechst*; para. 42, *Roquette*.

¹⁵⁹ Under ECHR law measures like this were found necessary in order to obtain evidence (para. 39, *Crèmieux*; para. 37, *Miailhe*; para. 45, *Camenzind*) which corresponds with the aim in EC law that competition infringements must be investigated in order to determine whether EC competition law has been observed.

¹⁶⁰ Paras. 23-24, *C-62/90*; para. 39, *K*, where the economic well-being of the state was also accepted.

¹⁶¹ Paras. 43-44, *Danzer*, para. 90, *Lindqvist*.

¹⁶² Para. 81, *ORF*.

¹⁶³ *Inter alia*, para. 59 *Chappell*; para. 34, *Buck*; paras. 44-45, *Camenzind*; para. 58, *Leander*. Acknowledged in EC law at para. 115, *Bavarian Lager*.

¹⁶⁴ Paras. 30, 36, *Keegan*.

¹⁶⁵ Paras. 94, 96, *Z/a*.

¹⁶⁶ Para. 19, *National Panasonic*; para. 71, *ORF*; para. 123, *ANH*; para. 26, *K*.

¹⁶⁷ Paras. 83-84, 86, 88, 90, *ORF*.

¹⁶⁸ Para. 76, *Roquette*; para. 74, *N*.

aim.¹⁶⁹ Examining whether the interference went beyond what is necessary or permitted can also indicate a disproportionate relationship.¹⁷⁰ The words excessive, undue, unacceptable, intolerable and arbitrary are often used together with proportionality providing further shades of meaning.¹⁷¹ In case of competing fundamental rights a fair balance between the rights must be found.¹⁷²

4. Similarity in the flexibility of the right to private life

4(a): The general approach

In ECHR law the ‘certain margin of appreciation’¹⁷³ of the Contracting States was held to depend not only on the nature or the seriousness of the legitimate aim pursued, but also on the particular nature or gravity of the interference involved.¹⁷⁴ The light-touch review suggested in the early cases concerning professional or business activities or premises¹⁷⁵ was never allowed to flourish as the ECtHR expounded in subsequent case-law that exceptions allowed must be interpreted narrowly and need for them must be established convincingly.¹⁷⁶ In contrast, a wide margin of appreciation is affirmed in cases involving considerations of national security and terrorism.¹⁷⁷

The margin of discretion allowed under the right to private life in Community law is equally contingent.¹⁷⁸ It is suggested that judicial interference in some cases may be more far reaching than in others.¹⁷⁹ The ECJ accepted under the influence of ECHR law that the scope of margin of discretion will depend not only on the nature of the legitimate aim pursued, but also on the particular nature of the interference involved.¹⁸⁰

¹⁶⁹ Para. 71, Roquette.

¹⁷⁰ Para. 422, Limburgse, CFI; para. 254, Limburgse, ECJ.

¹⁷¹ Para. 19 Hoechst; paras. 36, 27 and 76, Roquette; paras. 23, 25, C-62/90; para. 44, Danzer.

¹⁷² Para. 90, Lindqvist; para. 68, Promusicae.

¹⁷³ *Inter alia*, para. 47, SCE; para. 55, Funke; para. 41, Van Rossem; para. 41, M.S; para. 94, Z/a. Acknowledged in EC law at para. 115, Bavarian Lager.

¹⁷⁴ *Inter alia*, para. 88, Segerstedt-Wiberg; para. 77, Peck; para. 59, Leander; para. 99, Z/a. Acknowledged in EC law at para. 115, Bavarian Lager.

¹⁷⁵ Para. 31, Niemietz.

¹⁷⁶ *Inter alia*, paras. 47, 49, SCE; paras. 55, 57, Funke; para. 68, Roemen; para. 47, Rotaru. The ECtHR must be particularly vigilant (para. 45, Camenzind; para. 25, H.M.) and provide a most careful scrutiny (para. 96, Z/a).

¹⁷⁷ *Inter alia*, para. 104, Segerstedt-Wiberg; para. 59, Leander.

¹⁷⁸ The incoherence of the ECtHR’s approach may arise from the fact that it is not involved in a simple balancing exercise but it is required to juggle with many variables, p. 44, Warbrick: 1998.

¹⁷⁹ Paras. 27, 29, Roquette.

¹⁸⁰ Para. 83, ORF.

4(b): The benchmarks of flexibility

Due to the limited availability of Community cases in which a complete human rights scrutiny was executed, the comparison of the benchmarks of flexibility will be restricted to search and seizure and personal data cases. The benchmarks applicable in both areas are the following under ECHR law.

- a) Importance of the general interest supported by relevant and sufficient reasons.¹⁸¹
- b) Procedural safeguards, remedies, and judicial supervision.¹⁸²

In Community law the general benchmarks are highly similar.

- a) Importance of the general interest or the given measure¹⁸³ supported by relevant and sufficient reasons.¹⁸⁴
- b) Procedural safeguards in search and seizure cases. EC safeguards: legal representation,¹⁸⁵ duty to provide reasons,¹⁸⁶ and judicial review.¹⁸⁷ National safeguards¹⁸⁸: the Commission's duty to assist national safeguards¹⁸⁹ includes that reasonable grounds for suspecting the infringement must be provided¹⁹⁰ and substantiated,¹⁹¹ the facts justifying the investigation must be clarified,¹⁹² reasons to resort to coercive measures must be stated,¹⁹³ and any additional information must be provided.¹⁹⁴ Judicial supervision: to examine whether the requested coercive measures are excessive and arbitrary, and to ensure that national procedural safeguards are observed.¹⁹⁵

¹⁸¹ *Inter alia*, para. 48, SCE; para. 56, Funke; para. 37, Mialhe; paras. 88-91, 102, 104, Segerstedt-Wiberg; para. 59, Leander; para. 42, M.S; paras. 97, 102, 105, 106, 110, Z/a.

¹⁸² *Inter alia*, para. 46, Camenzind; para. 37, Niemietz; para. 116, Ernst; para. 37, Mialhe; para. 46, Buck; para. 60, Leander; paras. 41, 43, M.S; paras. 95, 101, 103-104, 107, 108, Z/a; paras. 64-65, Leander.

¹⁸³ *Inter alia*, para. 85, ORF; para. 74, N; para. 40, Ismeri, ECJ; paras. 20, 30, National Panasonic; paras. 25, 33, Hoechst; para. 255, Limburgse, ECJ; paras. 43-44, Danzer; paras. 42, 77-80, Roquette; para. 51, A.

¹⁸⁴ Para. 86, ORF; para. 115, Bavarian Lager.

¹⁸⁵ Para. 46, Roquette.

¹⁸⁶ Para. 47, *ibid*.

¹⁸⁷ Para. 49, *ibid*; para. 34, Hoechst.

¹⁸⁸ On national procedural guarantees, *inter alia*, paras. 32-34, *ibid*; para. 34, Roquette.

¹⁸⁹ Para. 37, *ibid*; para. 35, Hoechst.

¹⁹⁰ Paras. 54, 60, 69-70, Roquette.

¹⁹¹ Paras. 61, 77-82, 87-89, *ibid*.

¹⁹² Para. 55, *ibid*; para. 52, Dow Iberica; paras. 13, 21, National Panasonic.

¹⁹³ Para. 75, Roquette.

¹⁹⁴ Para. 93, *ibid*.

¹⁹⁵ Para. 35, Hoechst; paras. 36, 40, 52, Roquette.

- c) Procedural safeguards and judicial supervision in personal data cases.¹⁹⁶

Search and Seizure

ECHR law provides the following benchmarks specific to search and seizure cases.

- a) Detailed drafting of warrants determining powers and duties with precision¹⁹⁷ and prohibiting irrelevant searches and searches conducted in a wholesale and indiscriminate manner.¹⁹⁸
- b) Protecting confidentiality¹⁹⁹ and personal integrity (honour, reputation).²⁰⁰
- c) Minor procedural flaws could be irrelevant.²⁰¹
- d) Circumstances of the search,²⁰² in particular, that prior notice is not a general requirement as it may undermine the success of the investigation.²⁰³
- e) Attitude of the individual: must not complain of the action he forced upon the authorities.²⁰⁴

Community courts took into account similar factors.

- a) The width of investigatory powers and the conditions of inspection must be clearly determined, and the subject and purpose of the investigation must be communicated.²⁰⁵
- b) Protecting the confidential content of documents seized: the search cannot extend to non-business material;²⁰⁶ legal privilege must be protected.²⁰⁷
- c) Minor procedural flaws may not constitute relevant procedural defects.²⁰⁸

¹⁹⁶ Paras. 40-41, *Ismeri*, ECJ; para. 109, *Ismeri*, CFI.

¹⁹⁷ *Inter alia*, para. 37, *Niemietz*; para. 60, *Chappell*; para. 116, *Ernst*.

¹⁹⁸ Para. 58, *Funke*; para. 39, *Miailhe*; para. 116, *Ernst*.

¹⁹⁹ Para. 37, *Niemietz*.

²⁰⁰ Para. 37, *Niemietz*; para. 45, *Buck*; *Kent Pharmaceuticals*; *Banco de Finanzas*. Publicity may be welcomed as it could enhance transparency in undertakings under investigation, *Kent Pharmaceuticals*; *Banco de Finanzas*.

²⁰¹ Para. 62, *Chappell*. Procedural shortcomings can be mitigated by the circumstances of the search, cooperation on behalf of the applicant, the lack of complaints, and the assertion of national courts that the search was not flawed, paras. 64-66, *Chappell*. In contrast, depending on the circumstances when searches are executed in the absence of the applicant and an inventory of seized objects is not produced, these procedural flaws can influence the lawfulness of the search, paras. 49-50, *Van Rossem*.

²⁰² Availability of further evidence obtainable without a search: paras. 45, 49, *Buck*; *Kent Pharmaceuticals*.

²⁰³ *Kent Pharmaceuticals*.

²⁰⁴ *JDO Hedigan et al*, *Buck*.

²⁰⁵ Paras. 421-422, *Limburgse*, CFI; para. 29, *Hoechst*; paras. 44, 48, 83, *Roquette*.

²⁰⁶ Para. 45, *Roquette*.

²⁰⁷ Para. 46, *Roquette*.

- d) Circumstances of the search: prior notice is not required.²⁰⁹
- e) Attitude of the individual.²¹⁰

It appears appropriate to observe that in search and seizure cases similar parameters are assessed in both jurisdictions. It follows from the general formulas on justifying interferences that great importance will be attached to the weight of the general interest served by the interference. The availability of effective (procedural) safeguards and judicial supervision are equally important in both systems Community law having the advantage of a dual system of safeguards.²¹¹ It appears that ECHR law does not require the availability of specific safeguards, rather, it reflects upon the adequateness of safeguards provided in the given case by domestic law.²¹² The fact that the ECtHR's assessment was affected by the various safeguards (not) available in domestic competition investigations in *SCE*²¹³ does not entail that the same safeguards would be required in procedures concerning EC competition infringements.²¹⁴ Moreover, the fact that in ECHR law the adequateness of safeguards will be determined in the light of the circumstances of the individual case²¹⁵ enables the conclusion that the dual system of safeguards under EC law cannot be objected *per se* as an inappropriate benchmark of flexibility.

As regards the specific benchmarks, it is apparent that in both jurisdictions the powers of investigation must be clearly established enabling the assessment of the limits of those powers in the given case.²¹⁶ The powers of investigation may be wide under

²⁰⁸ Para. 425, *Limburgse, CFI* (excessive amount of copies).

²⁰⁹ Dawn raids such as in *National Panasonic*.

²¹⁰ Untrue declarations, *San Michele*; concealing or disposing evidence, para. 74, *Roquette*; voluntary or opposing attitude, paras. 421-422, *Limburgse, CFI*.

²¹¹ *Supra* fn. 33 and the benchmarks of safeguards above. The dual system may be of risk as, eventually, the adequacy of the Community solution would depend on the adequacy of the national solution, p. 1494, *Lienemeyer and Waelbroeck*: 2003. Concerning the prohibition for national courts to reassess the need for EC competition investigation (para. 35, *Hoechst*; paras. 36, 40, *Roquette*) even the ECtHR accepts that it is for the competent authorities, in our case the Commission, to assess on the basis of available evidence whether search is necessary, *Keslassy*.

²¹² For example, where safeguards were in place the ECtHR saw the interference justified, *Keslassy*. However, an obsolete regulation with well-known problems providing excessive powers was condemned, paras. 56-57, *Funke*; para. 38, *Miailhe*; para. 40, *Crèmieux*. Obviously, the manner the investigation was carried out will be relevant, *Crèmieux* (wide range raids); para. 39, *Miailhe* (wholesale, indiscriminate manner).

²¹³ Para. 49, *SCE*, (judicial warrant, presence of senior official, judicial supervision).

²¹⁴ On this basis, *Riley's* conclusion on the inadequacy of safeguards cannot be accepted, pp. 75-77, *Riley*: 2002, as he saw the safeguards in *Chappell* as direct requirements in EC competition investigations.

²¹⁵ For examples of the specific circumstances of the case determining the safeguards required by ECHR law, para. 46, *Camenzind*; paras. 59-65, *Chappell*; para. 37, *Niemietz*; paras. 69-71, *Roemen*; paras. 115-117, *Ernst*.

²¹⁶ Concerning the issue whether judicial warrants are necessary to perform searches in Community law it is left to the Member States where a judicial or administrative warrant is not a general requirement (p. 10,

Community legislation,²¹⁷ but they are subjected to precise conditions in individual cases so that the person concerned may be able to identify his obligations and assess whether his rights have been violated.²¹⁸ This corresponds with the requirement in ECHR law that the extent of searches must be determined in advance enabling the person concerned to assess whether there was an abuse and exercise the right to recourse.²¹⁹

It follows that ‘fishing expeditions’, where searches are executed without knowing what possible information they intend to find, are excluded in both jurisdictions.²²⁰ This, however, does not mean that searches would be required to identify with absolute precision what they aim to retrieve. It is accepted in both legal systems that some impreciseness can be mitigated or regarded reasonable in the circumstances.²²¹ In particular, overstepping the range of sizeable documents, otherwise a minor procedural flaw, could be reasonable in ensuring the success of investigations.²²²

Other factors shared by ECHR and EC law include the sensitive (confidential) content of the documents searched, the possible irrelevance of minor procedural flaws, the attitude of the undertaking in the procedure, and that a prior notice may not be required.

Personal Data

In personal data cases, apart from the general benchmarks, both jurisdictions considered the seriousness of the interference²²³ including any adverse consequence on the person

Waelbroeck: 2002 and p. 1494, Lienemeyer and Waelbroeck: 2003). This might be problematic from the perspective of ECHR law, which, however, does not have an unequivocal position in this respect (warrants were issued: Niemietz; Buck; Van Rossem; Ernst; Roemen; Kent Pharmaceuticals by court; Petri Sallinen by national authority; Panteleyenkov by prosecutor; no judicial authorisation: SCE, Mialhe, Cremieux, Elici). Nevertheless, it is sure that it is not required that a warrant must be issued by a judge, which, however, attracts a particularly vigilant scrutiny by the ECtHR (para. 45, Camenzind; para. 25, H.M.).

²¹⁷ Para. 26, Hoechst; para. 23, Dow Iberica; para. 37, Dow Benelux.

²¹⁸ Para. 29, Hoechst; para. 26, Dow Iberica; para. 40, Dow Benelux. See the condition of lawfulness and ECHR law permitting the clarification of rules in a coherent body of case law, *supra* fn. 122.

²¹⁹ Paras. 47-50, Van Rossem. It is not the official who has to be aware with the limits of his powers but the person concerned, paras. 46-47, *ibid.*

²²⁰ See Part III/b/Chapter 14/fn. 40.

²²¹ ECHR: the lack of precision can be mitigated by the expertise of investigators and the possibility to request irrelevant material seized to be returned; overstepping the range of seizeable documents could be reasonable in ensuring the success of investigations, Kent Pharmaceuticals. EC: it is not required to identify documents or files precisely in advance, para. 27, Hoechst; para. 84, Roquette. However, the highest possible level of preciseness must be reached, paras. 48, 83, Roquette; paras. 26-27, National Panasonic.

²²² ECHR: Kent Pharmaceuticals. EC: para. 425, Limburgse, CFI (the excessive amount of copies is not a breach considering the scale of operations).

²²³ ECHR: para. 88, Segerstedt-Wiberg; para. 59, Leander; para. 77, Peck. EC: para. 87, ORF; mm. paras. 42-44, K; mm. paras. 28-32, Pflugradt; mm. para. 74, N. The question whether the information was

concerned.²²⁴ The other common benchmark was whether more adequate alternative solutions imposing a lesser interference were available.²²⁵

Having hopefully established the similarity of the benchmarks of flexibility enables the conclusion that the right to private life attracts a protection by Community courts similar to that performed by the ECtHR. Further conclusions on its implications as to the present non-divergence thesis will be available below closing Part III.

collected systematically (purposefully) was addressed in both legal systems, ECHR: para. 43 Rotaru; EC: para. 28, Pflugradt.

²²⁴ ECHR: para. 84, Peck. EC: para. 89, ORF.

²²⁵ ECHR: paras. 80-83, Peck. EC: para. 88, ORF; para. 43, Danzer.

Chapter 6: The right to respect for family life and the right to marry in ECHR and EC law

Within the general framework of analysis specific regard must be had of similarity in defining the concept of family and family unity. It will be demonstrated that both jurisdictions provide a practical family concept, and raise the issue of family unity in cases concerning deportation or family reunification. Homosexual relationships and marriages between transsexuals receive a similar treatment under ECHR and EC law. Concerning the benchmarks of flexibility it will be apparent that both legal systems take into account similar general and specific parameters relating to the expulsion of aliens and family reunification.

1. Similarity in the scope of the right to family life

In both jurisdictions the essence of this fundamental right is to protect the individual against arbitrary action by public authorities.¹ In EC law the significance of the right to family life is experienced primarily as a matter of scope. It exists in a symbiosis with the law of the internal market and the EC equality principle² and it has served as an irreplaceable boost to free movement rights. The Community judicature has accepted that the right to respect for family life within the meaning of Article 8 ECHR is among the fundamental rights protected in the Community legal order.³ It is problematic from the present perspective that the right to family life strives on an extensive regulatory background in the EC and issues arose rather as matters of interpretation relating to substantive Community law than direct human rights conflicts.⁴ Influenced by the aims of the corresponding Community legislation the right to family life is preoccupied with securing the unity of the family with respect to migrant and immigrant persons.⁵

1(a): A practical family concept

¹ ECHR: para. 38, Gül; para. 61, Ciliz; para. 67, Abdulaziz; para. 63, Ahmut; EC: paras. 126-128, Hassan.

² See in this respect, pp. 129-137, 165-167, Hartley: 1978; pp. 69-73, 82-85, Ackers and Stalford: 2004.

³ Para. 32, Rutili; para. 52, C-540/03; para. 41, Carpenter; para. 58, Akrich; para. 10, Case 249/86; para. 72, Baumbast; para. 109, C-441/02; para. 98, Orfanopoulos.

⁴ Pp. 583, 585, McGlynn: 2001. See also, para. 69, Aristimuno, where the ECtHR decided to interpret Article 8 ECHR in the light of the applicable measures of Community substantive law.

⁵ See in this respect, pp. 236-240, Guild: 2004. It appears that both legal systems developed a taste for atypical family situations, p. 202, Opsahl: 1973.

The key concept of Article 8 ECHR is family life⁶ which presupposes the existence of a family.⁷ Family in ECHR law is defined by genuine family ties such as birth,⁸ regular contact with the child despite the divorce of parents,⁹ or attempted family reunification with the child left in the country of origin.¹⁰ Family life includes the mutual enjoyment of each other's company by parent and child¹¹ and by spouses.¹² Cohabitation is not a requirement, but the existence of a lawful and genuine marriage fulfils the requirement of family life.¹³ Committed relationships also enjoy protection provided that a sufficient degree of family life exists.¹⁴

In Community law a specific family concept has arisen.¹⁵ Generally, family is described as a relationship of dependence between family members.¹⁶ It is now established that family members do not have to have the nationality of one of the Member States in order to enjoy the protection of Community law.¹⁷ With the purpose of assisting the integration of migrant workers the Community concept of family also covers unmarried couples¹⁸ and children left in the state of origin.¹⁹ Although subjected to claims of incompatibility with ECHR law,²⁰ it is apparent that the Community concept places emphasis on the existence of family ties defined by practical circumstances as provided in the concept under ECHR law. Their similarity will be more approachable when different aspects of the right to family life are compared below.

⁶ See in this regard, pp. 187-189, Kilkelly: 2000; pp. 18-35, Sudre: 2002; pp. 194-196, Duffy: 1993.

⁷ Para. 32, Fretté; para. 31, Marckx; para. 62, Abdulaziz.

⁸ Para. 32, Gül; para. 21, Berrehab; para. 54, Hokkanen; para. 59, Ciliz; para. 28, Sen.

⁹ Para. 21, Berrehab; paras. 59-60, Ciliz; para. 60, Ahmut.

¹⁰ Para. 33, Gül.

¹¹ Para. 86, McMichael.

¹² Para. 60, Abdulaziz.

¹³ Para. 21, Berrehab; para. 62, Abdulaziz.

¹⁴ Paras. 63, 65, *ibid*; para. 37, Da Silva.

¹⁵ In a non-fundamental rights context it was addressed mostly in relation to professional activities at work, see, paras. 55-59, Vonier; para. 38, Gerster; para. 42, Hill and Stapleton; para. 20, Herrero; para. 80, Hanning.

¹⁶ Para. 22, Lebon; para. 43, Zhu.

¹⁷ TCN (third country national) spouses and children derive their right to enter and/or remain in a Member State on the basis of Community law, para. 23, Singh. See also, Mrax; Baumbast; Zhu; Carpenter; Akrich; Givane.

¹⁸ Paras. 15, 28-29, Reed.

¹⁹ Para. 19, Gaal.

²⁰ Pp. 72-73, 83-84, Ackers and Stalford: 2004 and pp. 412-420, Stalford: 2002, concentrating on the EC concept outside the fundamental rights context. We fail to see why the substantive EC concept should copy the ECHR concept and that this would be a genuine claim of divergence. Furthermore, the ECHR concept has been subject to severe criticisms as well, see, pp. 12-17, Sudre: 2002; pp. 184-185, 198-199, Opsahl: 1973. It was also held that it is not applicable in all legal circumstances so that the family concept of that legal area (in our case substantive EC law) could remain unaffected, see in this regard, p. 25, Liddy: 1998.

1(b): The protection of family unity

Maintaining or establishing the functional unity of the family is central to the right to family life in both jurisdictions. Article 8 ECHR was interpreted to provide the right to remain in and to enter a Contracting State for nationals of other states in order to maintain or establish family unity.²¹ Although the Convention does not guarantee the right of an alien to enter or to reside in a particular country and respect for family life does not necessarily include the right to choose the geographical location of family life,²² the removal of a person from a country where close members of his family are living may amount to an infringement.²³

Protecting family unity in Community law is a product of interpreting the right to family life in the context of substantive Community law.²⁴ It includes considerations similar to those under ECHR law.²⁵ Although establishing family unity is a prime concern for all migrant persons irrespective of their nationality, distinction must be made between the legal position of nationals of a Member State (and persons affiliated to them irrespective of their nationality) and third country nationals (TCN).

EU citizens and families including TCN family members

Since family unity is considered fundamental in ensuring the success of the free movement of persons,²⁶ Community law regulates the right of family members to join the migrant worker²⁷ which has been attracting extensive litigation. The right to family life as a fundamental right, however, has had limited application in this respect mostly due to the fact that this area is widely regulated and Community provisions show a high degree of sensitivity towards family unity.²⁸ Nevertheless, problems with national

²¹ Expulsion cases, *inter alia*, Boultif; Moustaquim; Berrehab. Leave to stay or enter cases, *inter alia*, East African Asians; Da Silva; Tuquabo-Tekle, Gül, Sen, Ahmut. See in this regard, pp. 228-231, Duffy: 1993; pp. 196-197, 203-204, Opsahl: 1973; pp. 658-660, Villiger: Wiarda.

²² *Inter alia*, p. 221, 9369/81; p. 145, Uppal; p. 354, 434/58.

²³ *Inter alia*, para. 39, Boultif; para. 36, Moustaquim.

²⁴ Genuine human rights disputes: Carpenter; Akrich; Orfanopoulos. Conflict between national and the Community measure (Regulation 1612/68/EEC) the latter interpreted in the light of fundamental rights: Case 249/86; Baumbast; Zhu. TCN spouses and Directives 68/360/EEC, 73/148 and 90/365/EC: C-157/03; MRAX. Directive 64/221/EEC: C-503/03. Regulation 1251/70/EEC: Givane.

²⁵ It is also deductible from Article 7 EUCFR on the right to family life read in conjunction with Article 24 EUCFR on the rights of the child. Article 24(3) EUCFR establishes the right of the child to maintain on a regular basis a personal relationship and direct contact with both of his parent (relied upon at para. 58, C-540/03).

²⁶ Pp. 375-376, Barrett: 2003.

²⁷ See, p. 585, McGlynn: 2001.

²⁸ See in this respect, para. 11, Case 249/86; para. 68, Baumbast.

implementation of free movement legislation required the introduction of a strong fundamental rights based approach influenced by developments in ECHR law.

In practical terms, family unity covers issues relating to residence permits, permits to remain in a state, or deportation.²⁹ It involves the right of nationals of Member States to reside in another Member State when their family resides in that state.³⁰ The right to enter, to receive visa or residence permit of TCN family members³¹ requires the Member State to accord every facility for exercising those rights³² and to interpret permissible restrictions to family life strictly.³³ Family unity also covers the right of the primary carer of a child to remain in the Member State where the child receives education,³⁴ the right of a TCN spouse to remain in the Member State where her husband is a national and runs a business providing services to nationals of other Member States,³⁵ the right of a TCN spouse living in a genuine marriage to return to a Member State where his/her family would reside,³⁶ and the right of TCN family members of a deceased migrant worker to remain in that Member State.³⁷

TCN persons and families

The right of TCN persons residing in the Community to maintain or establish family unity – in other words to avoid the deportation of family members, to avoid constructive deportation or to achieve family reunification in one of the Member States, is determined primarily by national law and international law.³⁸ Community law, however, within its own competence provides the right to family unity of TCN persons and families through legislation. After a period of denying jurisdiction over national measures interfering with the right to family reunification,³⁹ presently, the right to family reunification is recognised by the minimum requirements of Directive 2003/86/EC.⁴⁰ In this respect, the ECJ asserted that the right to respect for family life includes the right to live with one's close family which means either that an alien may

²⁹ *Inter alia*, Carpenter, Baumbast; Orfanopoulos.

³⁰ Orfanopoulos.

³¹ C-503/03, C-157/03; MRAX.

³² Para. 41, C-503/03; para. 60, MRAX; para. 33, C-157/03.

³³ Para. 45, C-503/03; paras. 64-65, Orfanopoulos.

³⁴ Baumbast; Zhu.

³⁵ Carpenter.

³⁶ Akrich.

³⁷ Givane.

³⁸ See in this respect, p. 1048-1051, Boelaert-Suominen: 2005.

³⁹ Demirel. The criticism by Weiler at pp. 72-85, Weiler: 1992 has been answered by the new directive.

⁴⁰ See also Directive 2003/109/EC on the status of long-term resident TCNs which provides reinforced conditions of expulsion and the right to join the long-term resident in another Member State.

not be removed from or that an alien may be let to enter and reside in a particular country where his or her family resides.⁴¹ It also covers the right of the child to maintain a regular personal relationship and direct contact with both parents which in a particular case may lead to family reunification requiring that permit is issued to enter and reside in a foreign country with settled immigrant family members.⁴²

Family unity also appeared as a requirement imposed in connection with family members of Turkish workers residing in a Member State.⁴³ As an interpretative principle it was confirmed that the purpose of family reunification is to enable the family to be together and family ties to be maintained.⁴⁴ In connection with other association agreements family unity was considered again as an interpretative principle guiding national authorities when deciding on the entry and residence applications of migrants.⁴⁵

1(c): Homosexual relationships and family life

In ECHR law the scope of the right to family life is not extended to homosexual relationships, although the right to private life provides some form of protection.⁴⁶ National provisions according more favourable treatment to heterosexual marriages and partnerships, as compared with stable homosexual relationships, are not contrary to Article 14 ECHR.⁴⁷ Similarly, in Community law the right to respect for family life does not cover stable homosexual relationships.⁴⁸ Since the issue was raised in the context of non-discrimination law, the ECJ held that stable relationships between two persons of the same sex are not regarded as equivalent to (comparable with) marriages

⁴¹ Para. 52, C-540/03; para. 42, Carpenter; para. 59, Akrich; para. 109, C-441/02. The removal of a person from a state where close members of its family live may infringe his right to family life, paras. 53, 59, C-540/03; para. 42, Carpenter; para. 59, Akrich.

⁴² Impliedly, paras. 52-54, C-540/03.

⁴³ See in this respect, Article 7 of Decision 1/80 of the EEC-Turkey Association Council. The expulsion cases involving Turkish nationals did not raise the issue of family unity, see, Centinkaya; Torun; Aydinli, decided similar to EC migrant workers expulsion cases, see, Nazli, Calfa, Bonsignore, Adoui and Cornuaille, Royer, Watson and Belmann with the exception of Rutili.

⁴⁴ *Inter alia*, paras. 33-43 Kadiman; para. 41, Ayaz; paras. 26-30, 32-34, Eyüp.

⁴⁵ Para. 85, Gloszczuk; para. 90, Kondova; para. 83, Barkoci.

⁴⁶ *Inter alia*, p. 274, Simpson; para. 1, Rööslü; para. 31, Karner, ECtHR; and pp. 223-224, Ovey and White: 2002. See Part III/a/Chapter 5/Point 1(d).

⁴⁷ *Inter alia*, para. 2, C and LM; para. 7, Simpson. The refusal to approve the adoption of a child on grounds of the sexual orientation of the applicant falls under the scope of the right to family life combined with the prohibition of discrimination, paras. 32-33, Fretté, which was found justifiable on grounds of a wide margin of appreciation and the interest of the child, paras. 40-42, *ibid*. In paras. 37-42, Karner, ECtHR, however, a violation was found on grounds of a narrow margin of appreciation when it comes to discrimination based on sexual orientation covered by the right to private life read in conjunction with Article 14 ECHR.

⁴⁸ Paras. 32-33, Grant.

or stable relationships outside marriage between persons of opposite sex.⁴⁹ This was affirmed in a subsequent case, where it was held that in spite of developments in providing legal recognition of cohabitation of homosexuals, which creates rights akin to marriages, national laws regard these partnerships distinct from marriages. This precluded an interpretation that would provide a treatment for stable homosexual relationships equal with marriages.⁵⁰

1(d): Assets and family life

The question whether the freezing of funds of persons suspected with terrorist activities interfered with the person's right to family life was raised in *Hassan*.⁵¹ The CFI found no violation in spite of accepting that it constituted a drastic measure capable of preventing a person from leading a normal social life and making the person dependent on public assistance.⁵² Besides, Community law regards family benefits in appropriate circumstances essential to family life.⁵³ As regards the financial aspects of the right to family life the ECtHR held that family life involves material interests between family members.⁵⁴ In *Petrovič* the ECtHR ruled that by granting parental allowances the Contracting States are able to demonstrate their respect for family life.⁵⁵ It follows that assets are acknowledged as aspects of the right to family life in both jurisdictions.

1(e): The right to marry and found a family

Article 12 ECHR provides that women and men have the right to marry implying that only persons of opposite sex could be considered.⁵⁶ This means that heterosexual couples with one or both members being transsexuals are covered.⁵⁷ It was held that prohibiting the marriage of persons of different sex, when their sex is the result of

⁴⁹ Paras. 33 and 35, *ibid*; paras. 46-51, D. See similarity with cases involving surviving partner's rights in ECHR law, Mata Estevez; Rösli; Simpson.

⁵⁰ Paras. 33-40, D; paras. 28-29, D, CFI.

⁵¹ Para. 70, *Hassan*.

⁵² Para. 97, *ibid*.

⁵³ Paras. 42-48, Offermanns.

⁵⁴ *Inter alia*, paras. 52-53, Marckx, para. 43, Pla; paras. 46-47, Merger. As opposed to homosexual partners (*supra* fn, 49.) the denial of allocating pension for the surviving partner of unmarried couples was found to interfere with the right to family life, Simoes; Quintana Zapata. In contrast, the Grand Chamber failed to consider whether the lack of effective compensation of disabled persons affected the possibility of leading a normal family life, paras. 119-120, Maurice.

⁵⁵ Paras. 26-29, *Petrovič*; mm. para. 31, Niedzwiecki; para. 32, Okpiz; paras. 51-58, Paulsen-Medalen.

⁵⁶ See, p. 226, Ovey and White: 2002.

⁵⁷ This was not always the accepted position, see, para. 49, Rees; paras. 44-46, Cossey; paras. 66-67, Sheffield-Horsham. The new approach, para. 98, Goodwin.

gender reassignment, deprives these persons, whose new identity is protected by the right to private life under Article 8 ECHR, of the right to marry.⁵⁸ Conversely, the right to marry of persons of the same sex has not been acknowledged excluding homosexuals to gain recognition of their partnership as marriage in the Contracting States.⁵⁹

In Community law an approach similar to that under ECHR was crafted under the principle of equality. In a case involving non-discrimination as regards survivors' pensions the ECJ recalled that ECHR law prohibits administrative limits on marriages between a person undergone gender reassignment and a person of the opposing sex.⁶⁰ In another case the ECJ noted that Article 12 ECHR applies only to traditional marriages between two persons of opposite biological sex excluding homosexual marriages. As under ECHR law the right to marry will be dependent upon the specific national rules on marriage.⁶¹

It appears that EC law provides a protection of the right to family life which corresponds with that under ECHR law as a matter of scope. Nonetheless, only the family unity cases can proceed to a further examination of similarity. Areas such as homosexual relationships and family life and the right to marry were relevant only in determining the scope of the fundamental rights involved. The cases concerning the financial background of family life will be considered under the right to property in Chapter 9 as a result of its robust influence on their assessment.

2. Similarity in the language of the right to family life

By virtue of Article 8(2) ECHR the language of the right to family life is permissive under the Convention. Case law suggests a wide possibility of restrictions in maintaining public order.⁶² In the relevant cases in Community law the language of the right to family life is equally permissive as they allow justifiable interferences either as

⁵⁸ Paras. 100-101, Goodwin.

⁵⁹ Article 12 ECHR covers only traditional marriages the conditions of which is determined in national laws, para. 66. Sheffield and Horsham; para. 49, Rees; para. 43, Cossey.

⁶⁰ Paras. 33-36, K.B.

⁶¹ Paras. 33-34, Grant; see also para. 34, D.

⁶² *Inter alia*, para. 54, Keles; para. 46, Boultif; paras. 28-29, Berrehab; para. 43, Moustaquim.

under Article 8(2) ECHR or as provided by substantive Community law.⁶³ It has also been accepted that the right to family life is not an absolute prerogative, therefore, allowing certain restrictions.⁶⁴ According to the general observations in this respect in the cases involving the right to family life as an interpretative principle the question of language is irrelevant.⁶⁵

3. *Similarity in the functioning of the right to family life*

3(a): Establishing a common general approach

The formulas in Community law of the right to family life show an exciting variety from which only a fraction can be considered when it comes to examining the functioning of the fundamental right to family life.⁶⁶ In the available cases the fundamental rights formula of EC law provides that interferences must meet the requirements of Article 8(2) ECHR.⁶⁷ Article 8(2) ECHR includes being in accordance with the law, serving a legitimate aim, and being necessary in a democratic society all present in the case law on expulsion.⁶⁸ In family reunification cases the questions of being in accordance with the law and serving a legitimate aim appear to receive lesser attention.⁶⁹

3(b): Lawfulness

⁶³ Para. 109, C-441/02; para. 42, Carpenter; para. 59, Akrich; para. 99, Orfanopoulos; para. 61, MRAX. Directive 2003/86/EC on family reunification imposes several conditions and possibilities to impose restrictions, Articles 4, 8, 16 and 17; see in this respect, paras. 54-56, 60-61, C-540/03. See also, that objective circumstances can justify exemptions from the burden of family unity set by substantive Community law, para. 33-43, Kadiman; para. 36, Ergat; para. 25, Cetinkaya; para. 41, Ayaz; paras. 26-30, Eyüp.

⁶⁴ Para. 56, Vonier.

⁶⁵ *Supra* fn. 24; and para. 10, Case 249/86; para. 72, Baumbast; para. 47, C-503/03; para. 32, Rutili.

⁶⁶ Interpretative principle, *ibid*; substantive EC law together with interpretative principle, paras. 53, 61, MRAX; para. 26, C-157/03; para. 45, Givane; pure substantive law, Zhu; the interpretative principle mixed together with the right to family life as a genuine fundamental right, para. 109, C-441/02; para. 98, Orfanopoulos; paras. 38-42, Carpenter; paras. 41 and 47, C-503/03; genuine fundamental right, para. 58, Akrich.

⁶⁷ Para. 109, C-441/02; para. 42, Carpenter; para. 59, Akrich.

⁶⁸ Para. 37, Yildiz; para. 41, Boultif; para. 37, Moustaqim; para. 23, Berrehab; para. 54, Üner.

⁶⁹ See, para. 39, Gül; para. 42, Tuquabo-Tekle.

In ECHR law it is required that the measure in question has its basis in domestic law.⁷⁰ The few available cases in Community law may not address this issue separately but they all address the issue of legality.⁷¹ In some cases the question of lawfulness was deferred to the national courts to assess.⁷² In the remaining cases legality was decided by the ECJ on grounds of the fundamental rights claim⁷³ and in the enforcement actions the lawfulness of the national measures at issue was at stake from the perspective of Community law.⁷⁴

3(c): Pursuing a legitimate aim

As a result of sharing a general formula in both jurisdictions the element of a legitimate aim refers to those listed in Article 8(2) ECHR.⁷⁵

3(d): Necessity

In ECHR law necessity requires that the interference must be justified by a pressing social need, and, in particular, it is proportionate to the legitimate aim pursued.⁷⁶ It aims at striking a fair balance between the competing interests.⁷⁷ Similarly, Community law requires the assessment whether the interference was proportionate to the legitimate aim.⁷⁸ Other formulas mentioned that a fair balance must be struck between the legitimate interest and the general principles of Community law⁷⁹ and that the measure supported by reasons of public interest must take account of fundamental rights.⁸⁰

⁷⁰ Para. 53, Keles; paras. 37-39, Yildiz; para. 42, Boultif; para. 38, Moustaquim; either in domestic or Community law, para. 79, Aristimuno.

⁷¹ See, pp. 32-37, Massias: 1992, finding that notwithstanding the lack of the requirement of being in accordance with the law, the legality of national and Community measures are observed in immigration cases.

⁷² Paras. 59-61, Akrich; paras. 99-100, Orfanopoulos.

⁷³ Paras. 43-45, Carpenter; see, C-540/03.

⁷⁴ See, C-441/02; C-157/03; C-503/03.

⁷⁵ Para. 109, C-441/02, para. 42, Carpenter; para. 59, Akrich. See in this respect, pp. 37-42, Massias: 1992 (it was suggested at p. 41 that even in those EC expulsion cases which did not deal with human rights issues EC law comes very close to the legitimate aim requirement of ECHR law).

⁷⁶ Para. 54, Keles; para. 41, Yildiz; para. 46, Boultif; para. 43, Moustaquim; para. 28, Berrehab.

⁷⁷ Para. 55, Keles; paras. 42, 44, Tuquabo-Tekle; para. 42, Yildiz; para. 47, Boultif; para. 39, Gül.

⁷⁸ Para. 99, Orfanopoulos. Proportionality was also examined within the analysis of substantive Community law, paras. 61, 77, MRAX.

⁷⁹ Para. 107, C-441/02, paras. 95, 96, Orfanopoulos; para. 54, C-540/03; para. 43, Carpenter.

⁸⁰ Para. 108, C-441/02; para. 95, Orfanopoulos; para. 24, Carpenter. The formula denying that the right to family life would constitute an unfettered prerogative also appeared accepting restrictions that correspond to objectives of general interest pursued by the Community, and do not constitute a disproportionate and intolerable interference that infringes the very substance of the rights guaranteed, para. 56, Vonier.

4. Similarity in the flexibility of the right to family life

Having found that the element of necessity is shared by both jurisdictions it is apparent that flexibility is a common component of style. Similarity in this regard requires establishing the similarity of general approaches and the benchmarks of flexibility.

4(a): The general approach

In ECHR law a greater leeway is afforded to the Contracting States because family unity and the treatment of aliens are considered sensitive issues.⁸¹ The exact degree of general deference is difficult to ascertain as often a ‘certain margin of appreciation’ would be mentioned,⁸² but the ECtHR could decide to favour the Contracting States expressly with a wide margin of appreciation.⁸³ Community law also takes notice of the sensitive nature of immigration matters. In the family reunification directive case a robust margin of appreciation of the Member States was acknowledged by reference to the provisions of the directive.⁸⁴ It also reflects a greater degree of deference that in *Carpenter* the legitimate aim presented by the Member State was readily accepted.⁸⁵ Sharing a general approach is even more apparent when it comes to the common principles of family reunification. Both jurisdictions accept that first, the obligation of states varies according to the particular circumstances of the persons involved and the general interest;⁸⁶ second, states have the right to control the entry of aliens;⁸⁷ and third, there is no general obligation to respect the choice of married couples of their matrimonial residence and to authorise reunion.⁸⁸

4(b): The benchmarks of flexibility

The comparison of benchmarks needs to distinguish between cases concerning the expulsion of aliens and family reunification. While in expulsion cases the ‘Boultif

⁸¹ See, *inter alia*, para. 54, Keles; para. 52, Dalia; para. 34, Mehemi; para. 46, Boultif; para. 41, Yildiz.

⁸² Para. 42, Tuquabo-Tekle; para. 39, Gül; para. 61, Ciliz; para. 63, Ahmut; para. 39, Da Silva.

⁸³ Para. 28, Berrehab; para. 66, Ciliz; para. 67, Abdulaziz.

⁸⁴ Paras. 54, 104, 106, C-540/03.

⁸⁵ Para. 44, Carpenter.

⁸⁶ ECHR: para. 67, Abdulaziz. EC: para. 55, C-540/03.

⁸⁷ ECHR: para. 67, Abdulaziz. EC: para. 55, C-540/03.

⁸⁸ ECHR: para. 68, Abdulaziz. EC: para. 55, C-540/03.

principles' are considered relevant,⁸⁹ family reunification attracts different benchmarks.⁹⁰

Expulsion

In ECHR law the following benchmarks were taken into account in examining the justifiability of expulsion of aliens.⁹¹

- a) Nature and seriousness of the offence.⁹²
- b) Length of stay in the host state referring to the degree of integration into the host society.⁹³
- c) Time elapsed since the offence and the applicant's conduct during that time.⁹⁴
- d) Family situations: children in marriage and their age; length of marriage and effectiveness of family life.⁹⁵
- e) Difficulties the spouse and children would encounter in the country of origin.⁹⁶

The list is neither exhaustive nor absolute leaving to the Contracting States, corresponding to the wide margin of appreciation acknowledged above, a considerable leeway in the application of the principles. The best interest and well-being of children, which could be covered by the above elements, was considered independently in an increasing number of cases.⁹⁷ The circumstances of cases may require the assessment of

⁸⁹ Para. 48, *Boultif*. Affirmed, *inter alia*, para. 57, *Üner*; para. 42, *Sezen*. The core of the 'Boultif principles' were established in earlier cases (*inter alia*, *Alam and Khan*; *Moustaquim*; *Beldjoudim*; *Nasri*), and similar principles were used at para. 29, *Berrehab* (not involving criminal offences) which means that the 'Boultif principles' could be regarded as applicable outside the context of expulsion for criminal offences.

⁹⁰ See, pp. 38, 40-43, *Warbrick*: 1998; pp. 219-221, 228-229, *Kilkelly*: 2000.

⁹¹ All under para. 48, *Boultif*.

⁹² Factors: number and gravity of offences, length and weight of sentences, interests violated by the crime (para. 54, *Dalia*; para. 48, *Baghli*; para. 37, *Amrollahi*); the sliding scale principle: committing the offence shortly after entering (para. 49, *Boultif*).

⁹³ See, paras. 55-56, *Üner*, high degree of integration: factors: educated and employed in host country, being a second generation migrant or equivalent; low degree of integration: factors: social, cultural and linguistic ties with country of origin, arrived at relatively old age, raised in country of origin.

⁹⁴ It must be considered whether the convicted person still presents a threat to public order and security, and whether there is a possibility of committing further offences: factors: criminal propensity (para. 63, *Üner*), undergoing drug rehabilitation (para. 60, *Keles*), not re-offended (para. 44, *Sezen*).

⁹⁵ A real and genuine family life is required: factors: length of cohabitation, close ties between parent and child, living with close family, difficulties do not exclude effective family life.

⁹⁶ Factors: speaking the language, links with country of origin, lived in country of origin, cultural, family and linguistic ties, leaving country of origin as an adult, spent short time in host country.

⁹⁷ Para. 58, *Üner*; para. 64, *Keles*; paras. 46-47, *Sezen*, para. 41, *Da Silva*.

factors other than those listed above.⁹⁸ Moreover, the ECtHR is not required to scrutinise every factor and it retains the right to assess the weight of each criteria favouring certain criteria ahead of others.⁹⁹ Often the individual factors must be balanced against each other.¹⁰⁰ As a result, it was suggested that the application of these criteria might be unclear¹⁰¹ and even arbitrary.¹⁰²

Practically, EC law has transplanted the ‘Boultif principles’.¹⁰³

- a) Nature and seriousness of the offence.
- b) Length of residence in the host state.
- c) Length of time elapsed since the offence.
- d) Family circumstances.
- e) Difficulties the spouse and children risk facing in the country of origin when executing constructive deportation.¹⁰⁴

Taking into account that the benchmarks in EC law are derived directly from the ‘Boultif principles’ and that the application of these principles in ECHR law is flexible depending on the circumstances of the case emphasising some and marginalizing others, the similarity of these benchmarks in the two jurisdictions is apparent. Building on the flexibility characterising the application of the principles in ECHR law the judgment in *Carpenter*, appears to acknowledge benchmarks similar to those in ECHR law. It considered the personal conduct of the individual, whether the individual presented an existing or future danger to public policy, that the infringement of immigration laws was minor, that the marriage was genuine, and that there were strong family bonds.¹⁰⁵ In *Orfanopoulos* the ECJ insisted on calling the attention of the national court to the gravity of the offence and that there was a present danger to public policy. It also pointed out that these factors must be balanced against the considerable length of

⁹⁸ Eg.: delay of expulsion, para. 66, Üner; limited length of expulsion and the right to return, para. 65, *ibid*; non-execution of the expulsion, para. 49, Sezen; possibility to enter the state without a visa, para. 23, Berrehab.

⁹⁹ In *Ciliz* the dominant feature was the lack of coordination between the expulsion procedure and the process concerning his access to his child the outcome of which could have affected the first procedure, paras. 68-72, *Ciliz*. Da Silva was dotted with references to family reunification cases but it was dominated by the consideration of the applicant’s immigration situation, para. 39, Da Silva. The interest of children can also be the dominant factor, para. 44, Da Silva; para. 49, Sezen.

¹⁰⁰ Para. 66, Keles; para. 55, Boultif; paras. 64-65, Üner.

¹⁰¹ Paras. 7-8, DO Thomassen, Sezen; p. 237, Duffy: 1993; pp. 32-34, Warbrick: 1998.

¹⁰² CO Baka et al, Boultif and p. 34, Warbrick: 1998.

¹⁰³ All under para. 60, Akrich; para. 99, Orfanopoulos.

¹⁰⁴ Only at para. 99, Orfanopoulos.

¹⁰⁵ Para. 44, Carpenter.

residence and the existence of family links in the host state¹⁰⁶ making the assessment similar to the balancing that may be required between the individual principles in *Boultif* under ECHR law.

Family Reunification

In both jurisdictions the benchmarks set against interferences in family reunification cases include the age of the children, their situation in the country of origin, and whether they are dependent on parents.¹⁰⁷ Other shared factors include the ties of children with¹⁰⁸ and their level of integration in the country of origin¹⁰⁹ inquiring into the obstacles to family life in that country.¹¹⁰ It was accepted by both courts that these might need to be measured against the level of integration of the family and the possible rapid reintegration of the child concerned in the host country.¹¹¹

Establishing the similarity of the benchmarks of flexibility in the overlapping area of expulsion and family reunification cases in ECHR and EC law enables the conclusion that the protection of the right to family life is similar in the two jurisdictions. Its implications on the non-divergence thesis will be discussed below in the conclusions closing Part III.

5. A detour: freedom of movement in ECHR and EC law

The right to freedom of movement provided in Article 2(1) Protocol 4 ECHR contains the right to liberty of movement and freedom to choose one's residence in the Contracting State where the person concerned lawfully resides. It is recognised in paragraphs 3 and 4 that freedom of movement may be subject to lawful and proportionate restrictions in the general interest. Correspondingly, Community law influenced by the ECHR acknowledges the right to choose one's place of residence freely.¹¹² In this case the ECJ on the basis of the proportionality requirement went on to

¹⁰⁶ Para. 100, Orfanopoulos, on a case-by-case basis.

¹⁰⁷ ECHR: para. 44, *Toquabo-Tekle*; para. 37, Sen. EC: para. 56, C-540/03.

¹⁰⁸ ECHR: paras. 40-43, *Gül*; para. 39, Sen. EC: para. 65, C-540/03.

¹⁰⁹ ECHR: paras. 69-70, *Ahmut*. EC: para. 65, C-540/03.

¹¹⁰ Since reunification in the host country is an equally viable option, para. 49, *Toquabo-Tekle*.

¹¹¹ ECHR: para. 40, Sen; para. 47, *Toquabo-Tekle*. EC: para. 64, 66, C-540/03, taking the best interest of the children into account at para. 63.

¹¹² Para. 35, *Uwe Kay Festersen*.

decide that due to the availability of less restrictive alternative measures the restriction of freedom of movement was not necessary¹¹³ which can hardly be objected under ECHR law.

¹¹³ Paras. 37, 39-40, *ibid.*

Chapter 7: Freedom of expression in ECHR and EC law

The **similarity argument** in respect of freedom of expression is supported foremost by the apparent direct influence of ECHR (case) law on the judicial approach developed under Community law. This is not only reflected in the similarity of scope, language, and functioning of freedom of expression, but in how flexibility is approached in cases concerning the overlapping areas of civil service, commercial speech, and collision with (fundamental) rights of others the latter including peaceful demonstrations. The divergence claim advanced as regards distinguishing types of speech and proportionality (flexibility) in EC free speech cases¹ will be addressed in the course of the ensuing analysis of similarity. The case *Grogan* and the television broadcasting cases in EC law provoking the specific strain of the divergence claim that Community courts failed to provide a human rights solution will also be examined within the scope of freedom of expression.²

1. Similarity in the scope of freedom of expression

The right to freedom of expression is of particular importance under the ECHR. Community law has not had the opportunity to address the issues that are most commonly associated with it. Regulating journalism, political speech, defamation, hate speech, obscenity, and blasphemy have little in common with free trade and economic regulation. Nonetheless, freedom of speech bears relevance in Community law even if only in a limited area. The duties and obligations of Community officials can interfere with freedom of speech. Restrictions on commercial speech, authorising demonstrations, and regulating broadcasting activities were matters raised in the context of the internal market.

1(a): The general concept

In ECHR law freedom of expression is regarded as a core element of a democratic society. The values of pluralism, tolerance, and broadmindedness demand that information or ideas that offend, shock, and disturb also fall under its scope.³ Article 10

¹ See, pp. 394-395, 397-400, Woods: 2006 and pp. 49-52, 71-72, 76-77, Arai-Takahashi: 2005.

² See, Part I/Chapter 1/Point 1(b).

³ *Inter alia*, para. 52, Vogt; para. 55, Ahmed; para. 49, Handyside; para. 41, Lingens; para. 44, Grigoriades.

ECHR not only protects the substance, but also the form of expression⁴ which includes the means of reception and transmission.⁵ It encompasses the freedom to hold opinions and to receive and impart information and ideas, and it is not restricted to certain categories of information, ideas, or forms of expression.⁶

The concept of freedom of expression in Community law is infused by considerations of ECHR law.⁷ Community courts have adopted the above recalled definition coined by the ECtHR.⁸ It was also referred to as the freedom arising from the fundamental right of the individual to express himself freely⁹ which includes the freedom to receive information.¹⁰ Freedom of press¹¹ and the maintenance of pluralism¹² have also been connected with freedom of expression in Community law.

1(a): Freedom of speech and civil service

In ECHR law the personal scope of freedom of expression extends to public/civil servants¹³ and military personnel.¹⁴ Community officials also enjoy the right of freedom of expression. It covers the expression, orally or in writing, of opinions that dissent from or conflict with those held by the employing institution.¹⁵

1(b): Commercial speech

⁴ Para. 48, De Haes and Gijssels; para. 52, Lehideux; para. 39, News Verlags; para. 31, Jersild.

⁵ Para. 47, Autronic.

⁶ *Inter alia*, para. 39, Hadjianastassiou; para. 27, Müller; para. 20, Krone Verlag. The right of access to information is not provided under Article 10 ECHR (para. 74, Leander). Article 6 ECHR may be of relevance (see the cases, Fressoz, Håkansson and Sturesson), but it does not guarantee a general right of access which corresponds to the approach of the ECJ in Van der Wal denying that Article 6 ECHR would entail a general obligation on courts to grant access (para. 17).

⁷ Article 10(1) ECHR is either cited or referred to by Community courts, see, para. 8, RTL; para. 32, Rutili; para. 50, Karner, ECJ; para. 26, Familapress; para. 79, Schmidberger; para. 62, Laserdisken; para. 72, Lindqvist; para. 157, Meister; para. 137, Montecatini. It is also regarded as a general principle of EC law, para. 12, E; paras. 34-35, Ter Voort; para. 44, ERT. See Article 11 EUCFR on freedom of expression and information.

⁸ Para. 50, Karner, ECJ; para. 26, Familapress; para. 79, Schmidberger; para. 30, C-353/89; para. 62, Laserdisken; para. 18, Cwik; the full formula at para. 39, Connolly.

⁹ Para. 19, Cwik.

¹⁰ Para. 64, Laserdisken.

¹¹ Para. 121, Tillack; para. 46, Binon. Freedom of press, however, does not mean that every legal provision connected to undertakings engaged in journalistic activities, such as the obligation to disclose their annual accounts under company law, would constitute an interference with that freedom, para. 47, Springer.

¹² Para. 25, TV 10; para. 30, C-353/89; para. 23, SCAG.

¹³ *Inter alia*, paras. 41, 56, Ahmed; paras. 43, 53, Vogt; para. 41, Wille.

¹⁴ *Inter alia*, para. 45, Grigoriades; paras. 27, 36, Gubi; para. 26, Rekvényi (police); para. 100, Engel.

¹⁵ Para. 43, Connolly; para. 16, Oyowe; para. 13, E; para. 157, Meister; para. 22, Cwik.

Article 10 ECHR protects commercial expression¹⁶ which stands for disseminating information of commercial nature (for the purposes of advertising).¹⁷ The situation in Community law corresponds to that under ECHR law, since commercial speech, which mainly concerns advertising, is provided protection under freedom of expression.¹⁸

1(c): Peaceful demonstrations

In ECHR law peaceful demonstrations¹⁹ are considered as a specific form of freedom of expression also protected under freedom of assembly.²⁰ According to its definition since demonstrations go beyond mere speech, they can be regarded as the expression of disagreement²¹ that can physically impede the activities of others.²² Similarly, in Community law demonstrations are protected by freedom of expression as they constitute a legitimate form of expressing views and opinions contributing to public debate on a matter of general interest.²³ As in ECHR law peaceful demonstrations organised according to national law are also covered by freedom of assembly.²⁴

1(d): Broadcasting and freedom of expression

Broadcasting is a specific form of expression. Generally, this area involved radio or television licensing disputes under the ECHR where rejections of licence applications or bans on broadcasting activities were attempted to be justified on public interest

¹⁶ See, *inter alia*, para. 25, *Jacobowski*; para. 42, *Barthold*; para. 35, *Cascado Coca*; para. 47, *Autronic*.

¹⁷ Para. 35, *Cascado Coca*; para. 57, *VgT*; para. 31, *Krone Verlag*. Advertisements with a dominantly political message belong, however, to political speech, paras. 56-57, *VgT*; paras. 48-50, *Hertel*.

¹⁸ See the subject matter of the following cases, *Karner*, ECJ; *Familiapress*; *RTL*; *Ter Voort*. There are a number of cases concerning commercial speech but without a human rights dimension, see, *inter alia*, *Hünernmund*; *De Agostini*; *Gourmet*; C-376/98; *BAT*.

¹⁹ They must be peaceful to enjoy protection under the ECHR, para. 77, *Stankov*.

²⁰ Paras. 85, 97, *Stankov*; para. 76, *Guneri*; paras. 56-57, *Djavit An*. Usually Article 11 ECHR takes precedence over Article 10, but regard will be taken of Article 10, para. 2, *Plattform Ärzte für das Leben*. Article 10 ECHR may subdue Article 11, para. 110, *Steel*. They might be considered together, but Article 10(2) ECHR is relied upon to determine the degree of margin of appreciation, para. 38, *Öllinger*; para. 88, *Stankov*.

²¹ Para. 143, *Steel*.

²² Para. 92, *Steel*; para. 23, *Choherr*. As in case of general free speech, demonstrations may annoy and give offence to persons that oppose the ideas or claims that they seek to promote, para. 32, *Plattform Ärzte für das Leben*; para. 86, *Stankov*.

²³ Para. 86, *Schmidberger*.

²⁴ Para. 79, 84, *Schmidberger*. See also Article 13 EUCFR. See also, paras. 90-95, *Laval* and paras. 43-45, *ITWF*, placing the right to take collective action within freedom of expression and assembly.

grounds.²⁵ A common point of reference with the relevant case law in EC law on broadcasting rights is, however, missing.²⁶

The majority of the EC cases considered (media) pluralism, which in some instances was connected to freedom of expression, as a public policy justification of restrictions on the free movement of services.²⁷ The ECJ never engaged in human rights adjudication and freedom of expression was only considered as a cultural policy aim that may constitute an overriding general interest in free movement law.²⁸ Eventually, in *TV10* the Dutch cultural policy that attempted to ensure pluralism as protected by Article 10 ECHR²⁹ was challenged on grounds of freedom of expression. However, the ECJ avoided addressing the alleged interference with freedom of expression and held that since the national measure was designed to enhance pluralism and freedom of expression, it could not be regarded as interfering with the same fundamental right at the same time.³⁰ It follows that apart from the common interest of promoting media pluralism case law in ECHR and EC law fails to offer an opportunity for comparison under the non-divergence thesis. In this respect, what might be concluded is that judicial approaches in both jurisdictions condemn unnecessary restrictions on national or trans-frontier broadcasting.³¹

1(e): Disseminating information on abortion

The notorious prohibition concerning the right to provide information on abortion clinics in other states was examined in both jurisdictions. The ECJ had the advantage of deciding the case before the Strasbourg court, but to the disappointment of many it

²⁵ See, *inter alia*, *Lentia*; *Autronic*; *Groppera Radio*; *Tele 1*; *Radio ABC*; *Demuth*.

²⁶ The *ERT* judgment cannot be mentioned here as the ECJ had no competence to rule on the issue of free expression and national media monopolies. A case concerning media monopolies was examined by both courts and they adopted different approaches. However, due to that fact that the cases are distinguishable on the basis of the approach taken divergence cannot be established, see, *Sacchi* (ECHR), p. 50, para. 4, on the possibility to regard media monopolies as possible violations of Article 10 ECHR, and *Sacchi* (EC), at 432, on the compatibility of media monopolies with EC competition law.

²⁷ *Bond van Adverteerders and VVOO: pluralism without freedom of expression*; SCAG, UPEC and C-353/89 mentioned freedom of expression, but it did not change the outcome as the ECJ followed its previous decisions in *VVVO* and *Bond van Adverteerders*.

²⁸ Para. 18, *TV10*; paras. 22-23, SCAG; paras. 42-44, UPEC; paras. 3, 29, 30, C-353/89; para. 9, *VVOO*. In *Bond van Adverteerders* the ECJ found no purpose in examining the freedom of expression issue as it found that the national measure was not justifiable on (other) public policy grounds.

²⁹ Para. 25, *TV 10*; para. 30, C-353/98; para. 23, SCAG.

³⁰ Para. 25, *TV 10*.

³¹ EC law approaches this from the perspective of free movement of services, see, SCAG; *VVOO*; C-353/89; *Bond van Adverteerders*. For the position under ECHR law, see, paras. 62-63, *Autronic*; paras. 38-39, *Lentia*; paras. 35, 40-41, *Tele 1*, paras. 31, 34, *Radio ABC*. Another similarity might be that broadcasting from one state to another, in order to circumvent the stringent regulations on broadcasting of the second state, is condemned by both courts, EC: para. 26, *TV10*; ECHR: para. 73, *Groppera Radio*.

declined jurisdiction on the issue of freedom of expression deferring it to the national court.³² Nonetheless, it thought fit to rule that the prohibition at issue was not contrary to Community law as the medical institutions concerned had no involvement in the distribution of information promoting their services. Therefore, the prohibition was not directed against their commercial activities protected under Community law.³³ In contrast, having established its jurisdiction to address the issue of free speech the ECtHR decided against the national interference.³⁴

The judgment of the ECtHR, however, does not signal that the judgment in *Grogan* falls short of the requirements of ECHR law. The ECJ never asserted that Community law permitted such restriction on freedom of expression. Instead, it held on two accounts that Community law could not afford protection as first, the ECJ lacked competence (as opposed to the national court), second, the provisions of EC law can only be applied when an intra-Community trade (a commercial) element is involved. It might be criticised on general grounds, but not having competence to decide a human rights dispute cannot be regarded as a sign of divergence in human rights adjudication.³⁵ Non-divergence (similarity) in the present context does not require similar competences, mostly, when one considers that the domestic court proceeding in *Grogan* was to decide the fundamental rights dispute. It must also be accepted that for the purpose of fundamental rights protection the scope of substantive Community law cannot be extended in contravention with the general legal framework.

Considering that the general approach on freedom of expression in EC law has been greatly inspired by ECHR law it seems logical that the scope of protection in the overlapping areas of free expression is similar.³⁶ Apart from the areas where comparison was not achievable due to the fact that the available judgments were

³² Para. 31, *Grogan*.

³³ Paras. 25-27, 32, *Grogan*. The ECtHR also acknowledged the lawfulness of intra-European trade in “abortion”, para. 72, *Open Door*.

³⁴ Paras. 72-77, *Open Door*. The ECtHR also found that fiscal restrictions on an anti-abortion campaign violated the right to free speech, paras. 45-47, *Bowman*. It is likely that the ECJ in a case similar to *Bowman* would have followed the approach in *Grogan* which in our view was not influenced by aversion to fundamental rights.

³⁵ See Part I/Chapter 1/Point 1(b).

³⁶ Even Woods accepted that the scope of freedom of speech in the two jurisdictions is similar, although she mentioned that the scope in EC law is broader which she substantiated by the questionable means of referring to cases where freedom of expression was not considered, comparing cases with different subject matters, and mixing the matters of deference and scope, pp. 400, 396-397, Woods: 2006.

distinguished (broadcasting and abortion information), the examination of similarity can proceed to the remaining components of the general system of analysis.

2. Similarity in the language of freedom of expression

The language of freedom of expression in ECHR law is permissive on grounds of Article 10(2) ECHR providing the limitation formula. It mentions, in particular, that duties and responsibilities can be imposed on the individual which may appear as formalities, conditions, restrictions, and penalties. Similarly, since Article 10(2) ECHR dominates case law, a permissive language prevails in EC law.³⁷ The ECJ has accepted that freedom of expression is not an absolute right, but must be considered in relation to its social purpose.³⁸ According to the general observations in this regard in the instances where freedom of expression was utilised as an interpretative principle the question of providing a permissive language is irrelevant.³⁹

3. Similarity in the functioning of freedom of expression

3(a): The general formula

Article 10(2) ECHR provides that restrictions must be prescribed by law, necessary in a democratic society, and must pursue a legitimate aim. In most instances Community law adopted the same formula.⁴⁰ It also yields the formula according to which the exercise of freedom of expression may be restricted in the general interest provided that the restriction does not constitute a disproportionate and unacceptable interference impairing its very substance.⁴¹

3(b): Lawfulness

ECHR law requires that the interference must be based on national law.⁴² The legal

³⁷ Para. 38, Ter Voort; para. 148, Connolly; para. 50, Karner, ECJ; para. 26, Familiapress; paras. 69-70, RTL; para. 87, Lindqvist; paras. 79-80, Schmidberger; para. 64, Laserdisken; paras. 157-158, Meister.

³⁸ Para. 80, Schmidberger.

³⁹ Para. 32, Rutili, para. 16, Oyowe; paras. 12-15, E; paras. 44-45, ERT.

⁴⁰ Para. 40, Connolly; para. 50, Karner, ECJ; para. 26, Familiapress; para. 79, Schmidberger; para. 69, RTL; para. 64, Laserdisken; para. 38, Ter Voort; para. 154, C-380/03.

⁴¹ Para. 80, Schmidberger.

⁴² *Inter alia*, para. 34, Grigoriades; para. 45, Barthold; para. 24, Krone Verlag.

provision at issue must have a quality of law in the sense that it must be accessible and foreseeable.⁴³ Foreseeability provides that the relevant national law must be formulated with sufficient precision enabling the person concerned, taking legal advice if needed, to foresee the consequences of his action.⁴⁴

EC law also requires that interferences must be prescribed by law.⁴⁵ Having a legal basis was considered in *Lindqvist* when the ECJ examined that the interference arose from the implementation of a Community directive⁴⁶ and in *Meister* where the CFI observed that the right in question was provided by Community legislation.⁴⁷ In *Schmidberger* the ECJ acknowledged that the interference was ordered by the national authorities on the basis national law.⁴⁸ The requirement of foreseeability is also present providing that restrictions must be prescribed by legislative provisions that are worded with sufficient precision enabling the interested parties to regulate their conduct taking appropriate advice if needed.⁴⁹

Furthermore, a general condition of lawfulness is examined extensively in Community law. The relevant disputes either concerned the legality of the Community measure imposing the interference⁵⁰ or the validity of a national measure interfering with the basic right.⁵¹ Lawfulness was ensured by examining the legality of interferences under different grounds such as procedural impropriety,⁵² insufficient reasons,⁵³ breach of law,⁵⁴ proportionality,⁵⁵ the rights of defence,⁵⁶ the principle of sound administration,⁵⁷ misuse of powers,⁵⁸ error of interpretation,⁵⁹ lack of legal basis,⁶⁰ and equal treatment.⁶¹

3(c): Pursuing a legitimate aim

Article 10(2) ECHR provides the range of possible aims in the general interest. As

⁴³ Para. 52, VgT; para. 54, Steel; para. 25, Choherr.

⁴⁴ *Inter alia*, para. 37, Grigoriades; paras. 47 and 49, Sunday Times; para. 35, Hertel; para. 38, Worm.

⁴⁵ Para. 51, Connolly; para. 52, Karner, ECJ; para. 154, C-380/03.

⁴⁶ Paras. 84-85, Lindqvist.

⁴⁷ Para. 160, Meister.

⁴⁸ Para. 84, Schmidberger.

⁴⁹ Para. 42, Connolly.

⁵⁰ Connolly; Cwik; E; Oyowe; Laserdisken.

⁵¹ RTL; Schmidberger; Rutili; Karner, ECJ; RTL; Familiapress; ERT; Cin  th  que.

⁵² Para. 40, Meister; para. 6, Connolly.

⁵³ Para. 6, *ibid*; para. 12, Cwik.

⁵⁴ Para. 6, Connolly. See also, Karner, ECJ; Familiapress; Laserdisken; RTL.

⁵⁵ Para. 15, Laserdisken; para. 165, Meister; para. 6, Connolly.

⁵⁶ Para. 6, *ibid*; para. 40, Meister.

⁵⁷ Para. 6, Connolly; para. 40, Meister.

⁵⁸ Para. 6, Connolly.

⁵⁹ Para. 12, Cwik.

⁶⁰ Para. 15, Laserdisken.

⁶¹ *Ibid*.

regards broadcasting specific interests can be taken into account such as the quality and balance of programmes or the rights and needs of the audience.⁶² Protecting the fundamental rights of others may also serve as a legitimate aim.⁶³ Correspondingly, Community law requires the existence of a legitimate aim, an objective in the general interest.⁶⁴ Consumer protection and fair trading,⁶⁵ press diversity,⁶⁶ the quality of programming,⁶⁷ the copyright of others,⁶⁸ the privacy of others,⁶⁹ and protecting the economic interests of others⁷⁰ are aims raised that match those under ECHR law. With respect to freedom of speech in civil service both jurisdictions accept that restrictions could be implemented in realising aims such as securing the functioning of public authorities.⁷¹ Preserving the relationship between employee and civil servant and ensuring that citizens are able to rely on the public body in carrying out its tasks in the public interest are further legitimate interests shared in ECHR and EC law.⁷²

3(d): Necessity

In ECHR law restrictions must correspond to a pressing social need.⁷³ In other words, a fair balance between the fundamental right and legitimate aim must be struck.⁷⁴ Necessity is achieved when the interference is proportionate to the legitimate aim.⁷⁵ As a result of borrowing from ECHR law the requirement of necessity in EC law involves the same considerations.⁷⁶ In *Lindqvist* the balancing was to take place

⁶² See, *inter alia*, paras. 32-33, *Lentia*; para. 52, *Autronic*; para. 61, *Groppera Radio*.

⁶³ *Inter alia*, para. 47, *OPI*; paras. 48-51, *Wingrove*.

⁶⁴ Para. 80, *Schmidberger*. Other heads of review such as proportionality, reasoning mistakes, misuse of powers can also entail an examination of the legitimate aim.

⁶⁵ Para. 52, *Karner*, ECJ; para. 69, *RTL*; para. 27, *SCAG*; para. 50, *ARD* – rights of others/audience under the ECHR.

⁶⁶ Para. 26, *Familiapress* – balanced media under the ECHR.

⁶⁷ Para. 69, *RTL*; para. 27, *SCAG*; para. 50, *ARD* – programme quality under the ECHR.

⁶⁸ *Laserdisken* – (fundamental) rights of others under the ECHR.

⁶⁹ *Lindqvist* – (fundamental) rights of others under the ECHR.

⁷⁰ *Schmidberger* – rights of others under the the ECHR.

⁷¹ ECHR: para. 52, *Ahmed*. EC: para. 47, *Connolly*; para. 160, *Meister*.

⁷² ECHR: para. 53, *Ahmed*. EC: paras. 44, 46, 47, *Connolly*; para. 158, *Meister*.

⁷³ *Inter alia*, para. 52, *Vogt*; paras. 55, 61, *Ahmed*; para. 44, *Grigoriades*; para. 42, *Rekvényi*.

⁷⁴ *Inter alia*, para. 53, *Vogt*; para. 72, *VgT*; para. 47, *Hertel*; para. 27, *Jacobowski*; para. 51, *Cascado Coca*.

⁷⁵ *Inter alia*, para. 52, *Vogt*; para. 44, *Grigoriades*; para. 55, *Barthold*; para. 87, *Stankov*; para. 59, *News Verlags*.

⁷⁶ See, para. 41, *Connolly*; para. 50, *Karner*, ECJ; para. 26, *Familiapress*; para. 79, *Schmidberger*; para. 73, *RTL*; para. 64, *Laserdisken*; para. 23, *Cwik*. A fair balance must be struck, paras. 81-82, *Schmidberger*; para. 48, *Connolly*; para. 19, *Cwik*; para. 51, *Karner*, ECJ; para. 73, *RTL*; paras. 158-159, *Meister*. Proportionality is sometimes considered separately on its own right, paras. 19-23, 27, *Familiapress*; para. 165, *Meister*.

between freedom of expression and the right to private life of others.⁷⁷

4. Similarity in the flexibility of freedom of expression

4(a): The general approach

In ECHR law the assessment of interferences with freedom of expression depends greatly on the circumstances of the case⁷⁸ and of the individual involved.⁷⁹ Interferences are examined in the light of the case as a whole⁸⁰ and its relevant facts.⁸¹ This means that flexibility varies according to the circumstances of the interference⁸² and the (initial) margin of appreciation is not identical as regards each of the legitimate aims.⁸³

Similarly, in EC law the assessment of interferences will depend on the circumstances of the case.⁸⁴ Community law accepts that the balance to be struck between the competing interests varies accordingly.⁸⁵ The discretion in determining the appropriate balance is different for each of the legitimate aims and depends on the nature of the activities in question.⁸⁶ It follows that approaches in ECHR and EC law do correspond in that the general flexibility of freedom of expression is variable.⁸⁷ Similarity in the general characteristics of flexibility must also be examined according to the type of speech involved.⁸⁸

Civil service

⁷⁷ Para. 86, Lindqvist.

⁷⁸ Paras. 53, 57, Vogt; para. 43, Rekvényi; para. 40, Rasmussen.

⁷⁹ Para. 88, Kosiek; para. 58, News Verlags; para. 53, Wingrove.

⁸⁰ Para. 31, Krone Verlag; para. 51, Cascado Coca; para. 44, Fuentes Bobo.

⁸¹ Para. 52, Vogt; para. 55, Ahmed; para. 44, Grigoriades; para. 34, markt intern Verlag; para. 68, VgT.

⁸² Para. 55, Barthold; para. 35, Lentia; para. 40, Demuth; para. 40, Appleby.

⁸³ Para. 49, Worm.

⁸⁴ Para. 159, Meister; para. 52, Karner, ECJ; paras. 28-31, Familiapress.

⁸⁵ Para. 51, Karner, ECJ; para. 73, RTL; para. 159, Meister; para. 48, Connolly; para. 155, C-380/03.

⁸⁶ Para. 51, Karner, ECJ; para. 73, RTL; para. 155, C-380/03.

⁸⁷ The inconsistencies pointed out in this respect by Arai-Takahashi: 2005 (pp. 49-52, 71-72, 76-77) are difficult to accept as they were based on various EC Advocate General Opinions and not supported by actual judgments of EC courts. The allegation of intensive review in commercial speech cases in EC law were not supported by contrasting EC cases with ECHR cases (the short introduction to the standard of review under Article 10 ECHR at pp. 75-76 was never used for an actual comparison), and at the end he conceded that there is only a potential for a more rigorous scrutiny.

⁸⁸ It is important to examine whether the communication was commercial, political or civic, pp. 97-99, Shiner: 2003; on a hierarchy of types of speech, pp. 54-55, Randall: 2006.

In such instances under ECHR law a wider margin of appreciation is provided taking into account the special significance of the duties and responsibilities of civil servants.⁸⁹ Community law appears to correspond to this approach as it provides that the duties and responsibilities mentioned in Article 10(2) ECHR assume a special significance that justifies leaving to the national authorities a certain margin of appreciation.⁹⁰

Commercial speech

It is well established in both jurisdictions that in commercial matters, in particular in fields as complex and fluctuating as advertising or competition, a margin of appreciation is essential.⁹¹ In Community law judicial supervision is limited to an examination of the reasonableness and proportionality of the interference.⁹² Similarly, Strasbourg would decline to re-examine the facts and circumstances of cases and resort to finding whether the interference is justifiable in principle and proportionate.⁹³

Rights of others and demonstrations

In the present context, it is appropriate to consider demonstrations, as a form of expressing opinions, among a wider range of cases in which freedom of expression conflicted with the rights and freedoms of others. In ECHR law the right to peaceful demonstration interfered with the freedom of religion⁹⁴ and the right to property of others.⁹⁵ In Community law it was the right to free movement of goods exercised by

⁸⁹ *Inter alia*, paras. 61-65, Ahmed; paras. 52-53, Vogt; para. 43, Rekvényi; para. 37, Diego Nafria. A stricter protection of freedom of expression was accepted when the communication by the civil servant concerned matters of general interest already debated intensively in public (para. 38, *ibid.*), however, the ECtHR neglected the balancing test and held that national courts are in a better position to provide an assessment, para. 42, *ibid.*

⁹⁰ Para. 49, Connolly; para. 161, Meister. The duty of fidelity and confidentiality in civil service is apparent in both jurisdictions, ECHR: p. 642, Lewis and Bowers: 1996; EC: by virtue of Articles 11, 12 and 17 of Staff Regulations.

⁹¹ ECHR: para. 33, Markt Intern Verlag; para. 69, VgT; para. 26, Jacobowski; para. 47, Hertel. EC: para. 51, Karner, ECJ; para. 73, RTL; para. 155, C-380/03.

⁹² Para. 51, Karner, ECJ; para. 73, RTL; para. 155, C-380/03.

⁹³ *Inter alia*, paras. 33-37, Markt Intern Verlag; para. 55, Barthold; paras. 26-28, Jacobowski. Although in broadcasting cases a strict supervision is required due to the importance of the rights in question (para. 35, Lentia; para. 61, Autronic), in case of commercial broadcasting a less severe control is implemented (paras. 42-43, Demuth). A similarly lax control is exercised with respect to advertising in the liberal professions (paras. 54-55, Cascado Coca; paras. 38-39, Colman).

⁹⁴ Para. 34, Öllinger.

⁹⁵ Appleby.

others.⁹⁶ In the ordinary free speech cases freedom of expression conflicted with the copyright of another person⁹⁷ and in *Lindqvist* the right to the protection of personal data. As to the general measure of flexibility, when it comes to collision with the rights of others the power of both Strasbourg and Luxembourg to reassess the balance struck in the domestic human rights solution is significant allowing only a reduced flexibility.⁹⁸

4(b): The benchmarks of flexibility

After distinguishing between different general approaches on flexibility on the basis of the different types of speech involved the similarity of the benchmarks of flexibility need to be examined within the same categories.⁹⁹

Civil service

ECHR law provides the following benchmarks in civil service cases.¹⁰⁰

- a) Importance of the legitimate aim.¹⁰¹
- b) Minimum impairment of rights or availability of less stringent measures.¹⁰²
- c) Conduct of the person concerned.¹⁰³
- d) Content of remarks/publication.¹⁰⁴
- e) Status and position within civil service.¹⁰⁵
- f) Availability of remedies.¹⁰⁶

⁹⁶ Schmidberger. See also, paras. 93-95, *Laval*, on the collision of the right to free movement of services and the right to take collective action and paras. 71-73, *ITWF*, concerning the right to freedom of establishment and the right to take collective action.

⁹⁷ ECHR: *News Verlags*; *Aral*. EC: *Laserdisken*; *mm. Cinèthèque*, film and video copyright.

⁹⁸ EC: para. 87, *Lindqvist*; paras. 84-91, *Schmidberger*; paras. 56-57, 63-63, *Laserdisken*; paras. 96-111, *Laval*. ECHR: paras. 43-38, *Öllinger*; paras. 48-49, *Appleby*; paras. 54-58, 69, *News Verlags*; para. 3, *Aral*.

⁹⁹ For a short account of the factors of justifying interferences in ECHR law suggesting a similar grouping, pp. 14-16, *Prebensen*: 1998.

¹⁰⁰ For a similar list of benchmarks, p. 642, *Lewis and Bowers*: 1996.

¹⁰¹ *Inter alia*, para. 62, *Ahmed*; paras. 58-69, *Vogt*; para. 46, *Rekvényi*; para. 45, *Grigoriades*.

¹⁰² *Inter alia*, para. 63, *Ahmed*; paras. 59-60, *Vogt*; para. 39, *Gubi*; para. 49, *Fuentes Bobo*; para. 49, *Rekvényi*.

¹⁰³ Appropriate conduct: paras. 68-69, *Wille*. Wrongful conduct: paras. 157-158, *Blake*; *Van der Heijden*.

¹⁰⁴ Contributing to public debate, para. 45, *Grigoriades*; paras. 38, 49, *Gubi*; para. 56, *Barthold*; paras. 65-66, *Wille*; paras. 37-38, *Diego Nafria*. Gravity and tone of attack, para. 45, *Grigoriades*; para. 41, *Diego Nafria*; *De Jong*. Restricted audience, para. 41, *Diego Nafria*; *Grigoriades* (addressed to a superior). Wide audience, paras. 46, 48, *Fuentes Bobo*.

¹⁰⁵ High ranking: paras. 63-64, *Wille*; para. 40, *Diego Nafria*.

In cases involving Community officials similar factors were taken into account.

- a) Importance of the legitimate aim.¹⁰⁷
- b) Alternative measures and minimum impairment of rights.¹⁰⁸
- c) Conduct of the person concerned.¹⁰⁹
- d) Content of remarks or publication.¹¹⁰
- e) Status and position of the person concerned.¹¹¹
- f) Availability of remedies.¹¹²

The similarity of a number of benchmarks is not surprising. It is an obvious characteristic of the necessity test that the importance of the aim of the interference will be considered and that the application of less stringent measures is demanded. The (appropriate/wrongful) conduct of the person concerned and his status (higher/lower ranking official) appear reasonable in assessing freedom of speech in this context. It must also be highlighted that both jurisdictions consider whether exercising the right to free speech contributes to public debate, whether its tone and contents are inappropriate, and whether it reaches a wider audience.¹¹³

Commercial speech

In this regard, both ECHR and EC law take into account the importance of the legitimate aim¹¹⁴ and the severity of the interference.¹¹⁵ Considering that in both jurisdictions it is acknowledged that it is primarily for the national authorities to decide whether commercial speech needs to be restricted in the public interest,¹¹⁶ it is not surprising that the dominant benchmark is the significance of the legitimate aim upon

¹⁰⁶ Petersen.

¹⁰⁷ Paras. 48, 56, 62, Connolly; para. 160, Meister.

¹⁰⁸ Paras. 54, 63, Connolly; para. 19, Cwik; paras. 166-171, Meister.

¹⁰⁹ Wrongful conduct, para. 58, Connolly.

¹¹⁰ Open public debate, para. 26, Cwik; paras. 66-67, Cwik, CFI. Aggressive, derogatory, insulting, detrimental to honour, paras. 53, 58-59, 61-62, Connolly; para. 15, E. Reasonable criticism, para. 164, Meister. Restricted readership, para. 26, Cwik; paras. 66-67, Cwik, CFI.

¹¹¹ High ranking, paras. 60, 62, Connolly; no management responsibilities, para. 26, Cwik.

¹¹² Para. 55, Connolly.

¹¹³ *Supra* fn. 104 and 110, relating to the content of the remarks/publication.

¹¹⁴ ECHR: para. 54, Cascado Coca; para. 41, Stambuk. EC: para. 52, Karner, ECJ; para. 73, RTL.

¹¹⁵ ECHR: paras. 35-36, Markt Intern Verlag; severity of sanctions (as interferences): para. 29, Jacobowski; para. 51, Stambuk. EC: para. 27, Familiapress, requiring less restrictive measures; para. 156, C-380/03, freedom of expression remains unimpaired and unaffected.

¹¹⁶ *Supra* fn. 91.

which the restriction imposed is based. Examining the severity of the interference as the second (final) benchmark also corresponds with the fact that judicial supervision is limited in this regard.

Rights of others

In case of peaceful demonstrations conflicting with the rights of others ECHR law considered the following factors.

- a) The right to demonstrate colliding with the right of others to proceed with a counter-demonstration: the importance of freedom of expression of both sides must be examined;¹¹⁷ preventive measures providing protection for both sides are important.¹¹⁸
- b) The right to demonstrate colliding with freedom of religion of others: the demonstration must not be directed against the rights of others;¹¹⁹ preventive measures providing protection for both sides are important.¹²⁰
- c) The right to demonstrate colliding with proprietary rights of others: alternative places and means where the right to demonstrate could be exercised effectively.¹²¹

In *Schmidberger* under EC law similar factors were taken into account.

- a) The importance of freedom of expression.¹²²
- b) The demonstration was not aimed at restricting the rights of others, presented no threat to them; the rights of others were taken into consideration.¹²³
- c) Alternative measures.¹²⁴

¹¹⁷ Paras. 43-45 Öllinger.

¹¹⁸ Para. 48, *ibid.*

¹¹⁹ Paras. 46-47, *ibid.*

¹²⁰ Para. 48, *ibid.*

¹²¹ Para. 48, Appleby.

¹²² Paras. 86, 89, 91, Schmidberger.

¹²³ Paras. 86, 88, *ibid.*

¹²⁴ Para. 87, *ibid.*; stricter conditions were not reasonable, paras. 90, 92, *ibid.*; reasonably believed that there were no alternative measures, para. 93, *ibid.* It may be seen as a preventive measure: information on the demonstration was provided in advance so the authorities could make preparations in time, para. 87, *ibid.*

Considering that both EC and ECHR law aim at ensuring that lawful demonstrations can be held without disruptions¹²⁵ the similarity of benchmarks is not surprising. Giving equal consideration to the rights of the opposing sides and enquiring into alternative and preventive measures clearly contribute towards achieving that aim.

Finding corresponding cases might face difficulties in case of ordinary free speech rights colliding with the rights of others. The majority of cases in ECHR law in this respect concern political speech and defamation,¹²⁶ authorship/artistic expression and morals,¹²⁷ and commercial speech.¹²⁸ From the available cases under EC law *Lindqvist* must be excluded as providing the human rights solution was deferred to the national court.¹²⁹ This leaves only the *Laserdisken* judgment available for examination which restricts the ensuing analysis to those cases in ECHR law where free (commercial) expression collided with proprietary rights.¹³⁰

Generally, the applicable scrutiny concerns whether one of the rights prevails over the other.¹³¹ This is apparent in *News Verlags* where the ECtHR went on to determine the prominence of freedom of expression on grounds of its essential role in the public interest¹³² and of the gravity of the interference.¹³³ In contrast, in *von Hannover* the right to control the use of one's photographic images prevailed.¹³⁴ In *Appleby* the ECtHR was preoccupied with the protection of property rights when highlighting alternative possibilities of exercising freedom of speech.¹³⁵ In *Aral*, which concerned the intellectual property rights of others, the Human Rights Commission went on to find

¹²⁵ ECHR: paras. 34, 37-38, Plattform Ärzte für das Leben; para. 37, Öllinger; paras. 103, 109-110, Steel; para. 8, p. 120, Rassemblement Jurassien; para. 32, Choherr. EC: para. 85, Schmidberger.

¹²⁶ See, *inter alia*, Lingens, Barfod, Oberschlick, Castells, Zana; Incal, Radio France, Tolstoy Miloslavsky.

¹²⁷ See, OPI; Müller.

¹²⁸ See, Jacobowski, Krone Verlag.

¹²⁹ Para. 90, Lindqvist.

¹³⁰ Account must be taken of the case *De Geillustreerde Pers* in ECHR law where copyright legislation extended to compiled radio and television programmes. It was found that the commercial interests of press undertakings are not protected by Article 10 ECHR, p. 14, para. 88. A similar application in *N.V. Televizor* was withdrawn.

¹³¹ ECHR: paras. 57-58, *News Verlags*; paras. 33-34, *Krone Verlag*; paras. 27-28, *Jacobowski*; para. 48, *Appleby*; para. 3 *Aral*. EC: para. 87, *Lindqvist*; paras. 62-63, *Laserdisken*.

¹³² Paras. 54-56, *News Verlags*. See the fairly similar judgments in *Standard Verlags*, paras. 44-55, and *WTZ-Verlags*, paras. 39-48, on publishing photographic images protected by national copyright regulation.

¹³³ Para. 69, *News Verlags*.

¹³⁴ Paras. 61-75, *von Hannover*. As in *News Verlags* the photographic images were protected by the national copyright act but copyright law had little to do with the ECtHR's conclusions. Considering that the forfeiture of products of free expression would interfere with the right to property, cases such as *Handyside*, *OPI* and *Wingrove* could also be mentioned here (para. 63; para. 57 and para. 64 respectively).

¹³⁵ Para. 48, *Appleby*.

that the interference with free expression was reasonably necessary for the protection of proprietary rights.¹³⁶

Similar to the practice under ECHR law in *Laserdisken* the ECJ made a serious effort to establish that the protection of copyright was more significant than freedom of speech. Apart from asserting that the right to property including copyright justifies the restriction on freedom of expression,¹³⁷ it considered further factors that enabled proprietary rights to prevail over free speech.¹³⁸ It follows that in both jurisdictions the benchmark of resolving the collision of fundamental rights is the relative importance (superiority) of the rights involved.¹³⁹

Having examined the similarity of the benchmarks of flexibility it appears that the protection of freedom of expression in EC law is similar to that under Article 10 ECHR as a matter of scope, language, and the elements and factors within functioning and flexibility.¹⁴⁰ The implications of this finding within the **similarity argument** on the non-divergence thesis will be examined below among the general conclusions closing Part III.

5. A detour: Freedom of thought, conscience and religion in ECHR and EC law

Freedom of religion has attracted little attention in Community law. In *Lindqvist* the freedom to carry out activities contributing to religious life was absorbed by freedom of expression.¹⁴¹ In *Prais*, where Article 9 ECHR was relied upon by the applicant for the purpose of challenging the rejection to provide an alternative date for recruitment exams, the ECJ avoided addressing the alleged interference with freedom of religion. It held that substantive Community law regulated the matter sufficiently placing the burden on the individual to indicate that her religious convictions impeded her ability to take the exam on the set date.¹⁴² Consequently, although not denying the existence of

¹³⁶ Para. 3, Aral.

¹³⁷ Paras. 63-64, *Laserdisken*.

¹³⁸ Paras. 56-57, *Laserdisken*, eg.: it contributes towards establishing the internal market, supports creativity and protects authors.

¹³⁹ See also, paras. 96-111, *Laval*, on the relative importance of the right to free movement of services and the right to take collective action.

¹⁴⁰ On this basis, it is difficult to see how Woods arrived to the conclusion that there are discrepancies between the interpretations of the three-stage limitations test, p. 399, Woods: 2006.

¹⁴¹ Para. 86, *Lindqvist*. This can hardly be criticised as freedom of expression is closely related to freedom of religion the latter referring to the content of expression, see, p. 407, van Dijk and van Hoof: 1990.

¹⁴² Para. 19, *Prais*.

freedom of religion in Community law, case law has yet to provide a human rights solution that would attract the attention of the present non-divergence claim.

Chapter 8: Freedom of association in ECHR and EC law

In case of freedom of association the **similarity argument** will be underpinned within the general system of analysis, in particular, by finding similarity in defining and distinguishing between different forms of association and establishing similarity in the approaches as regards 'ordinary' associations, trade unions, and political formations. The only Community case available for the examination of flexibility will reveal an approach similar to that under ECHR law regarding both the general characteristics and the benchmarks of flexibility. Demonstrations belonging to freedom of assembly, the other freedom under Article 11 ECHR, are examined in Chapter 7 on freedom of expression.

1. Similarity in the scope of freedom of association

Freedom of association in ECHR law must satisfy different expectations. First, it concerns the personal autonomy of individuals in deciding whether to participate in actions promoting collective interests.¹ Protecting personal opinion is one of the purposes of Article 11 ECHR closely linked with the aims of freedom of expression.² Second, it fulfils social functions. Associations contribute to social cohesion by ensuring the harmonious interaction of persons and groups with different identities. Civil society strives on the participation of citizens in the democratic process through associations which integrate opinions and enable the collective pursuit of shared objectives.³

Correspondingly, Community law accepts that freedom of association is linked with expressing opinions. Freedom of expression exercised adequately within the framework of freedom of association is considered as a powerful fundamental right.⁴ Its social attributes are revealed when freedom of association is placed in the context of extensive Community regulation in the field of (collective) labour law covering Community officials and workers residing in the Member States. Many issues concerning freedom of association are addressed as questions relating to substantive Community law.⁵

¹ Para. 54, Sørensen and Rasmussen.

² *Inter alia*, para. 37, Sigurjonsson; para. 57, Young, James and Webster; para. 52, Gustafsson.

³ Para. 61, Salvation Army; para. 58, UMO Ilinden; para. 92, Gorzelik.

⁴ See, paras. 94-96, Neves; paras. 77-80, Esch-Leonhardt. See also, paras. 90-95, Laval and paras. 43-45, ITWF, placing the right to take collective action within freedom of association and expression.

⁵ See in this regard, pp. 106-112, Bercusson: 1994; pp. 128-134, Napier: 1994; pp. 95-96, Watson: 1994.

Following the distinction apparent from ECHR jurisprudence the ensuing examination of similarity will distinguish between different types of associations.

1(a): 'Ordinary' associations

The right to form associations is inherent in Article 11 ECHR. It provides that citizens should be able to form legal entities to enable collective action in an area of mutual interest.⁶ Freedom of association also refers to the general capacity of individuals to join in associations.⁷ In Community law freedom to form associations is protected as a fundamental right.⁸ The influence of Article 11 ECHR is apparent.⁹ Its purpose is to allow persons to meet freely, however, it only covers lawful meetings and does not justify infringements committed during those meetings or as a result of them.¹⁰ In line with the personal scope of Article 11 ECHR, which covers civil servants,¹¹ freedom of association in EC law extends to Community officials.¹²

Association is a concept specific to ECHR law.¹³ The autonomous functioning of the association will be decisive in determining whether it is protected under Article 11 ECHR. Full autonomy in determining its own aims, organisation, and procedure will be relevant in this respect.¹⁴ Correspondingly, freedom of association in Community law does not cover all associations or all functions of associations. In this regard the legal autonomy of associations will be taken into account.¹⁵

1(b): Trade unions

⁶ Para. 75, *Salvation Army*; para. 88, *Gorzelik*; para. 40, *Sidiropoulos*; para. 57, *UMO Ilinden*.

⁷ *Inter alia*, 6094/73, p. 5 at 7; 7729/76, p. 164 at 174.

⁸ Para. 79, *Bosman*; para. 231, *De Gaulle*; para. 137, *Montecatini*; para. 33, *Werhof*; para. 71, *Schmidberger*. Article 12 EUCFR provides that everyone has the right to freedom of association at all levels of civic matters. Article 12 read in conjunction with Article 53 EUCFR is considered to be of relevant law and practice in ECHR law, para. 37, *Sørensen and Rasmussen*.

⁹ See, para. 79, *Bosman*; para. 231, *De Gaulle*; para. 137, *Montecatini*; para. 33, *Werhof*; paras. 71-72, 77-79, *Schmidberger*.

¹⁰ Paras. 319-320, *Montedipe*; mm. para. 138, *Montecatini*.

¹¹ Para. 65, *Vogt*.

¹² Para. 5, *GUPEO*; para. 14, *Massa and Kortner*; para. 15, *Maurissen*.

¹³ Para. 100, *Chassagnou*.

¹⁴ Para. 31, *Sigurjonsson*; para. 101, *Chassagnou*. The Austrian works councils were examined in both jurisdictions. The ECtHR in *Karakurt* held that they cannot be regarded associations under ECHR law. In a similar vein, although in different circumstances, the ECJ acknowledged that they were public law institutions (this questioned their autonomy), para. 92, *Wählergruppe GZ*; para. 39, C-465/01.

¹⁵ Para. 83, *Bosman*; para. 18, *Walrave and Koch*.

The right to form and join trade unions is a special aspect of freedom of association in ECHR law.¹⁶ It includes the right to collective action to protect the interests of union members.¹⁷ The right not to join or withdraw from a trade union is also encompassed by Article 11 ECHR.¹⁸ In Community law the right of association also provides that employees are entitled to be members of unions and associations.¹⁹ Trade unions are regarded as an accepted mode of organising freedom of association.²⁰ As in ECHR law freedom of association includes the right not to join an association or union.²¹

Article 11 ECHR does not guarantee any particular treatment of trade unions by the Contracting States.²² On the other hand, the ECHR safeguards the realisation of occupational interests of individuals by trade union action the conduct and development of which the Contracting States must allow and make possible.²³ Generally, the Contracting States enjoy discretion in this respect, however, when only a specific treatment of the trade union would suffice in protecting the interests of individuals, the Contracting States will be required to act accordingly.²⁴ In such instance it must be demonstrated that the particular treatment is inherent in²⁵ and indispensable to²⁶ exercising freedom of association. In this respect, the availability of appropriate alternative means must be taken into consideration.²⁷

Community law also regards trade union rights with reservations.²⁸ Nevertheless, as in ECHR law it is accepted that freedom of trade union activity concerns protecting the

¹⁶ *Inter alia*, para. 52, Young, James and Webster; para. 38, NUBP; para. 54, Sørensen and Rasmussen.

¹⁷ *Inter alia*, para. 30, Demir; para. 39, NUBP; para. 40, SEDU; para. 36, Schmidt and Dahlström. Acknowledged in EC law: para. 86, ITWF.

¹⁸ *Inter alia*, para. 35, Sigurjonson; para. 45, Gustafsson; para. 103, Chassagnou; para. 29, Sibson.

¹⁹ Workers, paras. 118-119, Blanchard. Community officials, para. 5, GUPEO; para. 14, Massa and Kortner; para. 15, Maurissen. Employees cannot be prevented from and penalised for participating in a trade union, para. 12, Maurissen/a. With respect to revealing trade union affiliation by accessing e-mail content and participating in trade union activities, see, paras. 69-70, 77-80, Esch-Leonhardt.

²⁰ Para. 119, Blanchard.

²¹ Paras. 33, 35, Werhof, where the transferee of a business is not bound by future changes of the collective agreement; this enables him not to join a trade union under the pressure of participating in the amendment of the collective agreement.

²² *Inter alia*, para. 38, NUBP; para. 39, SEDU; para. 42, Wilson.

²³ *Inter alia*, para. 31, Demir; para. 39, NUBP; para. 40, SEDU.

²⁴ Para. 35, Demir and paras. 44-48, Wilson, such as enabling consultations or concluding collective agreements.

²⁵ Paras. 36-40, Demir.

²⁶ Para. 34, Demir; paras. 44-48, Wilson; see also para. 52, Gustafsson as regards the right not to enter into a collective agreement.

²⁷ Eg.: right to be heard in consultations v. collective bargaining, paras. 39-40, NUBP; para. 45, Gustafsson; paras. 39-40, SEDU. The same applies to the right to strike, UNISON; para. 36, Schmidt and Dahlström.

²⁸ Not all workers' rights cases involved a freedom of association claim. In the cases concerning the exclusion of foreign workers from elections in workers' chambers in Austria, considered in both jurisdictions, the ECJ held that Community law (the principle of non-discrimination) was breached (C-465/01 and Wählergruppe GZ). The ECtHR in Karakurt suggested that the rules at issue did not interfere with trade union rights provided under the ECHR. Since the ECJ did not consider freedom of association

interests of union members.²⁹ Trade unions are entitled to act in fulfilling their role by keeping employees informed, representing them against employers, and participating in consultations affecting the working conditions of employees.³⁰

However, trade unions do not enjoy unlimited entitlements under EC law. Considering that trade union rights under the ECHR are only acknowledged for the purposes of promoting the collective occupational interests of individuals, excluding trade unions in Community law from exercising rights that are only available to individual workers³¹ appears acceptable. In particular, it was ruled that the right to protect members' interests relates only to the relationship between the employer and employee, therefore, it cannot be invoked in disputes between the organisation and the employer.³²

Furthermore, the leeway provided in ECHR law to Contracting States in affording rights to trade unions and the possibility of relying on alternative means appears to approve of Community law denying a specific treatment from trade unions. It was held that (when adequate alternatives are available) freedom of association does not entail that every possible means of distributing communications amongst employees must be provided.³³

From the same perspective it is unproblematic that judicial recourse as means of protecting collective interests remains subject to the conditions determined by law for such actions.³⁴

1(c): Political formations

Freedom of association has an inevitable political connotation.³⁵ It protects the formation and the functioning of political parties.³⁶ The right to form and join political parties under Article 11 ECHR is directly influenced by its close relationship with the right to vote³⁷ and freedom of political expression.³⁸ Similarly, Community law

the judicial approaches cannot be considered as diverging. Moreover, providing protection under EC law might need to be taken into account under ECHR law, mostly when one considers that the Austrian practice had been found to breach freedom of association by the ILO and ESC supervisory bodies, see, p. 72, Ryan: 2003.

²⁹ Para. 14, Massa and Kortner; para. 10, GUPEO; paras. 13, 20-21, Maurissen. See Articles 27 and 28 EUCFR on the right to information and consultation, and collective bargaining and action.

³⁰ Paras. 14-45, 35-37, Maurissen.

³¹ Para. 119, Blanchard; para. 18, GUPEO.

³² Para. 23, Maurissen.

³³ Para. 21, *Ibid.*

³⁴ Paras. 11-12, GUPEO; para. 39, Maurissen. See also, paras. 56-58, IPSO and USE; paras. 38-39, CCESCGS (Nestlé-Perrier); para. 58, Vittel; paras. 90, 95-96, 111, UEAPME.

³⁵ See, paras. 24, 29-31, UCPT; para. 28, PPM; para. 87, Refah Partisi; para. 25, UCPT.

³⁶ Para. 33, UCPT.

³⁷ Para. 141, Zdanoka.

³⁸ See, *inter alia*, paras. 42-44, UCPT; para. 96, Refah Partisi; paras. 44-45, PCN; paras. 89, 91, Gorzelik.

acknowledges freedom of association in political matters at all levels and it holds that political parties contribute to expressing the political will of citizens.³⁹ As under ECHR law freedom of association covers the formation of political groups.⁴⁰

2. *Similarity in the language of freedom of association*

Considering that Article 11(2) ECHR permits restrictions in the general interest the language of freedom of association in ECHR law must be permissive.⁴¹ It has also been acknowledged that the Contracting States enjoy discretion in regulating and policing freedom of association.⁴² Correspondingly, in Community law freedom of association allows interferences in the public interest.⁴³ The interpretation in *Werhof* of the right not to join a trade union that provides that the right at issue must be fully safeguarded⁴⁴ might appear as contradicting ECHR law which accepts that in some circumstances compulsion could be permitted.⁴⁵ However, no problems arise as this particular interpretation was dictated by the circumstances of the case reacting to the interpretation of the relevant legal provisions rejected by the ECJ which would have unduly impeded exercising that right.⁴⁶ Moreover, it is likely that in this case freedom of association was relied upon as a principle aiding the interpretation of Community law and not as a genuine fundamental right making that the issue of language irrelevant.⁴⁷

3. *Similarity in the functioning of freedom of association*

Due to the fact that from the limited amount of cases in Community law on freedom of association only one could be relied upon for further examination, that is *De Gaulle* as point 2 above suggests, the ensuing analysis of similarity does not appear alluring. In the competition law cases the claims were dismissed as freedom of association as a matter of scope was not allowed to be used to justify illegal activities⁴⁸ which

³⁹ See Article 12 EUCFR.

⁴⁰ Para. 232, *De Gaulle*, political groups within the European Parliament on the basis of political affinity.

⁴¹ *Inter alia*, para. 59, *Young, James and Webster*; para. 104, *Chassagnou*; para. 41, *Demir*; para. 53, *Gorzelik*.

⁴² *Inter alia*, para. 59, *Salvation Army*; para. 40, *Sidiropoulos*; para. 96, *Refah Partisi*; para. 32, *UCPT*.

⁴³ Para. 232, *De Gaulle*.

⁴⁴ Para. 35, *Werhof*.

⁴⁵ *Inter alia*, para. 45, *Gustafsson*; para. 29, *Sibson*; para. 54, *Sørensen and Rasmussen*.

⁴⁶ Para. 34, *Werhof*.

⁴⁷ Paras. 36-37, *Werhof*, it was used determining the appropriate interpretation of the directive at issue.

⁴⁸ Paras. 319-320, *Montedipe*; mm. para. 138, *Montecatini*.

corresponds with the prohibition on the abuse of Convention rights under Article 17 ECHR. In *Bosman* the rules of the association at issue fell outside the scope of freedom of association as they were not necessary to the enjoyment of that right.⁴⁹ In *Blanchard* the right at issue was not regarded as a trade union right protected by freedom of association.⁵⁰ Lastly, the majority of trade union cases did not address freedom of association⁵¹ and in *Werhof* it was applied as an interpretative principle.

3(a): The general formula

It follows from Article 11(2) ECHR that in order to justify lawful interferences pursuing a legitimate aim they must be necessary in a democratic society. This entails that a fair balance must be struck between the competing interests.⁵² Case law, mostly in trade union disputes, reveals that the requirement of necessity (proportionality) would dominate the assessment.⁵³ Community law provides a similar formula asserting that limitations can be imposed on freedom of association for legitimate reasons provided that they do not constitute a disproportionate interference.⁵⁴

3(b): Lawfulness

In ECHR law the requirement of lawfulness corresponds to having a basis in domestic law.⁵⁵ It also refers to the quality of law including accessibility and foreseeability the latter requiring preciseness.⁵⁶ It might not be as articulated as under ECHR law, but lawfulness is guaranteed an examination in EC law within the human rights scrutiny. In *De Gaulle* the legal basis of the restriction on forming political groups was extensively examined.⁵⁷ At first instance the legality of the restriction was analysed on numerous grounds such as misinterpretation of the law, violation of the principles of equality and

⁴⁹ Para. 80, *Bosman*; mm. Walrave and Koch; mm. Donà.

⁵⁰ Paras. 108-109, 119, *Blanchard*.

⁵¹ See, paras. 56-58, *IPSO and USE*; paras. 38-39, *CCESCGS (Nestlé-Perrier)*; para. 90, *UEAPME*. See also, *Maurissen*; *Massa and Kortner*; *GUPEO*.

⁵² *Inter alia*, para. 58, *Sørensen and Rasmussen*; para. 45, *Gustafsson*; para. 104, *Chassagnou*; para. 44, *Tsonev*.

⁵³ Para. 41, *Sigurjonsson*; paras. 52-53, *Gustafsson*; para. 42, *Demir*; para. 60, *Young, James and Webster*.

⁵⁴ Para. 232, *De Gaulle*.

⁵⁵ *Inter alia*, para. 41, *Sigurjonsson*; para. 105, *Chassagnou*; para. 42, *Demir*; para. 59, *Rekvényi*.

⁵⁶ *Inter alia*, para. 54, *Gorzelik*; para. 57, *Refah Partisi*; para. 32, *PCN*; paras. 59, 34, *Rekvényi*.

⁵⁷ Paras. 110-119, *De Gaulle*.

proportionality, breach of freedom of association, disregard of parliamentary traditions, and the infringement and misuse of procedure.⁵⁸

3(c): Pursuing a legitimate aim

The legitimate aims listed in Article 11(2) ECHR are considered by the ECtHR as indisputable imperatives⁵⁹ or pressing social needs.⁶⁰ It follows from the general formula mentioned above that EC law includes this element. The legitimate aim of the interference, the effective functioning of the European Parliament, was considered in extent in *De Gaulle*.⁶¹

3(d): Necessity

In ECHR law necessity requires that restrictions must be proportionate to the legitimate aim.⁶² In other words, the interference must not be excessive⁶³ and arbitrary.⁶⁴ Similarly, in EC law the condition of necessity requires that the interference cannot constitute a disproportionate and unreasonable intervention impairing the very substance of freedom of association.⁶⁵

4. Similarity in the flexibility of freedom of association

4(a): The general approach

In ECHR law in cases involving ‘ordinary’ associations and political parties the margin of discretion of the Contracting States is narrow as only convincing and compelling reasons⁶⁶ or indisputable imperatives⁶⁷ can justify the interference subject to rigorous

⁵⁸ Para. 77, *De Gaulle*.

⁵⁹ Para. 113, *Chassagnou*.

⁶⁰ *Inter alia*, para. 62, *Salvation Army*; para. 47, *Tsonev*; paras. 103-104, *Refah Partisi*; para. 54, *UPCT*.

⁶¹ Paras. 145-149, 233, *De Gaulle*.

⁶² *Inter alia*, para. 63, *Young, James and Webster*; para. 112, *Chassagnou*; para. 58, *Sørensen and Rasmussen*.

⁶³ Para. 49, *NUBP*.

⁶⁴ *Inter alia*, para. 45, *Gustafsson*; para. 31, *Demir*; para. 41, *Wilson*; para. 56, *Sørensen and Rasmussen*.

⁶⁵ Para. 232, *De Gaulle*.

⁶⁶ *Inter alia*, paras. 88, 94-95, *Gorzelik*; para. 42, *UCPT*; para. 40, *Sidiropoulos*; para. 51, *Tsonev*.

⁶⁷ Para. 113, *Chassagnou*.

European supervision.⁶⁸ The Contracting States are called to use powers of restriction sparingly.⁶⁹ In the single case Community law has to offer there are not many indications as regards the intensity of judicial control. However, the relevant paragraph demonstrates that the assessment of the CFI was executed prudently keeping the choice the European Parliament under tight control.⁷⁰

4(b): The benchmarks of flexibility

As regards political formations ECHR and EC law provide similar benchmarks. The importance of the legitimate aim,⁷¹ the gravity of the interference,⁷² and the breach of formal and substantive domestic requirements⁷³ were considered in both jurisdictions in examining the proportionality of the interference. It is the obvious consequence of the general formula discussed above that both legal systems take into account whether the legitimate aim was sufficiently important to underpin the interference and whether the interference was excessive. The possibility of regulating freedom of association in the Contracting States and in the appropriate areas of Community law is responsible for the similarity of examining whether the political formation complied with the corresponding legal requirements.

Having completed the examination of similarity with the benchmarks of flexibility enables the conclusion that freedom of association attracts similar judicial approaches in ECHR and EC law in the overlapping areas. Its implications on the non-divergence thesis will be discussed below in the conclusions to Part III.

⁶⁸ *Inter alia*, para. 76, Salvation Army; para. 98, Refah Partisi; para. 46, UCPT; para. 52, Tsonev.

⁶⁹ *Inter alia*, para. 98, Refah Partisi; para. 46, UCPT; para. 45, ÖZDEP; para. 51, Tsonev.

⁷⁰ Para. 233, De Gaulle.

⁷¹ ECHR: paras. 48, 58, PCN; paras. 104-105, Refah Partisi; paras. 46-48, Rekvényi; paras. 97-103, Gorzelik. EC: paras. 145-149, 233, De Gaulle.

⁷² ECHR: paras. 133-134, Refah Partisi; paras. 105-106, Gorzelik; paras. 60-61, Tsonev; para. 60, PCN. EC: paras. 145-149, 233, De Gaulle, stating that the interference does not affect the right to organise groups.

⁷³ ECHR: paras. 55-56, Tsonev; paras. 67-69, UMO Ilinden; paras. 97-103, Gorzelik; paras. 97-98, Refah Partisi. EC: paras. 148, 233, De Gaulle, mentioning patent breach of requirements.

Chapter 9: The right to property in ECHR and EC law

In establishing the similarity of human rights adjudication concerning the right to property the following will be of significance. Apart from identifying similar forms of interferences a similar concept of proprietary rights emerges in ECHR and EC law which covers similar objects of ownership. The commercial character of the fundamental right to property is acknowledged in both jurisdictions. It is of particular importance that the various and complex benchmarks of permissible interferences do correspond.

1. Similarity in the scope of the right to property

The right to property in ECHR and EC law is covered by a considerable bulk of case law produced in disputes with highly diverse backgrounds. Fundamentally, Article 1 Protocol 1 ECHR is designed to protect against the widest variety of arbitrary deprivations of possessions and domestic measures controlling or interfering with the use of property. In Community law the right to property has been of immense importance in controlling Community economic regulation and its domestic implementation. Similar to Article 1 Protocol 1 ECHR it extends to cases of deprivation, control of use, and other interferences.¹

1(a): The concept of proprietary rights

Judicial approaches towards what can be considered as a proprietary right are similar in the two jurisdictions. Article 1 Protocol 1 ECHR embraces ownership rights such as the right to the enjoyment, the use, and the disposal of one's property.² Properties must be existing possessions in respect of which at least a legitimate expectation can be claimed. The mere hope of enjoying a proprietary right cannot be considered as a possession. The same applies to conditional claims that would lapse as a result of the non-fulfilment of

¹ See, paras. 122-124, RAFVG/ERSA; para. 19, Hauer; para. 150, BAT; para. 125, ANH; para. 150, Travelex.

² *Inter alia*, para. 63, Marckx; para. 62, Handyside.

the condition.³ Economic risks inherent in commercial activities causing loss of value or cessation of rights are also excluded.⁴

In EC law it is acknowledged that everyone has the right to own, use, dispose of, and bequeath his or her lawfully acquired possessions.⁵ As in ECHR law untenable proprietary expectations,⁶ mere commercial interests or opportunities, and temporary advantages on the market⁷ are not considered as property rights. Losses resulting from economic risks or changes in market trends are not protected.⁸ It follows that in both legal systems untenable expectations, advantages, profits, and positions exposed to the uncertainties of the market are not considered as possessions.

As mentioned above, a legitimate expectation of obtaining the effective enjoyment of property rights falls under the scope of Article 1 Protocol 1 ECHR. The legitimate expectation must relate to an asset, including claims, which has sufficient basis in national law.⁹ According to Popelier the expectation must be based on a legal provision, an administrative act, or a court ruling and claims must be awarded in an enforceable final decision.¹⁰

Legitimate expectations are considered in a similar manner in EC law. It was held that the protection of legitimate expectations requires specific assurances from acts or omissions by authorities leading to reasonable expectations.¹¹ On this basis, a mere advantage enjoyed in a given time¹² or an existing economic situation, a market share,¹³ cannot be regarded a legitimate expectation. Consequently, both jurisdictions acknowledge legitimate expectations relating to palpable proprietary interests subject to legal assurances given in advance.

³ *Inter alia*, para. 83, Prince Hans-Adams; para. 17, Malhous; para. 63, Anheuser-Busch.

⁴ *Inter alia*, para. 59, Pine Valley; para. 70, Gasus Dossier; para. 54, Fredin; para. 62, Bäck.

⁵ Article 17 EUCFR.

⁶ The right to property does not comprehend the right to dispose, for profit, of an advantage which does not derive from the assets or occupational activity of the person concerned, para. 19, Bostock; para. 99, O'Dwyer; para. 27, Von Deetzen. The profitability of an undertaking is not protected, paras. 55-57, Atlanta, T-521/93; paras. 54-55 Atlanta, C-104/97 P; paras. 49-59, O'Dwyer.

⁷ Paras. 62-63, Atlanta, T-521/93; para. 15, Nold; para. 23, Winzersekt. A particular volume of business or a specific share of a given market is not guaranteed, para. 62, Atlanta, T-521/93.

⁸ Para. 22, Biovilac; paras. 84-85, Booker.

⁹ Paras. 48, 51-52, Kopecky; para. 66, Maurice; para. 68, Draon; para. 65, Anheuser-Busch.

¹⁰ Pp. 12-18, Popelier: 2006. They may arise from the ((consistent (paras. 61-65, Jokela)) application of the law by state authorities (para. 42, Pressos; para. 70, National and Provincial Building Society) or from contractual obligations (para. 68, Bäck).

¹¹ *Inter alia*, para. 57, Atlanta, T-521/93; para. 55, Atlanta, C-104/97 P; para. 58, Dubois; paras. 146, 148, Travelex; para. 57, O'Dwyer.

¹² Para. 22, Eridania; para. 23, Biovilac; para. 66, Dubois.

¹³ Para. 77, C-122/95; para. 73, Swedish Match; paras. 79-80, C-280/93; para. 18, Rau; para. 22, Eridania. Future changes in the legal environment do not invoke a legitimate expectation to maintain the existing situation, paras. 53-54, O'Dwyer; para. 44, Delacre; para. 25, IFA.

1(b): The commercial nature of proprietary rights

In Community law most interferences with the right to property are put into practice for the purpose of furthering the economic aims of the European Communities.¹⁴ The right to property is often intertwined with the right to pursue an economic activity.¹⁵ However, the commercial character of the right to property is not exclusive as interferences with economic activities may not serve exclusively economic purposes.¹⁶ Under ECHR law the right to property covers natural and legal persons, individuals and businesses.¹⁷ It is suggested that it has “taken on a commercial character and been used extensively by business in the advancement of its interests.”¹⁸ The Strasbourg organs have been called to adjudicate in many cases concerning general economic policy or individual interferences hindering the owner’s ability to pursue a business activity.¹⁹ Impediments to the ability to run a business are regarded as interferences under Article 1 Protocol 1 ECHR.²⁰ Therefore, it seems appropriate to conclude that the legal systems at issue consider property as an important element of commercial life giving the fundamental right to property a commercial flavour.

1(c): The objects of proprietary rights

‘Possessions’ is an autonomous concept of ECHR law defined in broad terms. Apart from rights *in rem*, physical goods, things with economic value under the control of a person, movable and immovable property, possessions include certain rights and interests constituting assets.²¹ In this respect, it needs to be examined whether the person concerned has an entitlement to a substantive interest.²²

¹⁴ Pp. 1-2, 248-249, von Milczewski: 1994.

¹⁵ *Inter alia*, paras. 19, 32, Hauer; paras. 70-74, SAM; paras. 126-131, Schröder; para. 56, NFFO; paras. 98-102, O’Dwyer; paras. 16-17, Kühn; para. 30, Duff; para. 22, Winzersekt; paras. 125-129, ANH; paras. 73-74, Swedish Match; para. 48, Springer; para. 8 Keller; paras. 20-22, Eridania.

¹⁶ Public and animal health, para. 126, BAT; paras. 59-60, Schröder; para. 69, Booker; para. 68, ANH; para. 31, Swedish Match. Interests of the international community, Bosphorus, ECJ; Yusuf; Ayadi; Kadi and Invest.

¹⁷ P. 78, Harris: 1999.

¹⁸ P. 201, Ovey and White: 2002. Property as understood in ECHR law is essential to the functioning of the market, p. 167, van Banning: 2002 and pp. 6-7, Bratza: 2000.

¹⁹ Eg.: in connection with business licences, planning law, consolidation of economic sectors, taxation, rent reform, agricultural reform, shop opening hours, interferences in bankruptcy cases or with banking contracts.

²⁰ Para. 49, Rosenzweig.

²¹ See, pp. 144-162, Çoban: 2004. See also, pp. 4-8, Sermet: 1990, mentioning rights *in rem*, *in personam* and intangible property.

²² *Inter alia*, para. 53, Gasus Dossier; para. 22, Kechko; para. 129, Broniowski; para. 54, Iatridis.

Although Community law does not provide such general assessment of possessions, it appears that a similarly wide concept is applicable. Besides mobile and immobile property the protection of innovations²³ and company data (business secrets)²⁴ were also held to coincide with the right to property. Intellectual property rights enjoy protection in both jurisdictions on the level of fundamental rights²⁵ subject to the specific rules of intellectual property law.²⁶ Interpreting ‘possessions’ beyond rights *in rem* led to embracing the following common areas within the right to property in ECHR and EC law: ownership of companies,²⁷ goodwill in business,²⁸ fishing rights,²⁹ rights of the user,³⁰ public law entitlements,³¹ contractual rights,³² and debts.³³

Their inspirations may be different but it appears that the scope of the right to property in ECHR and EC law attracts similar judicial approaches. This is not affected by the fact that the scope of protection in Community law is confined to the limits of the Community legal order. In *Annibaldi* involving an obvious case under the right to property, it concerned expropriation without compensation, the ECJ refused to deal with the issue as the national measure fell outside the ambit of Community law.³⁴ The refusal of the ECJ cannot be interpreted as meaning that EC law fails to provide protection against one of the primordial violations of the right to property. Instead, it signifies the inevitable division of competences between Community and national law in protecting fundamental rights where the human rights dispute will have to be resolved on grounds of national law by the domestic court.

²³ Para. 78, Generics (concerning the exclusive use of test results of a medicinal product).

²⁴ Paras. 43-44, Danzer.

²⁵ EC: para. 65, Laserdisken; para. 62, Promusicae. ECHR: see, para. 72, Anheuser-Busch; Smith Kline; *mm.* para. 70-71, BAT, ECtHR; p. 571, Lenzing AG; point 4, Aral.

²⁶ ECHR: see, Anheuser-Busch; Smith Kline. EC: see, Metronome Musik; para. 139, Travelex.

²⁷ ECHR: see, Lithgow; para. 92, Sovtransavto; Agrotexim; Jorge Nina Jorge. EC: see, Invest.

²⁸ ECHR: see, para. 41, Van Marle; para. 54, Iatridis. EC: see, para. 150, Travelex.

²⁹ ECHR: see, Banér. EC: see, NFFO.

³⁰ ECHR: see, Sildedzis, Immobiliare Saffi, Sporrang and Lönnroth. EC: see, Bosphorus, ECJ, Yusuf, Kadi, Ayadi, Hassan, Hauer, Schröder, Biovilac, Boehringer, Booker, Standley.

³¹ ECHR: *inter alia*, para. 41, Gaygusuz; para. 26, Solodyuk; para. 37, Koua Poirrez, ECtHR; paras. 33-34, Azinas; para. 30, Walker; para. 32, Barrow; para. 21, Pearson. EC: *mm.* para. 10, Belbouab; *mm.* para. 22, Vittorio Testa.

³² ECHR: see, para. 60, ASITO. EC: see, Fabricom.

³³ ECHR: *inter alia*, para. 57, Popov (2); para. 40, Burdov; para. 59, ASITO; para. 104, Kirilova. EC: see Dorsch Consult, T-184/95; para. 150, Travelex.

³⁴ Paras. 12-24, *Annibaldi*, jurisdiction was also denied on grounds that EC law does not provide rules on the expropriation of property and the Community rules invoked by the applicant did not aim at regulating ownership.

Moreover, it is not a case for divergence, as interpreted in the present context, when the right to property issue is addressed differently as a matter of substantive Community law and under Article 1 Protocol 1 ECHR. In *Koua Poirrez* the ECJ declined that Community law precludes the refusal to grant a state benefit when the freedom of movement has never been exercised.³⁵ In contrast, the ECtHR went on to conclude that the refusal was in breach of Article 14 ECHR read together with the right to property.³⁶ This difference, attributed to the limitedness of the Community legal order, is unproblematic as Community law cannot be held responsible for the failure to provide protection in a dispute the resolution of which belongs under the scope of another legal system. Basically, it cannot be required from Community law to extend beyond its competence to protect proprietary rights.

2. *Similarity in the language of the right to property*

Although the text of Article 1 Protocol 1 ECHR may appear to admit less convincingly the possibility of justifiable restrictions, its first paragraph permits deprivation of possessions and the second allows controlling the use of property. Having undergone gradual development the structure of the right to property now follows that of Articles 8 to 11 of the ECHR³⁷ which expressly provides for restrictions. This corresponds with the perception in the Contracting States that the right to property can be subject to limitations serving the common good.³⁸ It follows that the right to property attracts a permissive language in ECHR law.

In Community law it is evident from case law that the right to property is a fundamental right that is subject to legitimate and proportionate restrictions. Even the very early case law, in which the right was not expressly formulated, examined whether the Community measures in question were necessary, appropriate, suitable, and proportionate.³⁹ The ensuing *Nold* formula adopted a clearly permissive language as the ECJ held that rights

³⁵ Paras. 10-15, *Koua Poirrez*, ECJ.

³⁶ Paras. 46-49, *Koua Poirrez*, ECtHR.

³⁷ P. 300, Ovey and White: 2002.

³⁸ P. 454, van Dijk and van Hoof: 1990. See also, para. 3, *JDO Zekia et al*, *Sporrong and Lönnroth* and para. 10, *DO Costa*, *Chassagnou*. The social functions of property determine the limits of the fundamental right to property, pp. 571-572, 579-580, Schermers: Wiarda.

³⁹ Para. 12, *IHG*; para. 5, *Köster*; para. 2, *Deutsche Tradax*.

of ownership are not unfettered prerogatives, and they can be subject to necessary limitations in the public interest.⁴⁰

However, the right to property in EC may not always appear as attracting a permissive language. In certain cases the ECJ resorted to instructing the national authorities in preparing their decisions to observe the right to respect for property not mentioning whether this duty can be subject to limitations.⁴¹ In *Tempelman* the ECJ held within the assessment of proportionality that it is necessary for the Member States to take into account the right to property.⁴² It is apparent that in these cases the ECJ was not concerned with delivering genuine human rights solutions. Instead, it drew attention to the fact that the national authorities' solution could affect the right to property which should be addressed within their jurisdiction. It follows that the right to property was utilised as a principle aiding the interpretation of domestic authorities when applying Community law in case of which the lack of permissive language cannot be called to account.

The judgment in *Laserdisken* deserves a separate examination. Here, the ECJ found that freedom of expression could be justifiably restricted in the light of the need to protect the fundamental right to property which involves copyright.⁴³ The formulation of the judgment may give the impression that the right to property attracted a prohibitive language. However, considering that it concerned the collision of fundamental rights, where the right to property was utilised as the legitimate aim underpinning the interference with free speech, the usual permissive language was rightly inapplicable. In other circumstances, it could be the right to property the possible restrictions of which were to be considered in a collision with another fundamental right.⁴⁴ Finally, although in *Vittorio Testa* the ECJ appeared to refer to the right to property as an absolute right,⁴⁵ in reality, by considering the interpretation of substantive Community law it affirmed that minimal and proportionate interferences are accepted.⁴⁶

3. Similarity in the functioning of the right to property

⁴⁰ Para. 14, *Nold*. See also, paras. 4-5, *Hauer* influenced by Article 1 Protocol 1 ECHR; and Article 17 EUCFR confirming that the deprivation of property could be acceptable and the use of property may be regulated by law.

⁴¹ Para. 85, *Gloszczuk*; para. 90, *Kondova*; para. 83, *Barkoci*.

⁴² Para. 48, *Tempelman*.

⁴³ Para. 65, *Laserdisken*. See Part III/a/Chapter 7 on freedom of expression and collision of rights cases.

⁴⁴ Para. 21, *Metronome Musik*.

⁴⁵ Para. 18, *Vittorio Testa*.

⁴⁶ Paras. 21-22, *Vittorio Testa*. See also, paras. 8 and 10, *Belbouab*.

3(a): The general formula

As regards the permissibility of interferences Article 1 Protocol 1 ECHR requires striking a fair balance between the demands of the general interest and the individual's right to property.⁴⁷ A uniform general formula has now been established as regards the different interferences of expropriation, control of use and pure interference.⁴⁸ It provides that interferences must be in accordance with the law, must meet a legitimate aim, and must be proportionate by striking a fair balance between the individual and collective interest.⁴⁹

Correspondingly, in EC law the *Nold* formula provides that restrictions to the right to property must correspond to objectives of general interest and that they must not constitute a disproportionate and intolerable interference that infringes the very substance of the right.⁵⁰ When the right to property was considered as part of *jus cogens* under international law⁵¹ it was held that no one can be deprived arbitrarily of his property⁵² meaning that an act of deprivation must correspond to a detailed test of appropriateness or proportionality.⁵³ ECHR law has been increasingly influencing the general formula under Community law.⁵⁴

3(b): Lawfulness

Despite the apparent differences, the lawfulness of interferences is a requirement observed in both jurisdictions. In ECHR law interferences must be lawful as provided in national law.⁵⁵ In this regard, the requirements of being compatible with the rule of law, accessibility, preciseness, and foreseeability must be observed and appropriate procedural guaranties must be in place.⁵⁶ The rule of law representing a quality of law

⁴⁷ Para. 69, Sporrang and Lönnroth.

⁴⁸ Pp. 318-319, Ovey and White: 2002. See, paras. 134-136, Broniowski.

⁴⁹ P. 319, *ibid*.

⁵⁰ Para. 14, *Nold*. See, *inter alia*, para. 15, Schröder; para. 73, Süderdithmarschen; para. 126, ANH.

⁵¹ Paras. 286, 288, Yusuf; paras. 235, 237, Kadi; para. 92, Hassan.

⁵² Paras. 292-293, Yusuf; paras. 241-242, Kadi; para. 92, Hassan.

⁵³ Paras. 294-302, Yusuf; paras. 243-251, Kadi; para. 92, Hassan.

⁵⁴ It started with paras. 18-19, Hauer; some 20 years later it was revived at para. 138, *Travelex* to give way to a more profound utilisation at para. 125, ANH and paras. 120-125, *RAFG/ERSA* (at para. 125, recalling the general formula under ECHR law).

⁵⁵ *Inter alia*, para. 52, Rosenzweig; para. 42, Hentrich; para. 68, Sporrang and Lönnroth; para. 81, Jahn.

⁵⁶ *Inter alia*, para. 42, Hentrich; para. 110, Lithgow; para. 50, Fredin; paras. 109-110, Beyeler.

excludes arbitrary and manifestly erroneous action.⁵⁷ A fair procedure and legal protection are also required in this regard.⁵⁸

In Community law, although with exceptions,⁵⁹ the general formula offered by case law is silent on this requirement. However, most disputes involving the right to property address the lawfulness of the measures involved as a general matter.⁶⁰ In the procedures for annulment, for damages, and for preliminary ruling the violation of the right to property is only one among the many grounds of questioning the validity of Community measures. In enforcement actions the illegality of the Community measure at issue can be raised. Consequently, when the applicable procedures concern fundamentally the question of legality, Community law appears to provide for the condition of being in accordance with the law, in particular, that interferences are subject to the rule of law.

In EC property cases the comprehensive examination of lawfulness was ensured on the basis of the following grounds of illegality: misuse of powers and exceeding powers,⁶¹ inadequate reasoning,⁶² inappropriate legal basis,⁶³ breaching the limits of competence,⁶⁴ infringement of EC law,⁶⁵ breach of procedure,⁶⁶ and legitimate expectations.⁶⁷ Proportionality and equality were often regarded as separate heads of review.⁶⁸

It must also be mentioned that when the principle of legitimate expectations serves as a head of review, since it is regarded as a corollary of the principle of legal certainty, it is required from Community measures to be clear, precise, and foreseeable⁶⁹ as required under ECHR law. The lack of inappropriate foreseeability of the future effects of legal provisions can induce an examination whether the provision is manifestly incorrect.⁷⁰

Similarity with respect to the condition of lawfulness is further enhanced by the fact that in a recent case under the influence of ECHR law the question of lawfulness was

⁵⁷ *Inter alia*, para. 67, James; para. 58, Iatridis; para. 147, Broniowski; paras. 37-40, Saliba.

⁵⁸ *Inter alia*, paras. 47-50, Håkansson and Stureson; para. 50, Fredin; para. 45 Jokela; para. 55, AGOSI.

⁵⁹ Para. 125, RAFVG/ERSA. See also, Article 17 EUCFR.

⁶⁰ See in this respect, pp. 272-273, von Milczewski: 1994. Even the implementing measures of a general legislation must observe the requirement of lawfulness, paras. 43, 45, Atlanta, C-104/97 P.

⁶¹ See, BAT; Case 116/82; Swedish Match; O'Dwyer. At para. 3, Boehringer the ECJ held that the misuse of power entails that there has been unlawful interference with fundamental rights.

⁶² See, Pfizer; Nold; Swedish Match; BAT, ANH; Eridania.

⁶³ See, RAFVG/ERSA; BAT; ANH; Schröder; Schröder; Swedish Match; ABNA; Danzer.

⁶⁴ See, RAFVG/ERSA; Yusuf; Kadi; Ayadi; Hassan.

⁶⁵ See, Pfizer; RAFVG/ERSA; BAT; ANH; Biovilac; SAM; Schröder; Von Deentzen; O'Dwyer.

⁶⁶ See, C-280/93; Süderdithmarschen; Eridania.

⁶⁷ See, Biovilac; Dubois; Von Deentzen; Travellex; Swedish Match; O'Dwyer; Kühn; IFA; Duff; Pfizer.

⁶⁸ See, *inter alia*, NFFO; BAT, ANH; Von Deentzen; Travellex; SAFA; Rau; O'Dwyer; Kühn; IFA.

Similarly, in many property cases under the ECHR the principle of equality embedded in Article 14 ECHR affects the outcome of the case, see, pp. 235-244, Çoban: 2004.

⁶⁹ Para. 20, Duff; paras. 84-85, AIMA; paras. 51-52, Mulligan. See in this respect, pp. 265-266, Tridimas: 2006.

⁷⁰ Para. 90, C-280/93. In Rau the principle of sufficient degree of legislative precisuity was addressed.

considered on its own right within the requirement of being in accordance with the law.⁷¹ Another point of similarity is that in both jurisdictions the issue of lawfulness may be left to be determined when deciding whether the interference is justifiable.⁷²

3(c): Serving the general interest

Being in the general/public interest is a requirement observed in both jurisdictions.⁷³ In ECHR law a wide variety of interests are accepted and only the lack of consistent and genuine policy considerations will lead to the breach of this requirement.⁷⁴ In Community law there is little guidance as to the choice of general interest, but, generally, the detailed examination of the legal and policy context of the measure will suffice.⁷⁵ In both jurisdictions this element is considered usually within the examination of necessity/proportionality.⁷⁶

3(d): Necessity

Necessity has been considered as a requirement including similar considerations in the two jurisdictions.⁷⁷ In ECHR law according to the prevalent formula provided in *Sporrong and Lönnroth* a fair balance must be struck between the general interest and the individual's right to property.⁷⁸ In *James* the ECtHR added that a fair balance required that there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.⁷⁹ In Community law the

⁷¹ Para. 125, RAFVG/ERSA (the ECJ declared the measure lawful as its unlawfulness was not proved on other, traditional, grounds of illegality).

⁷² ECHR: para. 154, Broniowski. EC: paras. 19-29, Hauer; paras. 78-85, Generics; paras. 24-28, Winzersekt; paras. 57-63, Invest; paras. 8-18, Keller; paras. 22, SAFA; paras. 22-25, Bosphorus, ECJ; para. 123, Ayadi; para. 9, Metronome Musik. As regards national measures, paras. 22-23, Wachauf; paras. 88-95, Booker; paras. 56-60, NFFO.

⁷³ ECHR: Article 1 Protocol 1 ECHR mentions it. EC: *supra* Point 3(a). It also applies to national measures within the ambit of EC law, paras. 19-20, 56, NFFO; paras. 88-95, Booker. See, para. 139, Travelex, stating that the legitimate interest may be inherent in the proprietary right as its specificity could provide the reasons for potential limitations as in case of intellectual property rights.

⁷⁴ Para. 63, Rosenzweig; para. 79, Brumarescu; para. 26, Kliafas.

⁷⁵ See, *inter alia*, paras. 24-27, Hauer; paras. 18-19, Wachauf; paras. 127-129, RAFVG/ERSA; paras. 150-153, BAT; paras. 68-70, ANH; paras. 71-78, Booker; paras. 22-26, Bosphorus, ECJ.

⁷⁶ ECHR: see, p. 584, Van Dijk and Van Hoof: 1990. EC: *inter alia*, paras. 22-26, Bosphorus, ECJ; paras. 24-29, Hauer; para. 75, Dubois; para. 18, Schröder; para. 29, Von Deentzen; paras. 57-63, Invest; para. 30, Duff; paras. 66-85, Generics.

⁷⁷ Pp. 277-278, von Milczewski: 1994.

⁷⁸ Para. 69, *Sporrong and Lönnroth*. See, *inter alia*, para. 93, Scordino(1); para. 27, Kliafas; para. 35, Yiltas Yildiz; para. 35, Pressos; para. 70, Holy Monasteries; para. 59, *Tre Traktörer*; para. 55, *Jacobsson*.

⁷⁹ Para. 50, *James*. Necessity and proportionality are equivalent concepts, para. 202, *Mellacher*.

requirement of proportionality of interferences has been confirmed since the early days of right to property adjudication.⁸⁰ Establishing a fair balance between private rights and public interests through ensuring the proportionality of means and ends is a requirement included in the general formula.⁸¹ It was held that interferences must be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it.⁸² The right to property scrutiny may rely on the conclusions of proportionality utilised as a separate ground of review.⁸³

4. Similarity in the flexibility of the right to property

4(a): The general approach

Under Article 1 Protocol 1 ECHR in complex and difficult areas of policy the Contracting States enjoy a wide margin of appreciation subject to the supervision whether the requisite balance was maintained in a manner consonant with the applicants' right to property.⁸⁴ Necessity in right to property cases was characterised as allowing "almost unlimited power to impose restrictions".⁸⁵ Generally, any justification must consider the principle of peaceful enjoyment of possessions and the requirement of effectiveness of ECHR rights.⁸⁶ The person concerned must not be forced to bear an individual and excessive burden.⁸⁷

As under the ECHR in EC law a wider possibility to admit interferences is acknowledged in dealing with measures enacted under broad discretionary powers which involve political, economic, and social choices and complex assessments. Judicial intervention is equally restricted as in this regard only manifest

⁸⁰ *Supra* fn. 39.

⁸¹ *Supra* fn. 50.

⁸² *Inter alia*, para. 122, BAT; para. 111, ANH; para. 21, Case 116/82; para. 21, Schröder; para. 67, SAM; para. 47, Swedish Match; paras. 16-17, Keller; para. 66, Generics; paras. 58-59, NFFO; para. 26, Metronome Musik.

⁸³ *Inter alia*, para. 88, ABNA; paras. 410-456, 458, Pfizer; para. 57, Standley; paras. 43-44, Danzer; paras. 66-74, Generics; para. 74, Swedish Match; para. 129, ANH; para. 139, Schröder.

⁸⁴ *Inter alia*, para. 69, Sporrang and Lönnroth; paras. 149-151, 182, Broniowski; paras. 45-46, Saliba; para. 77, Elia; para. 56, James; para. 52, AGOSI; para. 93, Jahn; para. 69, Zvolisky.

⁸⁵ P. 464, van Dijk and van Hoof: 1990. Virtually no other human right is subject to so many limitations even to deprivation, pp. 2-4, van Banning: 2002.

⁸⁶ Para. 63, Sporrang and Lönnroth; para. 151, Broniowski; para. 76, Brumarescu; para. 61, Jokela.

⁸⁷ Para. 73, Sporrang and Lönnroth.

inappropriateness would lead Community courts to strike down interferences⁸⁸ and their scrutiny is limited to examining whether there was a patent error or a misuse of powers.⁸⁹

Similarity in the general approaches to flexibility is further accentuated by that when ECHR law mentions bearing an individual and excessive burden EC law speaks of intolerable interferences.⁹⁰ The principle of peaceful enjoyment of possessions and the requirement of practical and effective property rights under ECHR law are matched by the clause in EC law that interferences must leave the substance of the right untouched.⁹¹ Nonetheless, considering that this is the most the examination of general approaches to flexibility can offer, similarity can only be established satisfactorily in this regard by comparing the numerous benchmarks of flexibility.

4(b): The benchmarks of flexibility

The Strasbourg organs have considered the following benchmarks.⁹²

- a. Importance of the general interest.⁹³
- b. Individual and excessive burden on the individual;⁹⁴ excessive length of interference.⁹⁵
- c. Availability of alternative solutions⁹⁶ which represent a well-founded choice of action.⁹⁷
- d. Compensation in expropriation cases.⁹⁸
- e. Economic risks taken deliberately.⁹⁹

⁸⁸ *Inter alia*, para. 131, RAFVG/ERSA; para. 21, Winzersekt; para. 17, Biovilac; para. 123, BAT; para. 22, Schröder; para. 57, NFFO; para. 48, Swedish Match; para. 90, C-280/93; para. 412, Pfizer; para. 69, ABNA.

⁸⁹ Para. 57, NFFO; para. 67, Generics. On the restricted intervention of Community courts, see, pp. 110-112, von Milczewski: 1994.

⁹⁰ Para. 14, Nold; *supra* fn. 50.

⁹¹ Para. 14, Nold; *supra* fn. 50.

⁹² For a more concentrated version, see, pp. 18-19, Winisdoerffer: 1998.

⁹³ *Inter alia*, paras. 46-47, Saliba; paras. 40-42, Air Canada; paras. 51-57, James; paras. 52-54, Immobiliare Saffi; paras. 36-40, Kopecky; paras. 111-112, Von Maltzan; paras. 99, 116, Jahn; paras. 162-163, Broniowski.

⁹⁴ Para. 73, Sporong and Lönnroth; para. 57, Popov (2); para. 75, Brumarescu; para. 87, Maurice.

⁹⁵ *Inter alia*, paras. 114, 120, 123, Kirilova; para. 29, Akkus; paras. 37-39, Buffalo; para. 54, Almeida Garrett; para. 58, Jorge Nina Jorge; paras. 151, 185, Broniowski; para. 120, Beyeler; para. 79, Brumarescu.

⁹⁶ *Inter alia*, paras. 114, 123, Kirilova; para. 82, Chassagnou; para. 45, Asmundsson; para. 68, Poiss.

⁹⁷ Paras. 56-57, Rosenzweig; para. 63, Popov.

⁹⁸ It depends on the necessities and circumstances of the case, p. 78, Peukert: 1981. See also, para. 38, Yiltas Yildiz; para. 112, Kirilova; paras. 29-31; Akkus; para. 186, Broniowski.

- f. Legitimate expectations.¹⁰⁰
- g. Fair procedure, (access to) adequate judicial protection and effective remedies,¹⁰¹ practical and effective safeguards.¹⁰² Passivity and persistent ignorance from authorities,¹⁰³ the lack of cooperation,¹⁰⁴ or the outright negation of claims may also be inconsistent with the requirements.¹⁰⁵

Community courts have taken into account similar factors.

- a. Importance of the general interest.¹⁰⁶
- b. Excessive and individual financial or other burden on the individual;¹⁰⁷ excessive length and gravity of the interference.¹⁰⁸
- c. The existence of a less (the least) restrictive alternative solution¹⁰⁹ which is sufficiently effective to achieve the given aim.¹¹⁰
- d. Compensation for expropriation.¹¹¹
- e. Economic risks and changes in market trends.¹¹²
- f. Legitimate expectations.¹¹³
- g. Fair procedure and adequate remedies. The principles of sound administration, legal certainty, and effective remedies, the transparency, reasonable length and

⁹⁹ Paras. 53-55, Håkansson and Sturesson; para. 59, Pine Valley; para. 70, Gasus Dossier; para. 54, Fredin.

¹⁰⁰ Para. 58, Rosenzweig; para. 51, Slidedzis; para. 98, Former King of Greece.

¹⁰¹ *Inter alia*, para. 61, Dangeville; para. 64, Loizidou; para. 67, Poiss; para. 54, Jokela; paras. 70-74, Sporrang and Lönnroth; paras. 59-61, Rosenzweig; paras. 48, 73, J.A.PYE; para. 55, AGOSI; para. 56, Bäck. Even delay in compensation could be mitigated by effective remedies, para. 57, James.

¹⁰² Para. 63, Sporrang and Lönnroth; paras. 151, 184-185, Broniowski; paras. 110, 119-121, Beyeler; para. 98, Sovtransavto.

¹⁰³ Para. 109, Kirilova.

¹⁰⁴ Para. 121, Kirilova.

¹⁰⁵ Para. 61, Dangeville.

¹⁰⁶ *Inter alia*, para. 29, Von Deentzen; paras. 68-70, ANH; paras. 49-54, Swedish Match; paras. 136-137, BAT; para. 79, Booker; paras. 127-128, Schröder; para. 29, Hauer; para. 75, Dubois; paras. 22-26, Bosphorus, ECJ; paras. 57-63, Invest; paras. 92, 99-100, Hassan; paras. 295-298, Yusuf; paras. 244-247, Kadi.

¹⁰⁷ Para. 43, Danzer; para. 21, Vittorio Testa. Minor inconveniences are not relevant, para. 18, Schröder.

¹⁰⁸ Para. 28, Hauer; para. 299, Yusuf; para. 248, Kadi; paras. 105-109, Hassan; para. 116, Ayadi.

¹⁰⁹ Para. 138, Schröder; paras. 58-59, NFFO; para. 26, Metronome Musik; para. 43, Danzer.

¹¹⁰ Paras. 128-132, BAT; paras. 140-142, Schröder; para. 26, Metronome Musik; paras. 56-57, Swedish Match.

¹¹¹ Para. 31, IFA. Article 17 EUCFR provides that fair compensation must be paid good time. In Community law the payment of compensation could be ensured as a matter of domestic law when Community law only supplemented the action of Member States, para. 77, Dubois. In such case the national courts are required to interpret the Community measure in a way so that compensation will be paid, paras. 20-21, Wachauf. No compensation is required when no deprivation of property took place, but the undertakings were enabled to continue profitably their activities on their property, paras. 79-85, Booker.

¹¹² Para. 22, Biovilac; paras. 84-85, Booker.

¹¹³ Paras. 55-57, Atlanta, T-521/93; paras. 52-55, Atlanta, C-104/97 P; paras. 61-70, Dubois; paras. 13-16, Kühn.

accessibility of procedures,¹¹⁴ and effective safeguards such as the possibility of review of the interference¹¹⁵ must be considered in this respect.

ECHR law may draw its benchmarks from an immense diversity of facts, circumstances, and arguments, but this does not prevent Community courts from presenting a similar catalogue of factors that influence the justification of interferences with the right to property. Similarity in the benchmarks of flexibility is not surprising as some benchmarks follow directly from the requirement of establishing a fair balance between the countervailing interests. Taking into account the importance of the general interest invoked or the existence of alternative, less onerous means are obvious elements of a proportionality test.

The burden placed on the person concerned and the gravity of the interference are factors common to both legal systems. They also can be regarded as inherent elements of establishing a fair balance. In this respect, the prudent behaviour of the person concerned, his actual situation and abilities,¹¹⁶ or the imposition of interferences that take into account the interests of the person concerned¹¹⁷ can be relevant in both jurisdictions.

The payment of compensation is also considered essential in both legal orders accepting that exceptional circumstances could justify shortcomings in this respect.¹¹⁸ It comes from the concept of proprietary rights common to both jurisdictions¹¹⁹ that legitimate expectations and advantages subject to economic risk/change are part of the assessment of necessity. Finally, it is apparent that for the purpose of excluding arbitrary interferences both ECHR and EC law value procedural fairness and safeguards and raise similar problems which fall within the principle of sound administration.

¹¹⁴ Paras. 76-88, ANH.

¹¹⁵ Para. 300, Yusuf; para. 249, Kadi; paras. 105-109, Hassan; para. 116, Ayadi; para. 90, ANH.

¹¹⁶ ECHR: see, *inter alia*, para. 62, Rosenzweig; para. 35, Solodyuk; paras. 110-111, Kirlova; paras. 151, 181, Broniowski; paras. 114, 116, Beyeler; para. 82, Chassagnou; para. 70, J.A.PYE; para. 79, Brumarescu; paras. 58-59, Wittek. EC: see, *inter alia*, paras. 80-82, Booker; para. 152, BAT; paras. 132-133, RAFVG/ERSA; para. 130, Schröder; para. 29, Von Deentzen; paras. 459-461, Pfizer; para. 290, Yusuf, para. 239, Kadi; paras. 105-109, Hassan; para. 29, IFA; paras. 129-133, Ayadi.

¹¹⁷ ECHR, see, paras. 73-74, Stran Greek Refineries; paras. 42-43, Pressos; para. 55, Stere; paras. 82-85, Draon. EC: see, paras. 73, 83, Generics.

¹¹⁸ ECHR: *inter alia*, paras. 97-98, Fomer King of Greece; paras. 109-117, Jahn; para. 99, Scordino (1). EC: paras. 79-85, Booker, stating that the lack of compensation itself does not deem the interference disproportionate and intolerable, provided that the facts and circumstances of the case ensure proportionality otherwise. Generally, overlap in regard to compensation is limited as Community law is rarely connected directly to powers of expropriation, therefore, it does not address this matter as comprehensively as ECHR law.

¹¹⁹ *Supra* point 1(a).

Closing the comparison of flexibility with establishing the similarity of the benchmarks of flexibility enables the conclusion that the right to property is provided protection in EC law similar to that under Article 1 Protocol 1 ECHR. Its general implications on the **similarity argument** will be considered below within the conclusions to Part III.

Chapter 10: The right to free elections in ECHR and EC law

The similarity of the judicial appraisal of the right to free elections in Community law to that under ECHR law is the consequence of the palpable influence of ECtHR jurisprudence on the case law of Community courts. In particular, the two jurisdictions provide similar solutions as regards European elections as a matter of scope and approach justifying interferences with the right to free elections in a similar manner.

1. Similarity in the scope of the right to free elections

The right to free elections enshrined in Article 3 Protocol 1 ECHR establishes the duty of the Contracting States to hold free elections at reasonable intervals by secret ballots the specific conditions of which are determined in domestic law. The emphasis on the obligation of the Contracting States instead of the entitlements of individuals aims at preventing interferences with the right at issue.¹ It is now accepted that the right to free elections includes the subjective rights to vote (active aspect)² and to stand for an election (passive aspect).³ In Community law the right to vote and stand for an election is associated with the elections of the European Parliament. European elections are regulated on two levels Articles 189 and 190 TEC providing a general framework and national measures regulating the actual exercise of those rights.⁴ The influence of Article 3 Protocol 1 ECHR is considerable.⁵

The right to free elections concerns choosing the legislature. 'Legislature' is an autonomous concept of ECHR law which, apart from national parliaments, includes legislative bodies with influence (legitimacy) within the given constitutional structure.⁶ More importantly, in both jurisdictions the European Parliament is accepted as legislature.⁷ However, it is a different question whether the European Parliament can be regarded as legislature in connection with Overseas Counties and Territories (OCT) which have a specific status under the EC Treaty. It constituted a crucial problem that

¹ Paras. 56-57, Hirst; para. 50, Mathieu-Mohin; para. 102, Zdanoka; para. 50, Lykourazos.

² Paras. 105, 115, Zdanoka.

³ Paras. 106, 115, Zdanoka.

⁴ Paras. 40-43, Eman and Sevinger; paras. 65-71, C-145/04. See also, Article 39 EUCFR establishing the right to vote and to stand as a candidate at elections to the European Parliament.

⁵ See, para. 94, C-145/04; para. 54, Eman and Sevinger.

⁶ Para. 40, Matthews; para. 53, Mathieu-Mohin; para. 36, Py.

⁷ ECHR: paras. 41-44, 48-53, Matthews. EC: the question was never really examined; however, it can be deduced from paras. 47-48, Eman and Sevinger that the European Parliament is considered as legislature under the territorial scope of the TEC.

EU citizens residing in OCTs should be able to exercise electoral rights by virtue of Article 17 TEC,⁸ but Member States are not required to hold European elections in OCTs as Articles 189 and 190 TEC are not applicable to them.

The contradiction was resolved by the ECJ asserting that the European Parliament cannot be regarded as legislature as regards territories where the TEC is not applicable. It added that since the impact of Community law on the laws of OCTs is greatly limited and indirect, it cannot be regarded as affecting the population in the same way as measures emanating from the local legislative assembly.⁹ This questions that the European Parliament is included in the local constitutional arrangements. The ECJ's approach might be contrasted with the ECtHR's judgment in *Matthews* where the European Parliament was found to be legislature with respect to Gibraltar. However, the Community's position as regards OCTs appears unproblematic as the status of Gibraltar can be distinguished from that of OCTs. As the ECtHR reasoned in reaching its decision by virtue of Article 299(4) TEC substantive areas of EC law are applicable to Gibraltar in the same manner as they are applicable in the Member States¹⁰ making the European Parliament part of Gibraltar's constitutional structure.

Another matter that needs to be mentioned here is the extension of suffrage in European elections by national law to persons that cannot be regarded citizens of the European Union under Article 17 and 19 TEC. Extending electoral rights to the wider political community of the Member States was the result of delegating the regulation of European elections to the national level and, more importantly, compliance with the judgment of the ECtHR in *Matthews* could only be ensured this way.¹¹ It is a certain sign of similarity in scope when Community law is interpreted in the light of Strasbourg judgments.

2. Similarity in the language of the right to free elections

Although Article 3 Protocol 1 ECHR is silent on this issue, its permissive language has now been established. It was held that electoral rights are not absolute, but may be subject to limitations¹² allowing the Contracting States to regulate the exercise of these

⁸ Para. 29, *Eman and Sevinger*.

⁹ Paras. 46-51, *Eman and Sevinger*.

¹⁰ Paras. 11-14, 34, *Matthews*.

¹¹ Paras. 65-80, C-145/04; mm. paras. 63-64, *Eman and Sevinger*.

¹² *Inter alia*, para. 63, *Matthews*; para. 52, *Mathieu-Mohin*; para. 54, *Melnychenko*; para. 60, *Hirst*.

rights.¹³ Similarly, in EC law the language of the right to vote and stand for an election is permissive when it comes to laying down the rules of electoral systems.¹⁴

3. Similarity in the functioning of the right to free elections

According to the general formula in ECHR law interferences must pursue a legitimate aim in a proportionate manner having regard to the particular content and purpose of the rights at issue.¹⁵ Similarly, in Community law the interference imposed by electoral rules must pursue a legitimate aim and must be proportionate.¹⁶

3(a): Lawfulness

It may not be included in the general formula under the ECHR, but the ECtHR when examining possible justifications for interferences can consider the requirement of lawfulness. It concerns whether the interference complied with national provisions enacted within discretionary powers.¹⁷ Lawfulness can also form part of the scrutiny in Community law by way of scrutinising the grounds utilised to challenge the legality of electoral rules.¹⁸

3(b): Pursuing a legitimate aim

Under Article 3 Protocol 1 ECHR a wider range of aims is available than under Articles 8 to 11 ECHR.¹⁹ Generally, the choice of legitimate aim is subject to being compatible with the rule of law and the general objectives of the Convention.²⁰ In Community law legitimate aims included complying with the judgment of the ECtHR in *Matthews* by means of establishing an electoral system²¹ and having sufficient links with the state of

¹³ *Inter alia*, para. 53, Mathieu-Mohin; para. 54, Melnychenko; para. 60, Hirst; para. 33, Podkolzina.

¹⁴ Para. 94, C-145/04; para. 54, Eman and Sevinger.

¹⁵ *Inter alia*, paras. 61-62, 73, Hirst; paras. 33-35, Podkolzina; para. 63, Matthews; para. 52, Mathieu-Mohin. The ECtHR denied that it should automatically adhere to the same criteria as those applied under Articles 8 to 11 ECHR, para. 115, Zdanoka.

¹⁶ Para. 94, C-145/04; mm. para. 54, Eman and Sevinger.

¹⁷ See, para. 60, Melnychenko.

¹⁸ The grounds included in C-145/04 and Eman and Sevinger: breach of Community law, Article 3 Protocol 1 ECHR, and the principle of equality.

¹⁹ See, para. 74, Hirst; para. 34, Podkolzina; para. 62, Sukhovetsky.

²⁰ Para. 115, Zdanoka.

²¹ Para. 95, C-145/04.

origin manifested in the requirement of residence.²² The first is without doubt compatible with the rule of law and the objectives of the ECHR. Legitimate aims similar to that raised in the second example have been accepted by the ECtHR.²³

3(c): Proportionality

In this respect, ECHR law provides two main criteria, first, whether there was arbitrariness or a lack of proportionality, and, second, whether the restriction interfered with the free expression of political opinion²⁴ (in the choice of legislature).²⁵ A further requirement is that the integrity and effectiveness of electoral procedures must be maintained.²⁶ Correspondingly, in Community law the proportionality of electoral rules, regarded here as interferences, requires, in particular, that the right to vote must not be curtailed to such an extent that would impair its very essence and deprive it of its effectiveness.²⁷ It was also held that electoral rules must not be unreasonable, arbitrary, or inappropriate.²⁸

4. Similarity in the flexibility of the right to free elections

4(a): The general approach

In ECHR law wide discretionary powers are held to be pertinent as regards the choice of electoral systems.²⁹ Accordingly, diverse methods of organising and running electoral systems are accepted,³⁰ provided that they comply with the requirements of Article 3 Protocol 1 ECHR.³¹ It might appear as a more modest enunciation of flexibility, but in EC law it has been established that as regards electoral rules Member States enjoy wide discretionary powers.³² In both jurisdictions the eligibility to vote or stand for election

²² Paras. 54, 58-60, *Eman and Sevinger*.

²³ See the residence requirement cases: *Melnychenko*; *Py*.

²⁴ Para. 115, *Zdanoka*; para. 56, *Melnychenko*; para. 47, *Py*.

²⁵ *Inter alia*, para. 63, *Matthews*; para. 52, *Mathieu-Mohin*; para. 54, *Melnychenko*; paras. 61-62, *Hirst*.

²⁶ Para. 104, *Zdanoka*; para. 62, *Hirst*.

²⁷ Para. 94, C-145/04.

²⁸ Paras. 54-55, *Eman and Sevinger*.

²⁹ *Inter alia*, para. 39, *Gitonas*; para. 33, *Podkozlina*; para. 106, *Zdanoka*.

³⁰ Para. 64, *Matthews*; paras. 103, 115, *Zdanoka*; para. 61, *Hirst*; para. 46, *Py*; para. 51, *Lykourazos*.

³¹ Para. 46, *Py*; para. 54, *Mathieu-Mohin*; para. 55, *Melnychenko*; para. 33, *Podkozlina*; para. 115, *Zdanoka*.

³² Para. 94, C-145/04.

would also attract wide discretionary powers.³³ As regards the right to stand for election it is accepted in both legal systems that domestic regulation enjoys a greater leeway than in case of the right to vote.³⁴

4(b): The benchmarks of flexibility

In ECHR law the following factors have been considered in examining the justifiability of interferences with the right to free elections.

- a) Importance of the legitimate aim.³⁵
- b) Non-arbitrariness and safeguards against arbitrariness.³⁶
- c) Gravity of the interference.³⁷
- d) Position of the individual (links with the state).³⁸
- e) Due regard to local requirements.³⁹

In EC law similar factors have been taken into account.

- a) Importance of the legitimate aim.⁴⁰
- b) Appropriateness, non-arbitrariness and safeguards.⁴¹
- c) Gravity of interference.⁴²
- d) Position of the individual (links with the state).⁴³
- e) Due regard to local requirements.⁴⁴

³³ ECHR: para. 71, Hirst; para. 59, Melnychenko; para. 35, Podkozlina. EC: para. 60, Eman and Sevinger.

³⁴ ECHR: para. 115, Zdanoka; para. 47, Py; para. 56, Melnychenko. EC: para. 54, Eman and Sevinger.

³⁵ *Inter alia*, paras. 56-57, Mathieu-Mohin; paras. 40-41, Gitonas; paras. 59-64, Py; paras. 119-120, 131-135, Zdanoka; para. 57, Lykourazos.

³⁶ *Inter alia*, para. 59, Melnychenko; paras. 35-38, Podkozlina; paras. 125-128, 132, Zdanoka; para. 71, Hirst.

³⁷ *Inter alia*, paras. 64-65, Matthews; para. 29, Aziz; para. 31, Melnychenko; para. 82, Hirst; paras. 56-57, Py. Para. 57, Mathieu-Mohin concerned the reduction of choices in exercising the right to vote and stand for an election; see in this respect in EC law: the availability of alternative means to exercise that right meant that the right to vote was not compromised by the failure to grant a special leave to Community staff to travel to their home states to participate in elections, paras. 29-30, Brigaldi.

³⁸ Para. 64, Matthews; paras. 56, 62-66, Melnychenko.

³⁹ Article 56 ECHR; and paras. 58-64, Py; para. 59, Matthews.

⁴⁰ Para. 95, C-145/04; paras. 59-60, Eman and Sevinger.

⁴¹ Para. 95, C-145/04; paras. 60, 66-67, Eman and Sevinger.

⁴² Para. 54, Eman and Sevinger.

⁴³ Para. 59, Eman and Sevinger.

⁴⁴ Para. 96, C-145/04 (on para. 59, Matthews not indicating any requirements under Article 56(3) ECHR).

The similarity of the benchmarks of flexibility is not surprising. It follows from the general formula on justifying interferences with the right to free elections that the legitimate aim pursued and the impact of the interference on the individual's right to express his political opinion must be of importance in both jurisdictions. The shared benchmark of (lack of) arbitrariness is a general requirement set by Strasbourg and Luxembourg against interferences with fundamental rights.

The formulation of benchmarks might appear weightier in ECHR law, but the scarce sources in Community law do not fail to provide similar benchmarks. The status of the individual and the gravity of the interference received no attention in case C-145/04, (*Spain v. UK*). However, this appears reasonable considering that it involved a dispute between states which concerned whether the method chosen by the UK to comply with Article 3 Protocol 1 ECHR obligations corresponded with those requirements. Nonetheless, it is clear that the obvious influence of ECHR law on the approach of Community courts led to the similarity of the benchmarks of flexibility concerning the right to free elections.⁴⁵ This is reflected in sharing the benchmarks of having sufficient ties with the state and showing due regard to domestic requirements.

Closing the present scrutiny with establishing the similarity of the benchmarks of flexibility leads to the conclusion that the right to free elections attracts an approach in Community law similar to that under ECHR law. Its general implications on the non-divergence thesis will be discussed below within the general conclusions closing Part III.

⁴⁵ In C-145/04 and *Eman and Sevinger* Community courts kept referring to the judgments of the ECtHR in supporting their position.

Chapter 11: The right of access to a court in ECHR and EC law

Its characteristics place the right of access to a court in between rights acknowledging the margin of appreciation of states and rights permitting no justifiable interferences. Combining the proportionality test and the strict prohibition of denial of justice in its structure makes it ideal to close Part III/a with the examination of similarity in protecting the right of access to a court in ECHR and EC law. Despite the different backgrounds – in this respect the specificity of the right to (principle of) effective judicial protection in Community law must be mentioned, comparison faces similar issues in connection with the right of access to a court in both jurisdictions.

After identifying the exact parameters of the right of access to a court in EC law similarity will be established in connection with the question of applicability and legitimate restrictions. More importantly, the concept of denial of justice will be addressed within the similarity of scope. It entails examining the arguments of providing alternative access and deferring responsibility to the Member States which relieve Community courts from the burden of denial of justice. Although most problems regarding the right of access to a court in EC law are settled within the concept of denial of justice, the present scrutiny will consider the proportionality of interferences and, particularly, similarity in the benchmarks of flexibility.

1. Similarity in the scope of the right of access to a court

The right of access to a court is considered as inherent in Article 6 ECHR securing the right to have any claim falling under the scope of Article 6 ECHR brought before a court or tribunal.¹ The right to institute proceedings is not the only aspect of the right to a court which provides further guarantees as regards the organisation and composition of courts and the conduct of proceedings the whole constituting the right to a fair hearing.² The right of access to a court is among the core concepts of the ECHR embodying the pre-eminence of law.³

The right of access to a court in Community law is foremost associated with the various procedures in which the legality of Community measures can be challenged. Primarily, it concerns the admissibility of annulment actions brought under Article 230(4) TEC

¹ *Inter alia*, para. 92, Z, ECtHR; para. 55, Ashingdane; para. 80, Holy Monasteries; para. 41, Diaz Ochoa.

² *Inter alia*, para. 36, Golder; para. 55, Ashingdane; paras. 136, 147, Osman; para. 22, Airey.

³ P. 131, Renucci: 1998 and p. 143, Jacobs: 1999.

where the condition of individual concern is regarded as the most important impediment to access to justice.⁴ The main arguments revolve around the issue whether denying admissibility of actions for annulment constitutes denial of justice, an outright violation of the right of access to a court, taking into account the availability of alternative remedies under EC law.⁵ Recently, similar concerns were raised in relation to the limited availability of redress under Title V and VI TEU.⁶

It is accepted that access to justice is a constitutive element of the Community legal order. It is manifested in the complete system of legal remedies and procedures established by the EC Treaty designed to enable Community courts to review the legality of Community measures.⁷ The right of access to a court is inherent in the Community concept of the right to effective judicial protection⁸ (the right to obtain an effective remedy before a competent court).⁹ It has been associated with Articles 6 and 13 ECHR.¹⁰

1(a): National remedies and access to a court in EC law

The protection of rights provided by Community law before national courts is another area where the right of access to a court has gained significance. However, the right to full and effective protection of Community rights, including the right of access to a court, is a problematic concept. It is a perplexing task to distinguish when it is utilised as a mere legal principle and a genuine fundamental right. The more obvious conclusion

⁴ Another significant barrier to access is whether the Community measure is open to challenge by virtue of its ability to produce legal effect relevant for the person concerned, see the judgment in *RJ Reynolds*.

⁵ See in this respect, pp. 45-46, Ward: 2004, condemning the lack of coherence and certainty of the avenues of challenging Community measures on the basis of the ECtHR judgment, *Geouffre de la Pradelle*, paras. 34-35. This, however, appears problematic as the judgment of the ECtHR concerned the obscurity of the procedures under the circumstances of that specific case and not the system of remedies in general (para. 31, *ibid.*). Generally, the system of remedies in EC law are not such as to confuse potential applicants making them fail to meet time-limits as occurred in that case. It seems artificial to assume that potential private litigants would not be able choose between direct and indirect actions and miss out on the available remedies.

⁶ See the cases *SEGI*, *Gestoras*, *OMPI*, *Selmani*, *infra* fn. 89-92, 96-98.

⁷ *Inter alia*, para. 109, *Öcalan and Vanly*; paras. 41, 50, *Jégo-Quééré*, CFI; para. 23, *Les Verts*; para. 38, *UPA*, ECJ; para. 209, *Kadi*; para. 260, *Yusuf*; para. 16, *Foto-Frost*. Under the TEU, para. 51, *SEGI*; para. 51, *Gestoras*.

⁸ *Inter alia*, para. 157, *Sison*; para. 29, *Jégo-Quééré*, ECJ; para. 39, *UPA*, ECJ; para. 110, *OMPI*; paras. 210-211, *Kadi*. See, para. 55, *Van der Wal*, CFI, mentioning the principle of review of acts of the administration. The right to judicial review is a general principle of EC law, para. 57, *max.mobil*.

⁹ *Inter alia*, para. 121, *Philip Morris*; para. 41, *Jégo-Quééré*, CFI; para. 78, *Salamander*. See, paras. 42-46, *La Conquête*, mentioning the right to secure judicial redress.

¹⁰ *Inter alia*, para. 110, *OMPI*; para. 29, *Jégo-Quééré*, ECJ; para. 121, *Philip Morris*; para. 39, *UPA*, ECJ; paras. 2-3, 76-77, *Öcalan and Vanly*. References to Article 47 EUCFR, *inter alia*, para. 42, *Jégo-Quééré*, CFI; para. 209, *P&O Ferries*, CFI; para. 57, *max.mobil*; para. 122, *Philip Morris*, acknowledging that it only demonstrates the importance of the rights it sets out in the EC legal order.

is that it is a general principle of law stemming from the obligation of domestic courts to protect Community rights¹¹ underpinned by the principle of cooperation in Article 10 TEC.¹² The principles of autonomy, equivalence, and effectiveness determine judicial protection in this regard.¹³ According to the general formula, in the absence of Community rules it is for the domestic legal systems to designate courts with jurisdiction and to lay down procedural rules governing actions before those courts (autonomy) for the purpose of safeguarding Community rights, provided that the rules are not less favourable than those governing similar domestic actions (equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (effectiveness).¹⁴

In the meantime, a line of case law appeared diverting from the general approach.¹⁵ Its speciality rests in the fact that it is not informed of the principles of cooperation, autonomy, equivalence, and effectiveness. It regards Articles 6 and 13 ECHR as its inspirational sources and its general attitude towards the protection of Community rights before national courts demonstrates that the right to effective judicial protection is considered as a genuine fundamental right. It requires that judicial remedy against any decision of national authorities must be provided in Community law (effective judicial protection of Community rights must be secured).¹⁶ In other words, everyone is entitled to obtain an effective remedy in a competent court against measures violating rights under EC law.¹⁷

In recent judgments doubt was cast upon the distinctness of this approach.¹⁸ In *Eribrand* the *Johnston* formula enhanced by the statement that it is for the Member States to ensure effective judicial scrutiny was followed by the principles of autonomy,

¹¹ *Inter alia*, van Gend en Loos, at 12-13; paras. 16, 21, 26, Simmenthal; paras. 20-21, Factortame, Case 213/89; para. 39, Brasserie/Factortame, C-46, 48/93; para. 25, Courage. Picod saw this as the triumph of the Community logic/interpretation within the human rights jurisprudence of Community courts, pp. 313-314, Picod: 1998.

¹² *Inter alia*, para. 38, Unibet; para. 5, Rewe, 33/76; para. 12, Comet; para. 12, Peterbroeck. On the pivotal role of Article 10 TEC in the development of national remedies law: p. 18, Ward: 2000; pp. 421-422, Tridimas: 2006.

¹³ The fourth, no new remedy principle also surfaced denying that the EC legal order intended to create new national remedies, para. 44, Rewe, Case 158/80.

¹⁴ *Inter alia*, para. 45, Evans; para. 32, Upjohn; para. 60, Steffensen; para. 24, Verholen; para. 16, Emmott.

¹⁵ A line of case law much more distinct, p. 145, Ward: 2000 and p. 394, Timmermans: 2004.

¹⁶ *Inter alia*, para. 18, Johnston; para. 14 Heylens; para. 22, Vlassopoulou; para. 21, Coote; paras. 14-15, Borelli, para. 24, Verholen; para. 46, Kofisa; para. 101, MRAX; para. 27, Panayotova.

¹⁷ Para. 19, Johnston; para. 22, Coote.

¹⁸ Other hybrid cases (combining the *Johnston* formula with the traditional national remedies formula): paras. 46-48, Kofisa; paras. 17-19, Siples; para. 24, Verholen; paras. 110, Orfanopoulos; para. 47, Dörr and Ünal.

equivalence, and effectiveness¹⁹ that led the ECJ to leave the ultimate solution for the national court to provide redress on the basis of national law.²⁰ In *Hassan and Ayadi*, decided under immense human rights influence, the CFI was driven to address the issue of national judicial remedies on the basis of the principles of autonomy, equivalence, and effectiveness.²¹ It ruled that national law must be applied in a manner that ensures the effectiveness of Community law which may entail avoiding national provisions that prevent access to judicial review.²² In *Unibet* the ECJ produced a formidable mixture of arguments in connection with the lack of a freestanding action to address the compatibility of national law with Community law. Having commenced with the human rights formula²³ the ECJ turned to issues associated with the traditional approach such as the question of establishing new remedies in domestic law,²⁴ institutional and procedural autonomy,²⁵ and the principles of equivalence and effectiveness.²⁶

Settling the issue whether the right to effective judicial protection of Community rights before national courts could be considered as a genuine fundamental right is outside the reach of this work. However, for the present purposes it is assumed that the cases building on the *Johnston* formula entail solutions that could be considered under the fundamental right of access to a court.²⁷ They resemble those cases under ECHR law that address the issue of denial of justice within the right of access to a court. This corresponds with Ward's assertion that despite the unclear parameters of *Johnston* the fundamental rights based formula is only applicable when the national regime precludes access to a court entirely.²⁸ In a recent case the fundamental rights based formula was

¹⁹ Paras. 61, 62, Eribrand.

²⁰ Para. 63, *ibid*.

²¹ Para. 121, Hassan; para. 151, Ayadi.

²² Para. 122, Hassan; para. 152, Ayadi.

²³ Para. 37, Unibet, referring to para. 39, UPA, ECJ and Article 47 EUCFR.

²⁴ Paras. 40-41, Unibet, referring to para. 44, Rewe, Case 158/80 on no new remedies and para. 5, Rewe, Case 33/76; para. 16, Comet; paras. 19-23, Factortame, Case 213/89, on introducing new remedies in domestic law.

²⁵ Paras. 39, 42, Unibet.

²⁶ Para. 43, *ibid*. In this respect, standing requirements in national law were approached as in cases concerning Article 230(4) TEC actions, *infra* fn. 110: they must not undermine the right to effective judicial protection and it is for the national courts to interpret standing conditions in order to ensure effective judicial protection (para. 44, *ibid*). See, para. 73, *ibid*, stating that when the action is not admissible under national law access should not be provided against national rules, unless Community law on national remedies questions that inadmissibility.

²⁷ Others considered the *Johnston* line of case law as a general principle of Community law, *inter alia*, p. 4, Prechal: 1997; pp. 3-8, Kilpatrick: 2000; pp. 1209-1210, Eilmansberger: 2004; pp. 146, 152-153, Picod: 1998a.

²⁸ Pp. 70, 79, 328, Ward: 2000 and p. 282-285, Arnall: 2006. See, p. 225, Ward: 2000a, considering the *Johnston* principle as part of the fundamental rights case law of Community courts and pp. 443-445, Tridimas: 2006, on the affinity between the principle of effectiveness and the right to judicial protection as a fundamental right in *Johnston*-type cases. See also p. 7, Prechal: 1997, stating the necessity to guarantee the protection of Community rights is intimately linked to the fundamental right of effective judicial control. Dougan also appears to suggest a distinction between the fundamental right of access to a

utilised in establishing a right of appeal where no such right had been provided under national law.²⁹ It might only be of symbolic value, but the *Johnston* formula has been relied upon by the ECtHR in order draw inspiration whether to implement a broader scope of judicial control under ECHR law.³⁰

It follows that outside the instances of precluding access completely access to a court would be assessed on the basis of the principle of effective judicial protection without the need to refer to fundamental rights.³¹ In such cases, where rules on jurisdiction and standing rendered access to national courts difficult, access was to be ensured by the appropriate interpretation of domestic law in the light of the Community concept of effective judicial protection³² or by means of providing alternatives to judicial review.³³ The hybrid cases require further attention in this respect. They suggest an attractive solution in which the *Johnston*-type case law is dissolved within the standard approach on national remedies. Nevertheless, they must be distinguished from cases entailing a genuine human rights approach on grounds highlighted above by Ward that they do not concern denial of justice.³⁴ In particular, in *Unibet* the availability of (alternative) redress suggested that access to justice was not excluded.³⁵

1(b): Right of access to a court and effective judicial protection

The principle of effective judicial protection in Community law is often juxtaposed with Articles 6 and 13 ECHR³⁶ the latter providing the right to an effective remedy.

court and the principle of effective judicial protection, although the division between these concepts is difficult to ascertain: it seems that cases related to the issue of access would fall under the category of the fundamental right and the rest under the general principle, see, pp. 52-55, 58, 62-64, Dougan: 2004.

²⁹ Paras. 30-32, Tele 2.

³⁰ Para. 60, Vilho Eskelinen.

³¹ Dougan's category of "flanking protection" of access covers more or less the cases on access to a court outside the *Johnston*-type cases (pp. 12-14, Dougan: 2004). In our opinion he included cases in this category that provide more than a "flanking protection" of access – they are difficult to distinguish from outright denial as in *Johnston*, see, paras. 14-15, Heylens; para. 22, Vlassopoulou; paras. 27-28, Coote; para. 66, Douinas; paras. 13-15, Borelli.

³² *Inter alia*, paras. 40, 43-44, Dorsch Consult, C-54/96; paras. 25-26, Tögel; paras. 49-52, 54-55, Safalero; para. 40, Fantask; paras. 33-36, Upjohn; paras. 58-60, Kraaijeveld; paras. 28, 30-31, Munoz; paras. 27-30, Schneider.

³³ Damages action, para. 45, Dorsch Consult, C-54/96; para. 27, Tögel. Judicial review is not the only means of protecting Community rights before national courts, paras. 33-36, Upjohn. See also, requiring a right of appeal against administrative decisions, paras. 34, 37, Rutili; paras. 53, 55, Royer; paras. 10-11, Pecastaing.

³⁴ Para. 48, Kofisa and para. 19, Siples dealt with whether interim relief could be granted; para. 25, Verholen asked whether the claim was presentable on grounds of substantive Community law; para. 111, Orfanopoulos, para. 63, Eribrand and para. 47, Dörr and Ünal concerned the extent of review.

³⁵ See, paras. 47-67, *Unibet*. Hassan and Ayadi concerned the availability of remedies on the national level as alternatives to ensure access, paras. 118-120, Hassan and paras. 148-150, Ayadi.

³⁶ *Supra* fn. 10.

Introducing with a general effect the requirement of an effective remedy appears problematic as for the present purposes the right of *access* to judicial protection of Community rights (excluding denial of justice) is distinguished from the right to be *afforded* effective remedies in procedures in progress before national³⁷ and Community courts.³⁸ It is questionable that the right of *access* to remedies (invoked, in particular, in the *Johnston* formula as regards national courts and Article 230(4) TEC case law as regards Community courts) should incorporate the effectiveness of those remedies as the joint utilisation of Articles 6 and 13 ECHR would suggest. In this respect ECHR law on joining Articles 6 and 13 ECHR will be decisive.

It follows from the text of Article 13 ECHR that it can only be put into operation when (other) rights and freedoms under the ECHR are compromised.³⁹ This means that ECHR law does not provide an independent right to an effective remedy upon which individuals could rely whenever they consider that they were deprived of remedies as regards any legal claim.⁴⁰ In connection with Article 6(1) ECHR case law holds that its safeguards, involving the full panoply of a judicial procedure and which are stricter than those of Article 13 ECHR, absorb the claim under Article 13 ECHR.⁴¹ It follows, first, that when the right of access to a court is infringed the violation of Article 13 ECHR will be absorbed by that infringement⁴² (provided that the violation of no other fundamental right can be established) and, second, that when adequate access was provided the violation of Article 13 ECHR in this respect cannot be established.⁴³ This means that in Community cases where the sole fundamental rights violation concerns access to justice (and the other alleged infringements relate to mere Community rights)

³⁷ Typical areas: interim relief before national courts: *inter alia*, para. 21, Factortame, C-213/89; para. 67, Unibet; paras. 50-51, T-Port, C-68/95; national time-limits for bringing proceedings: *inter alia*, paras. 19-23, Emmott; paras. 48-49, Fantask; paras. 19, 31, Levez; raising of arguments before national courts: *inter alia*, para. 14, Peterbroeck; para. 21, Van Schnijdel; damages: *inter alia*, paras. 33 and 26, Frankovich; paras. 20, 22, Brasserie/Factortame, C-46, 48/93; sanctions and remedies: *inter alia*, para. 23, Von Colson; para. 23, Dekker.

³⁸ Interim relief: *inter alia*, para. 55, SMS-Lormines; para. 44, Bactria; para. 36, Antonissen; para. 41, Artedogan; para. 45, Aden.

³⁹ Article 13 ECHR is of hybrid nature: while it is not independent from other rights, it has a distinct goal of providing remedies for violations of fundamental rights, p. 137, Renucci: 1998.

⁴⁰ This holds true even when one considers paras. 64-65, Klass, on the basis of which it is not necessary to establish the violation of the Convention right before the ECtHR to trigger the protection of Article 13 ECHR.

⁴¹ *Inter alia*, para. 146, Kudła; para. 51, Tre Traktörer; para. 80, Ernst. Another explanation might be that the violation of the right of access to court can only be remedied by providing access, but that cannot be considered as a separate remedy as it involves ensuring the right of access to court. See in this respect, para. 151, Kudła, stating that Article 13 ECHR cannot be read as requiring the provision of an effective remedy that would enable the individual to complain about the absence in domestic law of access to a court as secured by Article 6(1) ECHR. The separability of Article 13 from Article 6(1) ECHR as established in para. 156, Kudła only concerns remedies for the unreasonable length of the procedure.

⁴² *Inter alia*, para. 158, Osman; para. 35, Airey; para. 88, Sporrang and Lönnroth.

⁴³ *Inter alia*, para. 81, Ernst; para. 207, Lithgow; para. 89, Posti and Rahko; para. 72, Stefanelli.

the requirement of effectiveness as provided under Article 13 ECHR cannot be applicable.

Nonetheless, access to a court under the ECHR considers effectiveness implicitly⁴⁴ as mere access to remedies does not always satisfy the requirements of Article 6(1) ECHR.⁴⁵ It was held that the degree of access afforded must be sufficient to secure the individual's right to a court⁴⁶ entailing that a practical opportunity of judicial challenge must be provided.⁴⁷ The same has also been recognised in Community law in that judicial protection available to individuals must be effective.⁴⁸ Consequently, although in Community law the right of access to a court is rightly disjoined from the right to an effective remedy, the right of access must be effective in order to meet the requirements of Article 6(1) ECHR. Effectiveness (of access), however, rarely dominates judicial scrutiny under ECHR law. As it will be demonstrated below, it is dissolved in the dominant considerations of denial of justice or of proportionality questioning its rationale as an independent requirement.

1(c): The issue of applicability

The applicability of the right of access to a court in ECHR law is subject to a number of conditions. Examining them will promote the **similarity argument** by highlighting areas to which Article 6(1) ECHR is not applicable.⁴⁹ First, Article 6(1) ECHR covers only civil cases excluding procedures of criminal nature. Its scope has been subject to evolution in this respect embracing procedures that would belong to public law in domestic legal systems.⁵⁰ Instead of examining whether the relevant Community cases would fall under the scope of Article 6(1) ECHR, it suffices to assert that in Community law the right of access to a court is provided as a general rule without questioning its

⁴⁴ P. 138, Renucci: 1998; p. 144, Jacobs: 1999. See also, para. 38, Bellet; para. 42, Lagrange; para. 70, Obermeier; paras. 46-47, Hajiyev; paras. 29, 33-34, De Geouffre de la Pradelle. The right of access must be practical and effective, *inter alia*, para. 45, Prince Hans-Adam; para. 57, Kreuz; para. 24, Airey.

⁴⁵ *Inter alia*, para. 36, Bellet; para. 40, Lagrange; para. 46, FE.

⁴⁶ *Ibid*, and, *inter alia*, para. 57, Ashingdane; para. 58, Waite and Kennedy; para. 53, De Jorio.

⁴⁷ Usually the relevant cases concern some sort of misunderstanding as to the law on access, see, *inter alia*, para. 36, Bellet; para. 40, Lagrange; para. 46, FE; para. 34, De Geouffre de la Pradelle; para. 52, Cordova I.

⁴⁸ Para. 110, Öcalan and Vanly; paras. 208-209, P&O Ferries, ECJ. On the requirement of effective judicial review of any Commission decision, see, paras. 60-61, Enso Espanola.

⁴⁹ The condition that it only applies to genuine and serious contestations (disputes) could be mentioned here (para. 93, Markovic; para. 87, Z, ECtHR). By this Community law could be freed from the obligation to comply with Article 6 ECHR; see, paras. 41-44, Campogrande, stating that it is not denial of justice when Community courts within their jurisdiction decide that the damages claim was inappropriate and was not proved.

⁵⁰ Pp. 78-83, Clayton and Tomlinson: 2001a.

applicability to Community and national procedures of administrative nature.⁵¹ In connection with the disciplinary proceedings where the right of access to a court was found applicable under ECHR law⁵² those Community disciplinary cases could be mentioned in which it was held that the specific aspect of the right of access to a court at issue must be observed.⁵³

Second, the applicability of the right of access to a court appears problematic in disputes where the actual existence of the right forming the basis of the claim is at stake.⁵⁴ In this respect ECHR law differentiates between substantive and procedural bars of access to a court.⁵⁵ In principle, Article 6(1) ECHR has no application to substantive limitations established under domestic law,⁵⁶ but it may be applicable to procedural bars.⁵⁷ This follows from the clause that Article 6(1) ECHR only covers rights that are recognised under domestic law.⁵⁸

On this basis, the characteristics of the EU system of remedies and procedures need to be re-examined. When EU law does not provide for a right of action, such as the lack of action for annulment for individuals under the former ECSC Treaty,⁵⁹ the restricted possibility to challenge measures under Title V and VI TEU,⁶⁰ or the exclusion of challenges against the Commission when it refuses to take action against a Member State,⁶¹ it needs to be taken into consideration whether such restriction involves a substantive or procedural bar. Admissibility conditions as the likes of the legal effects test and the criteria of direct and individual concern under Article 230(4) TEC⁶² also require reassessment, since in case these conditions remain unfulfilled it might be argued that the person concerned has not been provided substantive rights as a matter of Community law. This depends primarily on the measure under scrutiny as its general characteristics or its specific content can exclude that the person concerned has been

⁵¹ For a similar conclusion as regards fair trial rights under the criminal head of Article 6 ECHR see Chapter 14 on the privilege against self-incrimination, Chapter 17 on double jeopardy; Chapter 15 on the presumption of innocence; Chapter 16 on no punishment without law.

⁵² When it related to continuing a professional practice, para. 48, *Le Compte*; paras. 25, 28, *Albert*.

⁵³ Para. 83, *Irving*; paras. 23-24, *Z*, ECJ.

⁵⁴ See, *inter alia*, para. 55, *Ashingdane*; para. 36, *Golder*; para. 65, *Fayed*; para. 25, *Fogarty*.

⁵⁵ See, *inter alia*, para. 119, *Roche*; para. 94, *Markovic*; para. 71, *Pereira Henriques*.

⁵⁶ Para. 94, *Markovic*.

⁵⁷ *Inter alia*, para. 24, *McElhinney*; para. 65, *Fayed*; para. 47, *Al-Adsani*.

⁵⁸ Article 6(1) ECHR does not guarantee any particular content for rights in domestic substantive law and it must not create substantive rights having no legal basis in domestic law, *inter alia*, paras. 117, 119, *Roche*; para. 113, *Markovic*; para. 51, *Posti and Rahko*.

⁵⁹ See, paras. 36-39, *Diputación Foral, CFI*; paras. 32-33, *Diputación Foral, ECJ*.

⁶⁰ See, *Gestoras, SEGI, OMPI, Selmani*, *infra* fn. 89-92, 96-98.

⁶¹ *Inter alia*, para. 72, *T-Mobile Austria*; paras. 33-34, *Dumez*; para. 55, *Calvo Alonso-Cortés*. The lack of recourse against the European Ombudsman can also be recalled here, paras. 43-54, *ASCV*.

⁶² See, the judgments in *RJ Reynolds and Plaumann*, Case 25/62.

endowed with substantive rights. This means that Article 6(1) ECHR may not be applicable to these problems.

For instance, under Article 230(4) TEC a decision addressed to another person or a regulation addressed to no one specific does not invest *per se* the person wishing to challenge that measure with rights. The requirements of direct and individual concern can be regarded as placed upon the applicant for the purpose of ascertaining whether a substantive right provided by Community law is involved in a serious and genuine dispute. The ECtHR in *Posti and Rahko* has affirmed this where the condition of individual concern was utilised to establish that a substantive right was involved in the dispute that required the protection of Article 6(1) ECHR.⁶³ The same is true for the legal effects test, since when the measure is incapable of inducing relevant legal effects towards the person concerned, the availability of a substantive right in EC law for the applicant is questionable. Assuming that the rationale supporting the lack of challenges in the other instances above is similar to that of the admissibility conditions of Article 230(4) TEC there is no need to engage in a detailed examination of those impediments to access.⁶⁴ In any event, considering the major arguments on the right of access to a court in Community law and the purposes of the present analysis there is no reason to proceed further with hypothetical justifications of this kind for the system of remedies available in Community law. It can be concluded, nevertheless, that the applicability rules of Article 6(1) ECHR may be able to affirm certain aspects of the right of access to a court in Community law.

1(d): Legitimate limitations to access

ECHR law accepts that certain limitations to access by operation of law or fact are legitimate. These include statutory time limits or prescription periods, security for costs orders, and regulations concerning minors and persons of unsound mind.⁶⁵ Community

⁶³ Paras. 52-54, *Posti and Rahko*. The requirement of individual concern and those requirements under 230(4) TEC that aim to ascertain that the person concerned is provided with a right under Community law are essential to the functioning to the right of access to a court, however, the restrictions imposed by those requirements are not compatible *per se* with the right of access, see, paras. 60-66, *Posti and Rahko*. In paras. 49-50, *Alatulkkila*, a very similar case, the ECtHR decided not to follow the *Posti and Rahko* reasoning, however, it considered whether the measures provided substantive rights by examining that they had direct effect and impinged previous rights. This corresponds with the position under EC law that Article 6 ECHR cannot preclude certain criteria regarding admissibility from being set for the institution of proceedings, para. 39, *Kik*.

⁶⁴ As to the Commission's refusal to proceed against Member States it is sufficient to point to the extensive discretionary powers of the Commission which questions that substantive rights of individuals were involved.

⁶⁵ *Inter alia*, para. 99, *Markovic*; para. 29, *Devlin*; para. 75, *Winterwerp*; para. 54, *Kreuz*.

law also accepts that Article 6 ECHR does not exclude the setting of reasonable time limits for the institution of legal proceedings.⁶⁶ In both jurisdictions the acceptability of time limits depends on the relevant practical circumstances of the case.⁶⁷ The payment of security, although not for costs but to ensure compliance in case of granting interim relief, was also considered in EC law under effective judicial protection.⁶⁸ It is assessed in both jurisdictions in the light of the circumstances of the case involving, in particular, the applicant's ability to pay.⁶⁹

1(e): The concept of denial of justice

Exploring how Community courts address the problem of denial of justice will affect greatly the success of the **similarity argument** concerning the right of access to a court. Denial of justice is central to the right of access to a court under ECHR law.⁷⁰ It is regarded as the outmost boundary of limitations on access. It holds that access to a court must not be restricted or reduced in such way or to such extent that the very essence of the right is impaired.⁷¹

Generally, denial of justice cannot be established when claims are properly and fairly examined in the light of the applicable domestic legal principles.⁷² In particular, the inadmissibility of a claim cannot be considered as *per se* offending the principle of access to a court, provided that the existence of sustainable causes of action are ruled upon at the conclusion of an adversarial procedure based on the arguments submitted on the law by the person concerned.⁷³

Establishing that the limitation on access resulted in denial of justice would cut off further scrutiny by the ECtHR and result in declaring the violation of Article 6(1)

⁶⁶ Para. 10, Dufay. See also, para. 64, Eagle and para. 66, Sanders. As regards time-limits to initiate actions before national courts national procedural autonomy will be respected, but unreasonable time-limits will be struck down, para. 5, Rewe, Case 33/76; mm. para. 21, Peterbroeck.

⁶⁷ ECHR: *inter alia*, paras. 84, 85, Shishkov; paras. 33-39, Miragall Escolano. EC: para. 66, Eagle; para. 67, Sanders, referring to para. 187, Limburgse, ECJ. The lack of clarity in domestic law and practice in this respect may constitute a breach, paras. 86-90, Shishkov; see in EC law, paras. 58-60, Schmoldt (inconsistency in practice).

⁶⁸ Para. 16, TRAMASA.

⁶⁹ ECHR: paras. 60, 62-65, Kreuz; paras. 63-66, Tolstoy Miloslavsky; paras. 57-58, 61-62, Ait-Mouhoub. EC: paras. 12-13, 14-15, TRAMASA. The requirement in EC law that the amount must be proportionate, paras. 23-24, TRAMASA, corresponds with that under ECHR law that securities for costs shall not impair the very essence of the right of access, para. 66, Kreuz; paras. 62, 67, Tolstoy Miloslavsky.

⁷⁰ Para. 35, Golder; para. 24, Airey.

⁷¹ *Inter alia*, para. 57, Ashingdane; para. 99, Markovic; para. 147, Osman. Admissibility rules shall not deprive the person concerned of using the available redress, para. 26, Barbier; para. 29, Tricard.

⁷² *Inter alia*, para. 103, TP and KM; paras. 96, 98-101, Z, ECtHR; paras. 105-106, 109-115, Markovic; para. 196, Lithgow; para. 75, Klass; paras. 38-42, Canete de Goni.

⁷³ Paras. 101, 102, TP and KM; para. 97, Z, ECtHR; paras. 259-260, Velikovi.

ECHR.⁷⁴ The available alternative avenues of access are often taken into account in examining whether denial of justice can be excluded.⁷⁵ It appears that in denial of justice cases the only possible justification/defence is providing (alternative) means of judicial protection.

It must be mentioned that emphasis has been gradually shifted from denial of justice to the examination of proportionality of interferences with the right of access to a court.⁷⁶ Denial of justice would form part of the benchmarks within the proportionality test.⁷⁷ The alternative access argument has also been incorporated by the proportionality test.⁷⁸ Nevertheless, due to the arguments raised in Community cases in connection with the inadmissibility of actions denial of justice, as a key concept in ECHR law, remains essential in establishing similarity between judicial approaches on the right of access to a court in ECHR and EC law.⁷⁹ Since in EC law denial of justice was relied upon in two distinct contexts, before Community courts and national courts, it is appropriate to separate the ensuing examination accordingly.

Community courts

Countering the claims on denial of justice before Community courts Community law relies on two major arguments. First, by highlighting the available alternative recourses it establishes that access to a court is provided. Second, ultimately, by means of deferring to the Member States the obligation to provide access to a court Community law relieves itself of the responsibility for possible breaches of the right of access to justice.

The alternative recourse argument

⁷⁴ *Inter alia*, para. 40, Golder; paras. 77-78, Rotaru; paras. 24-28, Airey; paras. 76-77, Jacobsson; para. 63, Håkansson and Stüresson; para. 63, Fredin; para. 32, Barbier; paras. 65-66, Posti and Rahko; para. 72, Immobiliare Saffi; para. 38, Poitrimol; para. 43, Guérin, ECtHR; paras. 28-29, Paolini; para. 65, Brumarescu.

⁷⁵ Paras. 64-65, Philis (1); paras. 85-86, Sporrong and Lönnroth; para. 54, ID; paras. 120-121, Moldovan (2); paras. 105-107, Captial Bank AD; paras. 61-64, Posti and Rahko; paras. 51-53, Alatulkkila.

⁷⁶ Pp. 125-126, 128-132, Hickman: 2004. See in this respect, paras. 51-52, Prince Hans-Adam; paras. 73-75, Tinnelly; para. 30, Devlin; para. 148, Osman.

⁷⁷ *Infra* fn 143.

⁷⁸ *Infra* fn. 145.

⁷⁹ On the EC concept of denial of justice, para. 55, Algera, stating that unless the ECJ is to deny justice judicial review of Community measures must be ensured; see also, para. 56, max.mobil; para. 60, Enso Espanola. In paras. 39-40, Zuchtverband für Ponys, it appeared that the ECJ would agree to denial of justice, however, the case involved no Community right that needed interference from Community law in the form of judicial protection.

This argument, accepted under the concept of denial of justice in ECHR law, is derived from the premise that the right to effective judicial protection in Community law is considered in the light of the totality of remedies available. It was held that by virtue of the action for annulment under Article 230 TEC, the plea of illegality under Article 241 TEC, and requests for preliminary ruling on validity under Article 234 TEC the EC Treaty has established a complete system of legal remedies and procedures designed to ensure the review of Community acts by Community courts.⁸⁰ This system enables natural or legal persons that by reason of the admissibility conditions of Article 230(4) TEC are excluded from the direct challenge of Community measures to resort to alternative avenues of access. They include the plea of invalidity before Community courts and requesting national courts to make a reference to the ECJ for a preliminary ruling on validity.⁸¹

Community law is convinced that the request for preliminary ruling is capable of providing alternative access to a court. It was held that effective judicial protection will not be denied provided that a procedure can be commenced before national authorities in the same matter and the outcome of that domestic procedure can be challenged before national courts.⁸² In the procedure before domestic courts nothing prevents the applicant to question the validity of the Community measure in question driving the national court to rule on that issue, where required, after a request for preliminary ruling on the validity of that Community measure.⁸³ In more general terms, the possibility for individuals to have their rights protected before national courts, which have the power to grant interim relief and to make a reference for a preliminary ruling, constitutes the

⁸⁰ *Inter alia*, para. 80, RJ Reynolds; para. 23, Les Verts; para. 22, Gaston Schul; para. 46, Rothley; para. 39, BAT; para. 40, UPA, ECJ; para. 30, Jégo-Quééré, ECJ. This argument has been considered not applying to Titles V and VI TEU establishing a limited system of judicial review, para. 54, OMPI; this finding was not repeated in SEGI or Gestoras.

⁸¹ *Inter alia*, para. 46, Rothley; para. 40, UPA, ECJ; para. 30, Jégo-Quééré, ECJ; para. 23, Les Verts. Challenging the validity of Community measures was also considered as an alternative remedy to the action for damages against the EC, see, para. 14, Amylum; para. 11, Scholten-Honig; para. 11, Unifrex; para. 27, Krohn.

⁸² Para. 84, Area Cova, CFI; para. 32, Greenpeace; para. 40, Sniace.

⁸³ *Inter alia*, para. 11, Rau; para. 75, Kruidvat; paras. 35-36, Buralux; para. 40, Sniace; para. 33, Greenpeace. Para. 44, Jégo-Quééré, CFI, not accepting its adequateness. In respect of the suitability of preliminary references the ECtHR held that although the Convention does not guarantee a right to have a case referred for a preliminary ruling and that national courts are not under an absolute obligation to refer a preliminary question, in certain circumstances, refusal to refer by a domestic court trying a case at final instance might infringe the principle of fair trial, in particular, where such refusal appears arbitrary, *inter alia*, paras. 41-43, Wynen; para. 74, Ernst; para. 114, Coeme. This closes the circle for national courts as regards their duties under the right to effective judicial protection in EC law and under Article 6 ECHR.

very essence of the Community system of judicial protection.⁸⁴ Requests for preliminary rulings on validity are considered as self-standing means for reviewing the legality of Community acts.⁸⁵

The greatest concern as to the suitability of preliminary rulings as alternatives of annulment actions surfaced in connection with Community regulations. Although true regulations, these directly applicable legislative measures of general application, had been excluded from the scope of Article 230(4) TEC, subsequent legal development crowned by the judgment in *Codorniu* permitted challenges by private individuals against them.⁸⁶ This achievement on the front of access to justice, however, threatened to undermine the credibility of the alternative access argument. Namely, the possibility of challenging regulations before national courts appeared unattainable as in the absence of implementing domestic measures it may be impossible to lay a claim before domestic courts. In this respect, Community courts pointed out that alternative access can be provided by virtue of challenging, as a preliminary issue, the legality of the application of the regulation by national authorities.⁸⁷ Besides, national courts could be called upon to hear a genuine dispute in which the question of validity is raised indirectly.⁸⁸ This is not only achievable by driving the person concerned to contravene the measure, which would hardly be acceptable, but the person concerned could request from the competent national authority to issue a measure challengeable before national courts on the basis of the regulation at issue.⁸⁹

Protection before national courts combined with the possibility of preliminary rulings has also proved to be an important alternative recourse to annulment actions outside the Community pillar. After the initial resignation that against common positions the law of the Union provides no redress⁹⁰ the ECJ managed to conjure the missing remedy. On the basis of a wide interpretation of Article 35(1) TEU the right to make a reference to the ECJ for a preliminary ruling was acknowledged in respect of all measures adopted by the Council that are intended to have legal effects in relation to third parties.⁹¹ This meant that common positions, which because of their content have a scope going

⁸⁴ Para. 54, *Area Cova*, C-300/99 P and C-388/99 P; para. 46, *Area Cova*, C-301/99 P. When the person concerned was able to bring an action before the national court, there is no need to examine whether the right to judicial redress requires Community courts to declare admissible an action for annulment against the conditions of Article 230(4) TEC, paras. 42-46, 47, 48-49, *La Conquete*.

⁸⁵ Para. 18, *Süderdithmarschen*; para. 22, *Atlanta*, C-465/93; para. 22, *Gaston Schul*; para. 49, *T-Port*, C-68/95.

⁸⁶ Para. 19, *Codorniu*.

⁸⁷ Para. 20, *Atlanta*, C-465/93; para. 16, *Süderdithmarschen*.

⁸⁸ Para. 40, *BAT*.

⁸⁹ Paras. 34-35, *Jégo-Quééré*, ECJ.

⁹⁰ Para. 52, *SEGI*, ECJ; para. 52, *Gestoras*. See in this regard, pp. 894-897, *Peers: 2007*.

⁹¹ Para. 53, *SEGI*, ECJ; para. 53, *Gestoras*.

beyond that assigned by the TEU, are subject to preliminary rulings⁹² and, therefore, open to challenges by means other than the action for annulment.

Within narrow bounds the action to establish the non-contractual liability of the Community under Article 235 and Article 288(2) TEC was considered as another alternative to the action for annulment, provided that the challenged measure was capable of imposing liability on the Community.⁹³ The limited number of references to this remedy is explained by the fact that it is not part of the system of review of legality and it is only available where a party has suffered harm on account of unlawful conduct.⁹⁴ Nevertheless, it was held that the inadmissibility of the action for annulment does not exclude the admissibility of damages actions⁹⁵ and that being unable to establish the conditions of non-contractual liability does not entail that effective judicial protection is denied.⁹⁶

The action for annulment can also be considered as the alternative of an action for annulment unavailable in the given circumstances.⁹⁷ In the actions directed against common positions under the TEU admissibility was provided under considerations different from the original conditions. It was based on the jurisdiction of Community courts to examine an act adopted pursuant to the TEU in order to ascertain whether that act affected the Community's competences.⁹⁸ In the same context, the possibility of challenging in annulment Community and/or national acts implementing common positions before Community/national courts was considered as an effective, although indirect, legal remedy.⁹⁹ Similarly, in another context it was held that access to justice

⁹² Para. 54, SEGI, ECJ; para. 54, Gestoras.

⁹³ Para. 98, Tillack; para. 55, Korkmaz; para. 123, Philip Morris; para. 82, RJ Reynolds. See also, paras. 16-20, 21, Tete, CFI; para. 77, Salamander. In connection with individual concern, para. 85, Pescadores, CFI; para. 44, Jégo-Quéré, CFI, par. 52, SBC. On the action for damages as an alternative means of judicial review, pp. 204-208, Albors-Llorens: 1996.

⁹⁴ Para. 83, RJ Reynolds.

⁹⁵ Para. 97, Tillack; para. 59, Lamberts.

⁹⁶ Para. 84, RJ Reynolds. Provided that the ECJ meant the right of access to a court under the term effective judicial protection, on the basis of Z, ECtHR and the related case law under the ECHR, this assertion appears to be adequate. According to that case law even if the claim for damages is rejected, but a proper and fair examination of the claim took place, the right of access to court will not be compromised. The right of access to a court does not guarantee a judgment in favour, but an adequate examination and assessment of the case by a court. It follows that, in principle, the requirement of a reasonable alternative remedy to an action for annulment could be satisfied by an examination of the merits of the damages claim, irrespective that it results in striking out that claim. See in this respect, pp. 314-315, Van Dijk and Van Hoof: 1990, suggesting that access to a court refers only a right to submit a claim to a court.

⁹⁷ Making the action for annulment available when it constitutes the only procedural safeguard can ensure only that the right to effective judicial protection is observed, paras. 152-153, 155, OMPI.

⁹⁸ Para. 56, OMPI and paras. 56, 58, Selmani: action for annulment; paras. 41-42, SEGI, CFI, action for damages against the Community.

⁹⁹ Para. 55, OMPI.

could be ensured by making available the judicial review of measures issued in consequence of a measure against which the annulment action was not admissible.¹⁰⁰

The deference of responsibility argument

Irrespective whether the alternative remedies argument proves sufficient in addressing denial of justice, the Community approach on access to justice is sealed up by the deference of responsibility argument from the perspective of establishing compatibility with Article 6 ECHR. The deference argument provides that Community courts are able relieve their case-law, upon which the present analysis of non-divergence is focused, from the pressure to comply with the requirements of Article 6(1) ECHR by means of deferring the responsibility for the failure to provide adequate judicial protection to the Member States.¹⁰¹ This turns the issue of divergence between ECHR and EC law as defined by the present thesis moot, since the right of access to a court in Community law becomes a matter which falls outside the jurisdiction of Community courts.

Deferring the responsibility to provide access has appeared in various forms. Community courts claimed that the lack of effective judicial protection cannot constitute authority for changing by judicial action the system of remedies and procedures established by the EC Treaty.¹⁰² It was also held that the unavailability of the action for annulment,¹⁰³ the lack of proceedings before national courts,¹⁰⁴ or the reference for a preliminary ruling being less effective in reviewing the legality of Community measures,¹⁰⁵ even if proved, cannot induce such modifications.¹⁰⁶ In particular, the right to effective judicial protection cannot provide for the admissibility

¹⁰⁰ Para. 49-50, Rothley; para. 69, Makhteshim-Agan. See also the possibility to challenge a measure substituting the original measure or to launch an action for failure to act when such alternative measure was not issued, paras. 6-7, Case 44/81; paras. 33-34, 38-39, Guérin, CFI. Annulment actions launched by the right applicants can also be regarded as alternatives to inadmissible actions in the same matter, paras. 37-38, KNK; para. 55, SEGI, ECJ; para. 55, Gestoras.

¹⁰¹ See in this respect, p. 89, Albors-Llorens: 2003; p. 187, Gromley: 2001, suggesting that by means of deferring the responsibility to national courts the ECJ is "disappearing on a pink cloud".

¹⁰² *Inter alia*, para. 37, Pescadores, ECJ; para. 51, Rothley; para. 81, RJ Reynolds. However, the CFI suggested that a new judicial interpretation of individual concern is not excluded, paras. 49-50, Jégo-Quéré, CFI. The new interpretation at para. 51, Jégo-Quéré, CFI, was, however, overruled as it had the effect of removing all meaning from the requirement of individual concern, para. 38, Jégo-Quéré, ECJ. See, paras. 81-82, Fost Plus, rejecting the claim to reverse the latter ruling of the ECJ and refusing to consider the amended standing rules of the Constitutional Treaty (*infra* fn. 112) as it is not a binding legal instrument.

¹⁰³ Para. 37, Pescadores, ECJ.

¹⁰⁴ Para. 45, Jégo-Quéré, CFI; para. 54, Bactria; para. 26, Asocarne.

¹⁰⁵ Para. 75, Salamander.

¹⁰⁶ Neither can the exceptional seriousness of the infringement, nor the violation or adverse impact on fundamental rights, nor the breach of the institutional balance provide access against admissibility rules, paras. 38-42, FNAB; paras. 87-88, Philip Morris.

of an action for annulment when the conditions of admissibility are not satisfied.¹⁰⁷ Neither would alleged violations of ECHR fundamental rights lead to declaring an action admissible under Article 230(4) TEC.¹⁰⁸ Outside the Community pillar it was held that in the Community legal system the absence of an effective legal remedy cannot in itself confer independent Community jurisdiction in relation to an act adopted under Titles V and VI of the TEU.¹⁰⁹

Having relieved Community/Union jurisprudence of the duty to provide judicial protection the option available to Community courts was to burden the Member States with the obligation of establishing a system of legal remedies and procedures that ensures access to justice.¹¹⁰ The responsibility of Member States appears in two forms. The first entails that Member States, in particular their courts and tribunals, are required within their competences to interpret and apply national procedural rules governing rights of action in a manner that enables individuals to challenge before them the legality of national measures relative to the application of the Community measure unchallengeable before Community courts.¹¹¹ The second requires Member States, the constitutive authorities of the European Community/Union, to consider amending the founding treaties.¹¹² This entails that ultimately the admissibility conditions of annulment actions would have to be redrafted with the aim of ensuring access to Community courts.¹¹³

National courts

In the realm of protecting Community rights before national courts individuals often faced situations in which access to a court was not provided as a matter of domestic law. In such instances of denial of justice the ECJ would condemn situations in which access

¹⁰⁷ *Inter alia*, para. 26, *Asocarne*; para. 38, *CNPAAP*; para. 37, *Pescadores*, ECJ; para. 81, *RJ Reynolds*; paras. 43-44, *UPA*, ECJ; paras. 25, 47, *Rothley*; paras. 33, 36, *Jégo-Quééré*, ECJ; para. 66, *Korkmaz*; para. 60, *SEGI*, ECJ; para. 60, *Gestoras*.

¹⁰⁸ Para. 75, *Öcalan and Vanly*.

¹⁰⁹ Para. 38, *SEGI*, CFI; para. 54, *OMPI*. The guarantee of respect for fundamental rights referred to in Article 6(2) TEU cannot be relied upon against the failure of the TEU to entrust the Court of Justice adequate competences, para. 37, *SEGI*, CFI; para. 53, *OMPI*.

¹¹⁰ *Inter alia*, para. 41, *UPA*, ECJ; para. 31, *Jégo-Quééré*, ECJ; para. 74, *Salamander*; para. 58, *PPG*.

¹¹¹ *Inter alia*, para. 32, *Jégo-Quééré*, ECJ; para. 42, *UPA*, ECJ; para. 56, *SEGI*, ECJ; para. 56, *Gestoras*.

¹¹² *Inter alia*, para. 45, *UPA*, ECJ, para. 50, *SEGI*, ECJ; para. 50, *Gestoras*.

¹¹³ The Constitutional Treaty introduced changes to standing requirements in annulment actions in harmony with the new provisions on the legal instruments of the Union that appeared to resolve the problem of challenging the validity of directly applicable legislative measures, see in this respect, pp. 595-600, *Usher*: 2003; pp. 360-365, *Waelbroeck*: 2005; pp. 88-91, *Arnulf*: 2006; pp. 344-347, *Craig*: 2006.

to judicial protection was not provided¹¹⁴ and oblige the Member States to ensure access.¹¹⁵ The ECJ has demanded from national courts to regard admissible an action brought for the purpose of challenging the legality of domestic measures even in contravention of applicable domestic rules.¹¹⁶ In *Unibet* the hybrid solution addressed denial of justice in national law by means of taking stock of alternative remedies that would ensure access to a court.¹¹⁷ Besides damages actions in which an examination of compatibility can take place,¹¹⁸ the ECJ mentioned provoking judicial review by way of applying for a domestic measure subject to judicial review.¹¹⁹

It follows from the above that the concept of denial of justice is central to the scope of the right of access to a court in both jurisdictions and that judicial approaches to denial of justice do correspond. In particular, the stricter stance of Community law towards denial of justice in domestic law requiring access to be provided corresponds with that in ECHR law. Examining the availability of alternative remedies in Community and national law is considered as most adequate in avoiding denial of justice just as accepted under ECHR law. It might be an unorthodox approach, but the response of deferring the responsibility to provide access to a court to the Member States seems to be successful in relieving Community case law from the burden of divergence from Article 6 ECHR that satisfies completely the needs of the present **similarity argument**. It appears that Strasbourg subscribes to the alternative recourse argument adopted by Community courts.¹²⁰ Although it acknowledges that direct access to Community courts might be restricted,¹²¹ it holds that providing indirect access by means of alternative remedies can counterbalance this shortcoming. They include actions initiated by others in the same matter, action for damages against the Community, and remedies before national courts upon which the ECJ maintains its control by virtue of the preliminary

¹¹⁴ Para. 20, Johnston; para. 24, Coote; para. 46, C-424/99.

¹¹⁵ Para. 19, Johnston; paras. 20, 22, Coote; paras. 14, 17, Heylens; paras. 102-103, MRAX.

¹¹⁶ Para. 13, Borelli; para. 58, Kühne.

¹¹⁷ Paras. 55, 64, *Unibet*.

¹¹⁸ Paras. 48-49, 56-58, *ibid.*

¹¹⁹ Paras. 60-61, *ibid.* However, provoking national criminal or administrative procedures by disregarding domestic law cannot be considered as adequate means of judicial protection, paras. 62-64, *ibid.*

¹²⁰ Criticised at pp. 126, 131, Callewaert: Wildhaber for being light-hearted in accepting the Community system of access to justice; see also, p. 204, Eeckhout: 2007.

¹²¹ Paras. 161-162, *Bosphorus*, ECtHR.

ruling procedure.¹²² Furthermore, accepting that Community law provides adequate and in some cases wider opportunities for judicial protection is not alien from ECHR law. The ECtHR has accepted that the scope of judicial control as regards protecting Community rights before national courts is more substantive than that required from the Contracting States under Article 6(1) ECHR.¹²³

The ECJ has also expressed its persuasion that denying standing under Article 230(4) TEC could avoid condemnation under the ECHR. It asserted in the given circumstances that declaring the application inadmissible risked no conflict with the ECHR as the case would not be found admissible before the ECtHR.¹²⁴ The optimism of Community courts might also be triggered by the *Posti and Rahko* judgment of the ECtHR that led commentators to conclude that admissibility conditions under Article 230(4) TEC could be accommodated under Article 6(1) ECHR.¹²⁵ Some argued that the judgment in *Posti and Rahko* represents a restrictive attitude towards access to justice under the ECHR permitting situations where admissibility conditions would exclude access to judicial protection¹²⁶ just as under Article 230(4) TEC.

2. Similarity in the language of the right of access to a court

As mentioned above, ECHR law considers interferences with the right of access to justice on one hand as a matter resolvable under the concept of denial of justice and, on the other, as a matter of justifiable restrictions subject to the requirement of proportionality. However, the large majority of EC cases will resort to addressing the problem of denial of justice (the availability of alternative remedies) without advancing to the examination of proportionality. Although this can hardly be criticised under ECHR law, it entails that only a handful of cases are available for the purposes of

¹²² Paras. 163-164, *Bosphorus*, ECtHR.

¹²³ Para. 60, *Vilho Eskelinen*, referring to para. 18, *Johnston*.

¹²⁴ Paras. 82-83, *Öcalan and Vanly*, on grounds of the failure establish that the applicants were victims of human rights violations as required under Article 34 ECHR.

¹²⁵ P. 505, *Corthaut and Vanneste*: 2006. See also, *Waelbroeck*: 2005; it is difficult to agree with the comments on the incompatibility of the case law under Article 230(4) TEC with Article 6(1) ECHR at p. 370-371 as the statement that the procedure for preliminary ruling is not a genuine remedy under Article 35 ECHR was torn out of context, therefore, one cannot conclude that the ECtHR would not consider it as an alternative remedy: his argument rested on the exhaustion of remedies under Article 35 ECHR and not whether the remedies could be accepted under Article 6(1) ECHR.

¹²⁶ Pp. 508-509, *Corthaut and Vanneste*: 2006. See, para. 52, *Posti and Rahko*; para. 50, *Alatulkkila*, stating that Article 6(1) ECHR does not require states to get rid of every lacuna in legal protection - for instance Article 6 ECHR does not guarantee a right of access to a court with power to invalidate or override a law enacted by the legislature. See also, *JDO Pinheiro Farinha et al, Sporrang and Lönnroth*, stating that Article 6(1) ECHR does not require an unrestricted guarantee of judicial review against governmental and administrative acts.

establishing similarity with respect to the remaining components, apart from the language of the right, within the general system of analysis.

The following observations are warranted as regards the language of the right of access to a court. Basically, different uses of the right of access to a court must be distinguished. First, when Article 6(1) ECHR is interpreted as the prohibition of denial of justice the right of access to a court manifests as a core right under the Convention reflecting the general requirement of fairness and the pre-eminence of law.¹²⁷ Juxtaposed with the denial of justice case law of Community courts it is apparent that they both attract a prohibitive language accepting no other solution but providing access to justice even by means of alternative avenues of access.

Second, when the proportionality of restrictions on access to a court comes into play, its language will inevitably be permissive. In ECHR law the right of access to a court appears as a qualified right subject to limitations on grounds that it calls for regulation by states.¹²⁸ Therefore, it enables proportionate restrictions pursuing a legitimate aim.¹²⁹ This is comparable to the approach in EU/Community law surfaced under the pressure of *jus cogens*. In these cases concerning the lack of jurisdiction of Community courts the CFI denied that such lacuna in judicial protection is in itself contrary to *jus cogens*¹³⁰ implying that access to a court could entail a permissive language. This was affirmed by statements claiming that the right of access is not absolute as at a time of public emergency measures may be taken as derogations from that right and that outside such exceptional circumstances certain restrictions are inherent in that right.¹³¹

It must be pointed out that in Community law the right of access to a court was also utilised as a general legal principle (as opposed to a fundamental right) rendering the question of language irrelevant. The principle of effective judicial protection functions in a specific legal environment as a complex principle demonstrating characteristics different from that of fundamental rights.¹³² Another example of principle use is when

¹²⁷ *Supra* fn. 2 and 3.

¹²⁸ *Inter alia*, para. 34, McElhinney; para. 31, Bellet; para. 147, Osman; para. 99, Markovic; para. 38, Golder. The margin of appreciation with regard to access to a court appears as an organisational latitude in regulating access as opposed to discretion provided for justifying interferences, p. 32, Schokkenbroek: 1998.

¹²⁹ *Inter alia*, para. 57, Ashingdane; para. 65, Fayed; para. 99, Markovic; para. 147, Osman.

¹³⁰ Para. 286, Kadi; para. 341, Yusuf; paras. 90-93, 125, Hassan; paras. 115-117, 155 Ayadi.

¹³¹ Para. 287, Kadi; para. 342, Yusuf; paras. 90-93, 125, Hassan; paras. 115-117, 155 Ayadi. The CFI referred to Article 8 UDHR and Article 4(1) ICCPR in this respect. For inherent limitations generally recognised by the community of nations (the doctrine of state immunity) the CFI referred to the ECtHR judgments in Price Hans-Adam; McElhinney; and (the immunity of international organisations) Waite and Kennedy.

¹³² *Supra* Point 1(a).

in connection with national administrative procedures Community law requires that they must be accessible and remedies must be available.¹³³

3. Similarity in the functioning of the right of access to a court

In ECHR law limitations to the right of access to a court must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.¹³⁴ Although the rare cases in Community law fail to provide a general formula, the elements utilised in those judgments reveal a similar test as it will be demonstrated below.

3(a): Lawfulness

Lawfulness is rarely considered under Article 6(1) ECHR. It concerns whether the restriction was lawful and not arbitrary under national law.¹³⁵ Clarity and coherence may also be considered in connection with foreseeability.¹³⁶ In the relevant Community cases the condition of lawfulness was not examined specifically. However, considering that the ultimate purpose of these cases was to challenge the lawfulness of a measure the judicial control of which was limited and that as a consequence the arguments concentrated on the lawfulness of the restrictions on access, Community law appears to take into account this requirement.

3(b): Pursuing a legitimate aim

Pursuing a legitimate aim is a condition under Article 6(1) ECHR¹³⁷ and in the relevant Community cases.¹³⁸

¹³³ See, para. 27, Panayotova; para. 90, Peerbooms; para. 35, Greenham; para. 48, Inizan; para. 85, Müller-Fauré.

¹³⁴ *Inter alia*, para. 57, Ashingdane; para. 99, Markovic; para. 147, Osman.

¹³⁵ Paras. 61, 65, Prince Hans-Adam; mm. para. 42, Canete de Goni.

¹³⁶ Para. 42, Levages Prestations Services.

¹³⁷ *Inter alia*, para. 58, Ashingdane; paras. 53-59, Prince Hans-Adam; paras. 69-70, Fayed; para. 114, Capital Bank AD; para. 54, Al-Adsani; para. 50, Ernst; para. 53, Beer and Regan; para. 63, Waite an Kennedy. See *supra* point 1(d) on legitimate limitations.

¹³⁸ Para. 288, Kadi; para. 343, Yusuf; paras. 90-93, 125, Hassan; paras. 115-117, 155, Ayadi. It is equated with an essential public interest, para. 289, Kadi; para. 344, Yusuf; para. 135, Ayadi; para. 105, Hassan. In time-limit cases legal certainty was accepted as the legitimate aim in both jurisdictions, see, in ECHR law: para. 51, Stubbings; para. 44, Diaz Ochoa; and in EC law: paras. 64-65, Eagle; para. 66, Sanders; para. 75, Selmani.

3(c): Proportionality

The element of proportionality in ECHR law requires the ECtHR to strike a fair balance between the legitimate aim serving the interest of the community and the requirement of protecting the fundamental rights of the individual.¹³⁹ It represents an examination whether the interference is justifiable which is also apparent in the analysis carried out by Community courts as it will be revealed below under the component of flexibility.

4. Similarity in the flexibility of the right of access to a court

Before turning to the benchmarks of flexibility, by way of examining the general approach to flexibility under Article 6(1) ECHR, it can be concluded that in general terms flexibility depends on the circumstances of the case.¹⁴⁰ A similar approach might not be entirely apparent from the few available EC cases, but it is clear that the specific circumstances of the cases led the CFI to direct judicial scrutiny towards the justifiability of restrictions on access to a court.¹⁴¹

4(a): The benchmarks of flexibility

In ECHR law the following factors have been taken into account when examining the proportionality of interferences with the right of access to a court.

- a) Importance of the legitimate aim.¹⁴²
- b) The amplitude of the restriction (limited in time and degree).¹⁴³ The obvious limit to the restriction on access is denial of justice¹⁴⁴ incorporated within the examination of proportionality and the breach of other fundamental rights.¹⁴⁵

¹³⁹ Para. 65, Fayed.

¹⁴⁰ *Inter alia*, para. 59, Ashingdane; para. 71, Fayed; para. 51, Ernst; para. 64, Waite and Kennedy.

¹⁴¹ See, the cases at *supra* fn. 129 where the lack of judicial redress in the UN sanctioning system was challenged before Community courts.

¹⁴² *Inter alia*, paras. 36-38, McElhinney; paras. 35-37, Fogarty; paras. 79, 81, Fayed; paras. 53-59, Prince Hans-Adam; para. 58, Ashingdane; para. 52, Ernst; paras. 71-72, Waite and Kennedy; paras. 61-62, Beer and Regan.

¹⁴³ *Inter alia*, para. 59, Ashingdane; para. 77, Tinnelly; para. 31, Devlin; paras. 148-152, Osman; paras. 52-53, Stubbings; para. 64, Stefanelli; paras. 27-32, Barbier. The denial justice cases where the ECtHR would concentrate on the excessiveness of restrictions without considering proportionality could be

- c) Providing alternative access.¹⁴⁶

In EC law similar benchmarks were considered.

- a) Importance of the legitimate aim.¹⁴⁷
 b) The amplitude of the restriction (limited in time).¹⁴⁸
 c) Providing alternative access.¹⁴⁹

The similarity of the benchmarks of flexibility, in particular, the importance of the legitimate aim and the amplitude of the restriction, is not surprising as they follow from the basic structure of the proportionality requirement. The benchmark of alternative access is familiar from the prohibition of denial of justice in ECHR and EC law, and it is logical that both jurisdictions consider alternative means of access to justice as identifying alternative avenues of redress is perhaps the only defence in justifying (neutralising) impediments to access.

Having found that both jurisdictions take into account similar benchmarks of flexibility enables the conclusion that access to justice is protected (conceived) in a similar manner in ECHR and EC law. Its general implications on the **similarity argument** will be considered below in the conclusions closing Part III.

5. A detour: The right to appeal in criminal cases in ECHR and EC law

The single available judgment under EC law demonstrates similarity by applying paragraph 2 of Article 2 Protocol 7 ECHR containing exceptions to the right to appeal, in particular, when the person was tried at first instance by the highest court or tribunal.

mentioned here as it could be said that in those cases the balance was upset by the unacceptable degree of interference.

¹⁴⁴ *Inter alia*, para. 34, McElhinney; para. 44, Prince Hans-Adam; para. 99, Markovic; para. 147, Osman; para. 25, Barbier; paras. 44-45, Pérez de Rada Cavanilles; para. 29, Tricard.

¹⁴⁵ Paras. 57-66, Al-Adsani; para. 88, A, ECtHR.

¹⁴⁶ *Inter alia*, para. 59, Ashingdane; para. 39, McElhinney; paras. 66-68, Prince Hans-Adam; paras. 77-78, Tinnelly; paras. 53-55, Ernst; paras. 107-108, Wos; paras. 68-70, Waite and Kennedy; paras. 65-66, Stefanelli.

¹⁴⁷ Paras. 288-289, Kadi; paras. 343-344, Yusuf; paras. 90-93, 105, 125, Hassan; paras. 115-117, 135, Ayadi.

¹⁴⁸ Para. 289, Kadi; para. 344, Yusuf; paras. 135-136, Ayadi; paras. 105-106, Hassan. They also refer to the availability of safeguards and remedies which corresponds to that in para. 78, Fayed under the ECHR.

¹⁴⁹ Paras. 270, 290, Kadi; paras. 317, 345, Yusuf; paras. 90-93, 107-109, 118-120, 112-114, 124-125, Hassan; paras. 115-117, 137-142, 148-150, 154-155, Ayadi.

On this basis, the fact that no appeal may be brought against the decisions of the ECJ, the highest Community court proceeding at first instance in the case, was found not constituting a deficiency contravening the right to effective judicial protection.¹⁵⁰

¹⁵⁰ Paras. 112-113, Cresson. The higher court exception in paragraph 2 is associated with conducting criminal procedures against higher state officials, p. 370, Trechsel: 2005; this way it is not surprising that it was relied upon in Cresson involving a former European Commissioner.

Part III/b: The similarity argument: Rights with a prohibitive language

Chapter 12: Fair trial rights in ECHR and EC law

Despite the fact that they may allow, although in limited circumstances, necessary restrictions supported with sufficient reasons, fair trial rights are placed at the front of Part III/b discussing rights that do not permit justifiable interferences in the general interest. Fair trial rights are predominantly of prohibitive language and the problem of restrictions appears to be addressed as a matter of scope and not of flexibility. Therefore, it is more appropriate to establish the similarity of due process rights in ECHR and EC law among other fundamental rights with a prohibitive language.

The question of similarity in the protection of fair trial rights requires the assessment of various principles. The variety of fair trial rights is governed in ECHR law by principles such as fairness, the equality of arms, the requirement of an adversarial procedure, and by the specific guarantees of defence rights.¹ In general terms, the requirement of fairness guides the ECtHR in dealing with the specific circumstances of the given case.² In Community law fair trial rights are equally amorphous driven by similar principles. Their content and application depend upon the specific circumstances of each particular case.³ Consequently, the **similarity argument** will have to rely on contrasting judicial approaches concerning (the above mentioned) broader principles that in certain circumstances may materialise in more detailed provisions.

1. Similarity in the scope of the right to a fair trial

For the present purposes the right to a fair trial will be considered as the various privileges under Article 6(1) and (3) ECHR. It is an overarching category embracing the requirement that procedures must be adversarial,⁴ the principle of equality of arms,⁵ and the rights of the defence.⁶ Essentially, Article 6 ECHR is governed by the general

¹ See, pp. 85-86, Trechsel: 2005.

² P. 171, Buergenthal: 1968.

³ See, para. 1021, Limburgse, CFI; para. 70, ICI, CFI; para. 192, Atlantic Container; para. 127, Aalborg Portland. In this respect in ECHR law see, para. 53, Helle; para. 60, Ernst; paras. 42-43, Meftah.

⁴ *Infra* fn. 9.

⁵ *Inter alia*, para. 60, Rowe and Davis; para. 46, Edwards and Lewis; para. 51, Jasper; para. 146, Öcalan.

⁶ *Inter alia*, para. 24, Borgers; para. 37, Imbrioscia; paras. 32-33, Artico; para. 27, Quaranta; para. 42, Lüdicke.

requirement of fairness.⁷ Cases are often examined only from the wider angle of fairness neglecting the previously listed specific guarantees within fair trial rights.⁸

The specific guarantees are defined as follows. The right to adversarial proceedings stands for the opportunity for the parties to have knowledge of and to comment on all evidence adduced and observations filed with a view of influencing the court's decision.⁹ The ability to participate effectively in the proceedings and to adduce evidence and arguments promoting the claims are also involved.¹⁰ The equality of arms requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent.¹¹ Defence rights are greatly exposed to the general requirement of fairness.¹² Since defence rights are considered as specific aspects of the right to a fair trial, they are examined in the light of the fairness of the entire procedure¹³ or under Article 6(1) ECHR whilst having due regard to their specificity.¹⁴ As a result, the general approach towards fair trial rights in ECHR law combines the requirements of fairness, an adversarial procedure, the equality of arms, and protecting the rights of the defence.¹⁵ In Community law the right to a fair trial appears as a general principle of law (fundamental right)¹⁶ inspired by Article 6(1) ECHR.¹⁷ As under ECHR law it includes

⁷ See in this respect, Pp. 209-210, Trechsel: 2005 and pp. 31-41, Sudre: 2001.

⁸ See, *inter alia*, para. 66, Brandstetter; para. 28, Delcourt; para. 63, Ruiz-Mateos; para. 104, Reinhardt; para. 45, Martinie; para. 74, Kress.

⁹ *Inter alia*, para. 56, Walston; para. 31, Lobo Machado; para. 60, Ernst; para. 63, Ruiz-Mateos; para. 33, Mantovanelli. The adversarial principle is only applicable before a tribunal, para. 33, Mantovanelli; mm. para. 42, Kerojärvi; acknowledged in EC law, para. 70, Aalborg Portland.

¹⁰ Para. 118, Capital Bank AD; para. 59, Milatová; para. 80, Perez; para. 28, Boldea. It also includes the principle that the contending parties should be heard, para. 102, Kamasinski.

¹¹ *Inter alia*, para. 56, Walston; para. 72, Kress; para. 60, Ernst; para. 23, Niederöst-Huber. In the civil limb of Article 6 ECHR it refers to a fair balance between the parties, para. 33, Dombó Beheer; para. 38, Ankerl.

¹² Their connection with Article 6 (1) ECHR is emphasised in that their basic purpose must not be forgotten nor should they be severed from their roots, para. 40, Meftah; para. 32, Artico. However, the defence rights claim can absorb the fairness claim, see, para. 42, Pakelli.

¹³ *Inter alia*, para. 40, Meftah; para. 43, Granger; para. 25, Asch; para. 58, Mattoccia; para. 34, Kuopila.

¹⁴ *Inter alia*, para. 36, Colozza; para. 29, Laaksonen; para. 52, Pélissier and Sassi; paras. 177-178, Popov/a.

¹⁵ See in this respect, pp. 86-89, Trechsel: 2005.

¹⁶ Para. 29, OBF; involving the rights of the defence, the equality of arms, access to a court, the right of access to a lawyer, para. 31, *ibid*. See also, para. 121, Tillack and para. 182, Schneider. It has close connections with the principle of sound administration which includes rights similar to fair trial rights, para. 127, Tillack and para. 48, max.mobil, referring to Article 41(1) EUCFR.

¹⁷ *Inter alia*, para. 69, Pre-Insulated Pipes, ECJ; para. 72, Steffensen; para. 26, Krombach, ECJ; para. 21, Baustahlgewebe; para. 17, Van der Wal, ECJ; para. 65, Eurofood; para. 40, Salzgitter Mannesmann. As to defence rights, para. 316, Limburgse, ECJ; para. 126, Corus; para. 32, TU, CFI. Article 6(1) ECHR quoted, para. 20, Baustahlgewebe; para. 4, Emesa Sugar, ECJ; para. 33, F; para. 3, OBF; para. 2, Öcalan and Vanly.

the principle of equality of arms¹⁸ and the right to an adversarial procedure.¹⁹ The protection of defence rights has a particularly broad general basis.²⁰ Defence rights evolved in the context of Community administrative procedures²¹ and they endow various requirements, similar to that under ECHR law, which include fairness, an adversarial procedure, the equality of arms, and the protection of the interests of the defence. They are derived from the general principle of procedural fairness.²² The term defence rights is often substituted with terms such as the right to be heard,²³ the adversarial principle,²⁴ and the observance of the right to a fair hearing²⁵ suggesting that defence rights in Community law correspond with the wider notion of fair trial rights under the ECHR.²⁶

As under ECHR law the adversarial principle in Community law provides that the (judicial) decision must be based on facts or documents of which the parties have been able to take cognisance and in relation to which they have been able to state their views.²⁷ Similarly, the all-embracing defence rights require that decisions concluding administrative/judicial procedures may incorporate only those objections that were known by the person concerned and that they only take into consideration facts on which the person concerned had the opportunity of making known his views²⁸ (of

¹⁸ Mm. para. 329, Tzoanos; mm. paras. 42-45, TEAM; para. 23, SPAG; para. 330, HFB; mm. para. 186, Sison. In OHIM procedures, para. 42, Chef Revival; paras. 38, 45, Strongline; para. 72, GE Betz; paras. 41-43, Focus Magazin Verlag; para. 43, DEF-TEC.

¹⁹ Para. 18, Emesa Sugar, ECJ; para. 28, Deutsche Telekom; paras. 46-47, Varec.

²⁰ See Articles 47 and 48(2) EUCFR as a potential general basis for fair trial rights. On the rationale for expanding the presence of defence rights in EC law, pp. 430-433, Azoulai: 2001.

²¹ See, *inter alia*, pp. 197-198, Harding and Joshua: 2003; pp. 91-94, Schwarze: 2004. Legislative background: anti-trust, Article 27 Regulation 1/2003/EC; Articles 10-13 Regulation 773/2004/EC; state aid, Article 6 Regulation 659/1999/EC; merger, Article 18 Regulation 139/2004/EC; anti-dumping, Article 6(5) Regulation 384/96/EC. Before national administrative authorities, see, para. 35, Rutili; national courts, para. 52, Leffler.

²² Para. 27, ASML. Fairness might not be the only source of defence rights in EC law. On pp. 204-205, Harding and Joshua: 2003 it was suggested that defence rights in anti-trust procedures were dictated by powerful corporate actors in order to protect their interests overshadowing other interests procedural rights should support.

²³ *Inter alia*, para. 174, C-68/94 and 30/95; para. 104, Cresson; para. 9, Hoffmann-La Roche; para. 121, WLG; para. 68, SDK; para. 28, Ismeri, ECJ; para. 15, Transocean; para. 80, Enso Espanola.

²⁴ Para. 74, Arizona Chemicals.

²⁵ *Inter alia*, para. 90, OMPI; para. 10 Musique Diffusion; para. 42, Krombach, ECJ; para. 15, Al-Jubail; para. 81, Nutrasweet.

²⁶ For a variety of defence rights see, paras. 106-110, Cresson.

²⁷ Para. 24, Plant and para. 47, Varec. Other manifestations of the adversarial principle, para. 28, C-225/97; para. 21, Van Schnijdel; para. 176, Nippon Steel. The adversarial principle also provides that in judicial procedures applications must contain the necessary information that enables the defendant to prepare his defence, *inter alia*, para. 168, Österreichische Postsparkasse; para. 89, Tillack.

²⁸ *Inter alia*, paras. 138, 191, 194, Atlantic Container; paras. 26, 94, ACF Chemiefarma; para. 18, France Télécom; paras. 49-52, CB and Europay; para. 25, TUM; paras. 248-249, Limburgse, CFI; para. 87, Limburgse, ECJ; paras. 51-52, 56, Hoechst; para. 26, Orkem; paras. 29, 30, 32, 34, Plant.

exercising his right to be heard²⁹ or to set forth his views effectively³⁰ enabling him to present his defence³¹). Defence rights also include the obligation to divulge to the parties all the facts, circumstances, or documents on which the case relies.³²

In composite procedures³³ the right to be heard represents a particular problem. These procedures are specific to Community law involving two levels of decision-making in which only the national authorities are in direct contact with the person concerned.³⁴ According to Community courts only when the Community institution contemplates diverging from the opinion of the national authorities, must the person concerned be able to exercise his right to be heard on the Community level.³⁵ Considering that this is the only case when the decision-making process is in any way conducted by Community institutions, not providing the right to a hearing as a matter of Community law in any other case (when the procedure is completed on the national level and its conclusions are accepted by the Commission) can hardly be objected.³⁶

In circumstances similar to composite procedures, where the Community institutions were required to transpose UN Security Council resolutions and Sanctions Committee decisions, the lack of appreciation of Community institutions in the process of transposition made it unnecessary to provide a right to be heard. This may not be objected as transposing those measures was not part of the actual decision-making process where the right to be heard should be provided.³⁷

The situation was, however, different, when transposition involved the exercise of the Community's own powers. In such case the Community institutions are bound to observe the right to a fair hearing of the parties concerned³⁸ as the institutions contribute to the decision-making process. Nonetheless, the division of competences between the national and Community levels familiar from composite procedures requires a further

²⁹ *Inter alia*, para. 81, Enso Espanola; para. 68, Bolloré; para. 32, Van Landewyck; para. 34, Tzoanos, ECJ; para. 90, OMPI; para. 255, Kadi; para. 325, Yusuf; paras. 15, 17, Al-Jubail; para. 22, Citicorp; para. 43, De Bry; paras. 63-64, Gómez-Reino; para. 20, Vidrányi; paras. 70, 73-76, Danone, ECJ; para. 47, Campogrande.

³⁰ *Inter alia*, para. 23, Ismeri, ECJ; para. 49, Lisrestal, CFI; para. 50, Mediocurso.

³¹ *Inter alia*, para. 179, Kaufring; para. 25, TUM; para. 80, Eyckeler and Malt; para. 63, Primex.

³² *Inter alia*, para. 36, Musique Diffusion; paras. 29, 41, Hoechst; para. 15, Transocean; paras. 17-18, Al-Jubail; paras. 63-64, Gómez-Reino; paras. 40-41, De Bry.

³³ See in this respect, pp. 24-30, Cassese: 2004; pp. 191-192, Franchini: 2004; pp. 315-316, Craig: 2006.

³⁴ Customs procedure: the remission of import duties, paras. 74-75, Eyckeler and Malt; paras. 148-150, Kaufring; paras. 57-58, Primex.

³⁵ Para. 84, Eyckeler and Malt; para. 36, France Aviation; paras. 152, 160-161, Kaufring. Submitting written observations instead of a hearing is acceptable, paras. 106-110, Common Market Fertilizers.

³⁶ On the rights of defence in composite proceedings, see, pp. 31-34, Cassese: 2004.

³⁷ Paras. 258-259, Kadi; paras. 328-329, Yusuf; (the Community had no power of investigation, it was excluded from the examination of individual situations and from assessing the appropriateness of the measures at issue).

³⁸ Para. 109, OMPI. See also, paras. 147-154, Sison.

distinction in this regard. Provided that the decision in question was adopted by a competent national authority, the right to be heard does not have to be ensured at the Community level (concerning the adoption of Community measures simply confirming the national measure) as it may only be exercised at the national level.³⁹ Conversely, when the Community measure is based on information or evidence that has not been assessed at the national level, that information must be subject to the right to a hearing at the Community level.⁴⁰ As a conclusion for composite procedures, it follows that when the determination of rights and obligations falls under Community competences defence rights will be provided as a matter of Community law, otherwise, domestic law will ensure that defence rights are observed. Therefore, the fact that competences are divided between the Community and the Member States cannot be criticised from the perspective of the non-divergence thesis.

Before turning to the particular issues of similarity under fair trial rights, it must be reaffirmed that, despite its highly specific context, the all-embracing rights of the defence (the right to be heard) in Community law correspond to the right to a fair trial in ECHR law on the level of principles such as fairness, an adversarial procedure, and equal opportunities for both parties in a procedure.⁴¹

1(a): The issue of applicability

Mostly, the different manifestations of the right to a fair trial in Community law are relied upon in various Community administrative procedures.⁴² Considering that Article 6 ECHR is preoccupied with (judicial) procedures before tribunals this circumstance requires special attention. This is further underlined by the assertion in Community law that the Commission conducting the relevant administrative procedures cannot be described as a tribunal⁴³ within the meaning of Article 6 ECHR.⁴⁴ Therefore, it must be

³⁹ Paras. 121-122, OMPI, referring to the principle of sincere cooperation of Article 10 TEC in accepting the national appreciation of the matter and refraining from undue interference with national competences.

⁴⁰ Paras. 125, 126, 132, OMPI.

⁴¹ The M&Co decision by the ECommHR practically acknowledged the EC anti-trust procedure as providing an adequate level of protection of fair trial rights, p. 54, Tulkens: 2000.

⁴² The CFI has accepted that the right to a fair hearing in administrative procedures must be distinguished from that in judicial procedures, para. 94, OMPI. See, para. 70, Aalborg Portland, stating on the basis of ECHR law (*supra* fn. 9) that procedural safeguards in Article 6(1) ECHR including the adversarial principle relate only to judicial proceedings before a tribunal.

⁴³ As regards what constitutes a tribunal under EC law see, paras. 35-36, F, stating that a medical committee delivering a purely medical opinion does not exercise judicial functions, although it proceeds in appeal to the medical opinion of a medical advisor. See, para. 55, Le Compte, on the fact that the body exercises judicial functions is one element of the concept of a tribunal under ECHR law.

ascertained whether Community administrative procedures can be brought under the scope of Article 6 ECHR.⁴⁵

First, defence rights provided by Article 6(3) ECHR are often applicable before the procedure reaches the trial stage before a tribunal.⁴⁶ On this basis, Article 6 ECHR could cover the procedure before the Commission considered as the pre-trial phase of the procedure as a whole including judicial review before the CFI.⁴⁷ Second, as affirmed in the ensuing chapters concerning other principles relating to the criminal procedure,⁴⁸ defence rights under the criminal limb of Article 6 ECHR can be assumed as binding in Community administrative procedures, particularly in the anti-trust procedure.⁴⁹ Considering that defence rights are also applicable in state-aid, anti-dumping, customs, and OHIM procedures, in disciplinary law, and in case of the reduction of financial assistance⁵⁰ nothing prevents including Community administrative procedures under the scope of Article 6(3) ECHR.⁵¹

Third, it is more problematic in deciding whether Article 6 ECHR is applicable that the Commission cannot be considered as a tribunal. It is described as combining investigative, prosecutorial, and adjudicative functions.⁵² ECHR law comes to assistance in that it requires that decisions taken by bodies (administrative authorities)

⁴⁴ *Inter alia*, para. 339, Tzoanos; para. 56, Enso Espanola; para. 86, Bolloré; para. 39, Shell, CFI. The potential problems arising under Article 6 ECHR from the lack of separation of procedural functions in the Commission were to be neutralised by this position, para. 56, Enso Espanola; see in this regard Chapter 14.

⁴⁵ It is assumed that judicial procedures under the scope of EC law fall under Article 6 ECHR; merger procedures would fall under the civil limb of Article 6 ECHR.

⁴⁶ Para. 36, Imbrosia; point a, Ninn-Hansen (the body not qualifying as a tribunal must comply with certain aspects of Article 6 ECHR). In EC anti-trust procedures, the most relevant administrative procedure for the present purposes, the rights of the defence are fully effective after the communication of the statement of objections (SO) by the Commission, paras. 50-55, TU, C-113/04 P; para. 59, Dalmine, ECJ; certain defence rights are already applicable in the preliminary inquiries phase preceding the SO, paras. 15-16, Hoechst; para. 33, Orkem.

⁴⁷ Suggesting that a formal answer in this respect is not possible, p. 173, Harding and Joshua: 2003.

⁴⁸ See, Chapter 14 on the privilege against self-incrimination; Chapter 17 on double jeopardy; Chapter 15 on the presumption of innocence; Chapter 16 on no punishment without law; Chapter 11 on access to a court.

⁴⁹ See, *inter alia*, para. 21, National Panasonic; para. 68, Danone, ECJ; para. 92, ThyssenKrupp. The CFI declined that it was of criminal nature, however, at the same time it requires the protection of due process rights, pp. 184-186, Harding and Joshua: 2003. See in this respect the M&Co decision stating that for the purpose of the admissibility of a claim under Article 6(2) and (3) ECHR it can be assumed that the anti-trust procedure conducted by the Community would fall under Article 6 ECHR, had it been conducted by the Member States.

⁵⁰ *Inter alia*, para. 256, Kadi; para. 326, Yusuf; para. 28, Ismeri, ECJ; paras. 24-30, 33-34, Lisrestal, ECJ; paras. 46-50, Windpark Groothusen; para. 83, Irving; para. 59, Primex; para. 104, Cresson; para. 42, Krombach, ECJ; para. 70, C-33/04; paras. 92-99, C-304/02; para. 201, TGI; paras. 12-13, Case 259/85; paras. 114-121, Euroalliages; paras. 155-156, Ferchimes; paras. 45-50, Glaverbel.

⁵¹ This is not the case when it comes to the right to be heard in Community legislative processes, paras. 95-98, OMPI; paras. 34-38, Atlanta, C-104/97 P.

⁵² See Chapter 14. Besides, the entitlement to an oral and public hearing can only be provided before EC courts. In this respect ECHR law holds (paras. 57-58, Malhous) that the hearing before bodies that are not tribunals is irrelevant under Article 6 ECHR; under that provision the hearing must be held before a tribunal.

which do not themselves satisfy the requirements of Article 6(1) ECHR must be subject to subsequent control by a judicial body that has full jurisdiction and provides the guarantees laid down in that provision.⁵³ In particular, the combination of the prosecutorial and adjudicative functions conferred on administrative authorities is consistent with the ECHR, provided that the person concerned is able to turn to a tribunal that offers the guarantees of Article 6 ECHR.⁵⁴ In consequence, it must be ascertained whether by virtue of judicial review available before the CFI the procedures conducted by the Commission can be brought under Article 6(1) ECHR.⁵⁵ This will also demonstrate that the relevant Community procedures abide by the said requirements of Article 6(1) ECHR.

Basically, it needs to be determined whether the CFI exercises full jurisdiction in review. This comes from the interpretation of the concept ‘tribunal’ in ECHR law⁵⁶ and it provides that the tribunal’s jurisdiction must extend to examining all questions of fact and law relevant to the dispute.⁵⁷ Full jurisdiction allows the tribunal to annul in all respects, on questions of fact and law, the challenged decision.⁵⁸ The necessary powers also include confirming, varying, and substituting the decision after a full rehearing on the merits.⁵⁹

First, it must be acknowledged that the CFI is an independent and impartial tribunal.⁶⁰ In response to the requirement of full jurisdiction Community law provides that the CFI’s jurisdiction includes the review of legality of administrative decisions which involves the assessment of their correctness in law and in fact.⁶¹ It is clear from the relevant legal provisions that the CFI has exclusive jurisdiction to find facts, to assess those facts, and to review the legal characterisation of those facts and the legal

⁵³ *Inter alia*, para. 46, Helle; para. 52, De Haan; para. 29, Albert; par. 34, Kingsley; para. 37, Umlauf; para. 29, Zumtobel; paras. 103-104, Capital Bank AD; para. 33, Mantovanelli; para. 42, Kerojärvi. The demands of flexibility and efficiency may justify the prior intervention of administrative or professional bodies and of judicial bodies which do not satisfy the said requirements in every respect, para. 51, Le Compte.

⁵⁴ *Inter alia*, para. 58, Öztürk; para. 57, Lutz; para. 68, Belilos; para. 57, Kadubec; para. 64, Lauko.

⁵⁵ The rule that Article 6(1) ECHR does not prohibit procedures conducted by administrative bodies that do not satisfy every requirement of a procedure before a tribunal has been accepted in Community law, para. 183, Schneider (ref. to para. 51, Le Compte, *supra* fn. 53).

⁵⁶ *Inter alia*, para. 76, Chevrol; para. 55, Le Compte; para. 64, Belilos; paras. 38-39, Beaumartin.

⁵⁷ *Inter alia*, para. 77, Chevrol; para. 29, Franz Fischer; para. 98, Capital Bank AD; para. 32, Zumtobel.

⁵⁸ *Inter alia*, para. 39, Umlauf; para. 93, Vastberga Taxi; para. 54, Van de Hurk; para. 99, Capital Bank AD.

⁵⁹ *Inter alia*, point 2(a), Porter; para. 34, Kingsley.

⁶⁰ Para. 62, Enso Espanola. Asserting that without doubt the CFI is impartial and independent, p. 338, Wils: 1996 and p. 576, Einarsson: 2007.

⁶¹ *Inter alia*, para. 63, Enso Espanola; para. 73, Sumitomo and Nippon Steel. In particular, whether the rights of the defence were observed, paras. 134-135, Kaufring; para. 14, Interhotel, para. 487, Cimenteries. Furthermore, the judgments of the CFI may amenable to judicial review on appeal by the ECJ, para. 77, Sumitomo and Nippon Steel; para. 25, Baustahlgewebe; para. 53, Somaco.

conclusions drawn from them.⁶² The CFI's jurisdiction is unlimited meaning that it may substitute its own appraisal for the Commission's and it may cancel, reduce, or increase fines imposed by the Commission.⁶³ In short, the action for annulment under Article 230 TEC provides the recourse through which the requirements of Article 6(1) ECHR can be fulfilled by virtue of a subsequent review by a tribunal.⁶⁴

It is a relief from the requirement of full jurisdiction that ECHR law may accept limitations on the scope/intensity of review in the circumstances of the given case,⁶⁵ in particular, where adequate procedural safeguards have been available.⁶⁶ This corresponds with the obligation of the Commission under EC law to observe procedural guarantees in Community administrative procedures irrespective of the availability of full review by the CFI.⁶⁷

As a result, the current procedural arrangements in EC law are not incompatible with Article 6(1) ECHR.⁶⁸ The ability to challenge Community administrative decisions before a judicial body that provides the guarantees of Article 6(1) ECHR proved essential.⁶⁹ Indeed, the CFI was created to enhance the judicial control of Commission decisions and it has established a high intensity of judicial review engaging in a circumspect and meticulous examination of whether the Commission complied with the obligation to support its findings with evidence to the required legal standard.⁷⁰ Nonetheless, the true basis of adequate judicial control by Community courts is still provided by requiring the protection of fair trial rights before the Commission.⁷¹ By combining judicial protection and protection by administrative authorities procedural rights in Community administrative procedures can be pressed under the scope of Article 6(1) ECHR⁷² enabling the **similarity argument** to proceed further.

⁶² *Inter alia*, para. 82, TU, C-113/04 P; para. 23, Baustahlgewebe; para. 51, GM; all referring to Article 225 TEC and Article 58(1) of the Statute of the Court of Justice.

⁶³ *Inter alia*, paras. 60-61, Danone, ECJ; para. 692, Limburgse, ECJ; para. 64, Enso Espanola; paras. 719, Cimenteries. See Article 229 TEC on unlimited jurisdiction to be established under secondary legislation with regards penalties imposed under that legislation. This decision is also amenable to subsequent review by the ECJ, paras. 92-110, Limburgse, ECJ.

⁶⁴ Para. 184, Schneider. See also, para. 115, Thyssen Stahl.

⁶⁵ Para. 45, Findlay. The discretionary powers of administrative bodies need to be appreciated by judicial deference, para. 47, Bryan; para. 70, Obermeier; para. 31, Zumtobel.

⁶⁶ Paras. 46-47, Findlay.

⁶⁷ *Inter alia*, para. 56, Enso Espanola; para. 39, Shell, CFI; para. 87, Bolloré; para. 445, Pre-Insulated Pipes, ECJ.

⁶⁸ See, *inter alia*, pp. 556-557, Leanerts and Vanhamme: 1997; p. 209, Wils: 2004; p. 370-371, Craig: 2006.

⁶⁹ See, *inter alia*, p. 88, Gyselen: 1993; pp. 188-189, Harding and Joshua: 2003; and *ibid.*

⁷⁰ See, pp. 174-183, 186, 201, Harding and Joshua: 2003; pp. 99-100, Schwarze: 2004.

⁷¹ See in this respect, p. 189, Harding and Joshua: 2003.

⁷² It was called a "boomerang effect" at p. 563, Leanerts and Vanhamme: 1997, meaning that the judicial review of fair trial rights essentially incorporates their protection in the administrative phase into the judicial phase. This construction could also be applicable in connection with other rights under the

1(b): The requirement of an independent and impartial tribunal

Independence and impartiality are requirements applicable in both jurisdictions.⁷³ Under Article 6(1) ECHR tribunals must be independent of the executive and the parties to the case.⁷⁴ This has also been confirmed in Community law.⁷⁵ Moreover, both jurisdictions allow that after the annulment of the decision in a case the case is re-examined by the same (judges) officials, as the requirement of impartiality does not necessitate sending the case back to a different authority or to a differently composed body of that authority.⁷⁶

1(c): The adversarial principle and the submissions of the Advocate General in Community law

In ECHR law the requirement of fairness (the adversarial principle)⁷⁷ extends to evidence adduced or observations filed by an independent member of the national legal service with a view of influencing the court's decision.⁷⁸ It is argued that such observations cannot be regarded objective from the perspective of the parties to the procedure.⁷⁹ Therefore, when the person concerned is unaware of their content and prevented from replying to those submissions, the fairness of the procedure will be compromised.⁸⁰ This is also accepted in Community law in that the ECJ distinguished

criminal limb of Article 6 ECHR. Although they are assumed to be applicable to Community administrative procedures, their reconsideration in judicial review makes a stronger case supporting their application to administrative procedures and makes it unnecessary to argue whether the procedure is of criminal nature (see cross-ref. at *supra* fn. 48). See in this respect, paras. 86-87, Bolloré, combining these approaches when addressing the right to hear witnesses.

⁷³ ECHR: text of Article 6(1) ECHR. EC: para. 181, Schneider; para. 93, IBP; para. 17, Van der Wal, ECJ; para. 127, Tillack; para. 17, TUM; paras. 338-340, Tzoanos. See also, *supra* fn. 60.

⁷⁴ *Inter alia*, para. 55, Le Compte; para. 78, De Wilde; para. 95, Ringeisen.

⁷⁵ Para. 34, F.

⁷⁶ ECHR: para. 97, Ringeisen; para. 38, Diennet. EC: paras. 185-188, Schneider.

⁷⁷ Para. 33, Vermeulen; para. 31, Lobo Machado; para. 41, Van Orshoven.

⁷⁸ *Inter alia*, para. 33, Vermeulen; para. 44, Van Orshoven; para. 51, Meftah; para. 80, McMichael; para. 74, Kress; para. 46, Martinie; para. 55, Göc; para. 30, Voisine; para. 39, APEH ÜSZ.

⁷⁹ *Inter alia*, para. 31, Vermeulen; para. 29, Lobo Machado; para. 39, Van Orshoven; para. 48, Bulut; para. 26, Borgers; para. 46, Martinie; para. 81, Kress. The doctrine of appearances (from what is visible to the person concerned he may conclude that the procedure is unfair) will be relevant in this respect, para. 24, Borgers; para. 47, Bulut; para. 39, APEH ÜSZ; para. 81, Kress.

⁸⁰ Para. 49, Bulut; para. 42, APEH ÜSZ; paras. 26-27, Borgers. Overturned case law, paras. 32-42, Delcourt.

the position and function of the Advocate General from positions and functions to which the provisions above apply.⁸¹

The judgment in *Kress*⁸² requires specific attention as the legal status of the *Commissaire du Gouvernement* (Government Commissioner) in French law shows considerable similarity to that of the Advocate General in EC law⁸³ admittedly designed after the francophone model.⁸⁴ In the corresponding EC case, *Emesa Sugar*, the breach of the adversarial principle was raised as regards the refusal to reopen the oral procedure after the Advocate General has delivered his opinion. It was claimed that the parties concerned were not given an opportunity to react to matters raised by the Advocate General or to raise awareness of the possible mistakes or omissions of that opinion. Basically, it must be examined whether the Community practice on reopening the oral procedure before the ECJ can be accommodated under ECHR law.⁸⁵ The rule in question provides that the ECJ may, of its own motion, on a proposal of the Advocate General, or at the request of the parties, order the reopening of the oral procedure, in case it lacks sufficient information or that the case should be decided on the basis of arguments not discussed by the parties.⁸⁶

The starting point in both jurisdictions was the adversarial principle.⁸⁷ The ECHR approach opted to highlight safeguards in domestic law ensuring that the procedure was adversarial.⁸⁸ The following safeguards were identified: the Government Commissioner before the hearing could be asked to indicate the tenor of his submissions, the parties may reply to the submissions by means of a memorandum for the deliberations, and, in the event that he raises at the hearing a new ground, the presiding judge would adjourn

⁸¹ Paras. 11-15 and 16, *Emesa Sugar*, ECJ; basically, the ECJ regarded the Advocates General as members of Community courts; this appears as an adequate approach under the doctrine of appearances (by clarifying what should be seen by the person concerned). Beaumont saw this reasoning well-founded even from the perspective of Article 6(1) ECHR, pp. 160, 174, Beaumont: 2002. See on the specific position of the Advocates General within the Community judicial organisation, p. 826, Barav: 1974.

⁸² Para. 54, *Kress*, cited *Emesa Sugar*, ECJ from EC law as relevant law. The dispute in *Emesa Sugar* was found inadmissible in ECHR law, see admissibility decision in *Emesa Sugar*, ECtHR.

⁸³ Para. 73, *Kress*.

⁸⁴ Point 11, *JPDO Wildhaber et al*, *Kress* and pp. 809-810, Barav: 1974.

⁸⁵ It was to be seen whether the fact that there are no procedural provisions for the parties to submit observations in response to the Opinion of the Advocate General can be reconciled with the ECHR, see, para. 2, *Emesa Sugar*, ECJ and para. 14, *SGL Carbon*. The problem of participation of the independent member of the national legal service in the deliberation of the court (para. 28, *Borgers*; para. 32, *Lobo Machado*; para. 34, *Vermeulen*) need not to be addressed as even the ECtHR accepted that the Advocates General do not attend the deliberations of Community courts, para. 86, *Kress*.

⁸⁶ Article 61 of the Rules of Procedure. See, *inter alia*, para. 50, *Cresson*; para. 18, *Emesa Sugar*, ECJ; para. 28, *Deutsche Telekom*; para. 25, *Swedish Match*; para. 15, *SGL Carbon*.

⁸⁷ ECHR: paras. 73-74, *Kress*. EC: para. 18, *Emesa Sugar*, ECJ; see also, para. 28, *Deutsche Telekom*.

⁸⁸ Para. 76, *Kress*. For similar safeguards, para. 106, *Reinhardt*; paras. 49, 51-52, *Meftah*; paras. 23-26, *Menet*; paras. 21-23, *Chesnay*. Inadequate safeguards distinguished the case from *Kress*, paras. 56-57, *Göc*.

the case to enable the parties to present their arguments.⁸⁹ It follows that in circumstances where no automatic right to reply is provided, safeguards in domestic law can ensure that the adversarial principle will not be compromised.⁹⁰

Although safeguards were not mentioned expressly, the solution in Community law also considered whether the adversarial nature of the procedure could be ensured despite the lack of an immediate possibility to react to the Advocate General's Opinion.⁹¹ There might not be a memorandum for deliberations available under Community law, but the party requesting the reopening of the oral procedure has a prime opportunity to put forward his arguments in his application.⁹² The sufficient arguments required to have the oral procedure reopened⁹³ can surely include a claim that a reply is necessary to the submission of the Advocate General indicating the potential elements of that reply at the same time. Nothing excludes drafting the application as a reply to the Opinion. The fact that such an application could be rejected⁹⁴ is irrelevant as from the present perspective what matters is that an opportunity is available for the person concerned to make known his views on the Opinion. The purpose of the memorandum for deliberations is exactly the same. Furthermore, the memorandum for deliberations is by no means a more effective safeguard of the adversarial principle.⁹⁵ It is not guaranteed that it would receive more attention from the court than an application for the reopening of the oral procedure. Since it appears that only the ability to submit a reply bears significance in this context, it makes little difference in what form and channel those replies are presented.

Finally, similar to what was suggested in *Kress*, the adversarial nature of proceedings before Community courts could be restored by way of reopening the oral procedure. Provided that the application (for the reopening) refers to any factual element or legal provision (argument) on which the Advocate General based his opinion that had not been discussed by the parties, the Court will grant the reopening of the oral procedure.⁹⁶

⁸⁹ Para. 76, *Kress*.

⁹⁰ See, para. 80, *ibid*.

⁹¹ According to Tridimas the safeguards under EC law are inadequate, therefore, the reasoning asserting that the Advocate General is part of Community courts (*supra* fn. 81) should be given weight in order to avoid falling short of ECHR law, pp. 1349 and 1380, Tridimas: 1997.

⁹² On this basis the clash with the ECtHR may be avoided, p. 165, Beaumont: 2002.

⁹³ Para. 19, *Emesa Sugar*, ECJ; para. 29, *Deutsche Telekom*.

⁹⁴ Eg.: a commentary of the Opinion will not suffice for such applications, para. 51, Cresson.

⁹⁵ See the criticisms of the memorandum for deliberation element (it is not meant to guarantee the adversarial principle as it has a different aim), CO Rozakis et al, *Kress*.

⁹⁶ Para. 51, Cresson; para. 18, *Emesa Sugar*, ECJ. This corresponds with the conclusions reached in cases where the reopening of the oral procedure was not requested upon the hearing of the Opinion of the Advocate General, see, paras. 63-64, 66, *Shell*, ECJ; para. 155, *Cimenteries*; para. 7, *Prelle*; para. 53, *Bosman*; paras. 127-128, *Hüls*; paras. 60-61, *ICI*, ECJ; paras. 104-105, *Hoechst*. At least minimum factual evidence must be provided in this respect, paras. 67-68, *Shell*, ECJ; mm. para. 155, *Cimenteries*.

Nothing suggests that being bound by the principle of an adversarial procedure the ECJ would risk jeopardising that principle, although it must be remembered that reopening is a matter for the courts to settle.⁹⁷ Moreover, in preliminary ruling procedures the person concerned can convince the national court to refer questions concerning the submissions of the Advocate General afresh providing a second opportunity for an oral procedure in which the adversarial principle will be applicable.⁹⁸

1(d): Requirements on evidence

As regards taking, adducing, and using evidence the core requirement of ECHR law is that of fairness.⁹⁹ Furthermore, as follows from the adversarial principle all material evidence must be disclosed to the defence.¹⁰⁰ The rights of the defence demand that the person concerned is given opportunity to challenge the evidence available.¹⁰¹ Optimally, this would require that all the evidence is produced at a public hearing in the presence of the accused with a view to an adversarial argument. When evidence is produced outside these circumstances the rule to follow is that the rights of the defence must not be infringed.¹⁰² It follows that fairness is ensured when the evidence adduced can be challenged in an adversarial procedure.¹⁰³

As a prerequisite, the person concerned must have knowledge of and must be allowed to comment on the evidence. Failing this the evidence must be excluded unless the conviction is not based solely or to a decisive extent on that evidence¹⁰⁴ which requires the availability of sufficient alternative evidence.¹⁰⁵ It is also required that the parties are

⁹⁷ The failure to reopen the oral procedure can only be condemned when the adversarial principle requires that the parties concerned submit observations on arguments that would influence the assessment of the case. It follows that when the court declares elements, upon which the parties have not been able to comment, irrelevant or incorrect, and, therefore excludes them from the assessment, the adversarial principle will not be jeopardised.

⁹⁸ See in this respect, the repeated request for a preliminary ruling in C-466/00, Kaba.

⁹⁹ *Inter alia*, para. 95, Jalloh; para. 45, Pélissier and Sassi; para. 62, Mattoccia; para. 34, Mantovanelli. The same applies to evidence under the presumption of innocence being part of the requirement of fairness, para. 15, Telfner; para. 68, Barberá; para. 37, Bernard; acknowledged in Community law, para. 76, Steffensen.

¹⁰⁰ *Inter alia*, para. 36, 46, Edwards; para. 40, Atlan, para. 51, Jasper; para. 44, Fitt.

¹⁰¹ *Inter alia*, par. 96, Jalloh; paras. 166-167, Popov/a; para. 118, Capital Bank AD, paras. 35-40, Khan.

¹⁰² *Inter alia*, para. 51, Van Mechelen; para. 41, Kostovski; para. 39, Lucá; para. 85, Craxi; para. 78, Barberá.

¹⁰³ See, *inter alia*, para. 61, Ernst; para. 31, Niederöst-Huber; para. 39, Ziegler; para. 61, Milatová. On the basis of equality, para. 38, Kuopila; para. 50, Martinie.

¹⁰⁴ *Inter alia*, para. 40, Lucá; para. 54, Kuvikas; para. 25, AM; para. 76, Doorson; para. 48, Schenk.

¹⁰⁵ *Inter alia*, para. 48, Schenk; para. 22, Artner; mm. para. 96, Jalloh; para. 39, Khan; paras. 82-85, Bricmont.

able to participate effectively in the proceedings.¹⁰⁶ In particular, the person concerned must be allowed to comment on evidence that pertains to a technical field outside the judges' knowledge and it is likely to influence the assessment of that court.¹⁰⁷

Correspondingly, in Community law the right to be heard (the rights of the defence) requires that the party concerned is informed of the evidence adduced against him and he is afforded the opportunity to comment on that evidence.¹⁰⁸ When the person concerned was not able to express its views on the evidence utilised to establish the infringement, the rights of defence will be jeopardised¹⁰⁹ and the evidence must, therefore, be excluded.¹¹⁰

In Community anti-trust proceedings the adversarial principle is satisfied because evidence must be communicated to the person concerned by means of issuing the statement of objections (SO) and providing access to the file.¹¹¹ The SO contains all essential evidence¹¹² and documentary evidence enabling the preparation of the defence is annexed to the SO.¹¹³ New evidence can be adduced after issuing the SO subject to the condition that the necessary time must be provided for the person concerned to comment on that evidence.¹¹⁴ The failure to annex to the SO documents referred to therein can be remedied by allowing access to those documents subsequently¹¹⁵ or when arranging access to the file.¹¹⁶ In a similar vein, despite the emphasis on a written procedure the failure to communicate documentary evidence could be remedied, when the person concerned was heard in connection with that evidence.¹¹⁷

National rules on taking evidence under the ambit of Community law must also comply with the requirements arising from the ECHR,¹¹⁸ in particular, that the procedure as a

¹⁰⁶ *Inter alia*, para. 33, Matovanelli; para. 42, Kerojärvi; para. 44, Feldbrugge; para. 59, Hermi; *supra* fn. 10.

¹⁰⁷ Para. 36, Mantovanelli.

¹⁰⁸ *Inter alia*, para. 93, OMPI; para. 7, Michelin; para. 21, BPB, ECJ; para. 162, Atlantic Container; para. 25, VBVB; para. 153, Kaufring; para. 61, Primex; para. 88, CAS; para. 40, Fiskano; para. 255, Kadi; para. 325, Yusuf; paras. 91-92, Hassan; para. 38, De Bry; para. 20, Vidrányi. In compound procedures when the Commission wants to rely on an evidence in its decision, it must make sure that the person concerned can make his views known on that evidence either in the national or the Community phase by communicating that evidence to him, paras. 181-187, Kaufring.

¹⁰⁹ *Inter alia*, para. 35, TU, CFI; para. 73, Mo och Domsjö; para. 55, Shell, CFI; para. 27, AEG.

¹¹⁰ *Inter alia*, para. 160, Dresdner Bank; paras. 55-56, Shell, CFI; para. 56, Bolloré; para. 34, Tzoanos, ECJ.

¹¹¹ Para. 58, Dalmine, ECJ. See in this respect, paras. 112-114, Bolloré.

¹¹² *Inter alia*, para. 59, Dalmine, ECJ; paras. 315-316, Limburgse, ECJ; paras. 66-67, Aalborg Portland.

¹¹³ Para. 29, Musique Diffusion.

¹¹⁴ *Inter alia*, para. 45, Tokai Carbon; para. 190, LR AF 1998; para. 29, AEG; para. 165, Atlantic Container.

¹¹⁵ Para. 60, Dalmine, CFI; paras. 78-86, Thyssen Stahl.

¹¹⁶ Paras. 61-62, Dalmine, CFI; para. 53, TU, CFI; paras. 96-102, CAS.

¹¹⁷ Paras. 153-158, WLG.

¹¹⁸ Para. 71, Steffensen.

whole must be fair.¹¹⁹ Recalling the ECtHR judgment in *Mantovanelli*, mentioned above, the ECJ ruled that fairness under Article 6(1) ECHR requires that the person concerned is able to comment effectively on the evidence adduced before a court. It added that the right to comment is essential where the evidence pertains to a technical field of which judges have no knowledge and it is likely to influence the assessment of that court.¹²⁰

In connection with the requirement of effective participation (although not in connection with evidence) a further example of corresponding approaches can be identified. The ECJ has acknowledged that under the ECHR the effective exercise of defence rights¹²¹ entails that the defendant must be enabled to appeal in an adversarial procedure.¹²² In particular, the failure to communicate the grounds of the judgment within the period allowed for bringing an appeal constitutes an infringement of Article 6(1) and (3) ECHR.¹²³

It appears from the above that Community law implements the adversarial principle as regards securing and adducing evidence as required by ECHR law. The ability to have knowledge of the evidence and to submit observations on the evidence is considered as an essential requirement of a fair trial in both jurisdictions. This is also reflected in affirming the dominant position of the parties (the defence) in the adversarial procedure. Under ECHR law it is for the parties (the defence)¹²⁴ to decide whether or not a document calls for their comments.¹²⁵ Correspondingly, in Community administrative procedures the Commission cannot alone decide which documents are of use for the defence.¹²⁶ Instead, the defence must be enabled to make the choices it considers the most appropriate in pursuing its aims.¹²⁷

The similarity of judicial approaches as regards communicating evidence to the person concerned is not compromised by the position adopted in cases concerning the freezing of funds of terrorist suspects. Although the party concerned does not have to be notified of the evidence adduced against him before the adoption of the initial (surprise)

¹¹⁹ Para. 76, *ibid.*

¹²⁰ Para. 77, *ibid.*

¹²¹ Para. 27, ASML. See in this respect in ECHR law, para. 80, Perez; para. 28, Boldea; para. 33, Artico and para. 38, Imbrioscia, on fair trial rights not being theoretical or illusory but practical and effective.

¹²² Para. 25, ASML.

¹²³ Para. 28, *ibid.*; see further, paras. 34-36, 40-48, *ibid.* and paras. 165-172, OMPI. See in ECHR law: paras. 33-34, 37, Hadjianastassiou.

¹²⁴ *Inter alia*, para. 49, Bulut; para. 58, Walston; para. 65, Milatova.

¹²⁵ *Inter alia*, para. 29, Niederöst-Huber; para. 38, Ziegler; para. 42, APEH ÜSZ.

¹²⁶ *Inter alia*, para. 143, Cimenteries; mm. para. 24, AEG; para. 339, Atlantic Container; paras. 81, 83, Solvay; para. 171, LR AF 1998; para. 72, Ricosmos; para. 185, Kaufring; para. 64, Primex; paras. 1012, Limburgse, CFI; para. 126, Aalborg Portland.

¹²⁷ See, paras. 46, 58-59, BASF; para. 74, Ricosmos; paras. 128-129, Aalborg Portland.

measure, the evidence must be communicated to him either concomitantly with or as soon as possible after the adoption of that decision.¹²⁸ Without needing to consider at this point whether such (remediable) restriction on the right to be heard is acceptable, it must be acknowledged that in connection with such measures the adversarial nature of the procedure will be ensured subsequently, when the person concerned decides to challenge the measure (on the basis of the evidence communicated to him). No such problem arises in connection with decisions issued subsequent to the initial measure as the adversarial principle requires that the decision is preceded by a notification of new evidence and a hearing.¹²⁹

1(e): The right of access to the file

The right of access to the file in ECHR law is derived from the general requirement of a fair trial.¹³⁰ Apart from fairness, it is closely connected to the principle of equality of arms¹³¹ and the rights of the defence.¹³² It falls under the criminal limb of Article 6 ECHR, specifically paragraph (3)(b) on the right to have adequate time and facilities to prepare the defence. Correspondingly, the right of access to the file in Community law is associated with defence rights,¹³³ in particular, the right to be heard¹³⁴ and the principle of equality of arms.¹³⁵

Under Article 6(1) ECHR fairness requires that the prosecution discloses to the defence all material evidence for or against the accused.¹³⁶ Having access to the case file and obtaining a copy of the documents it contains enables the person concerned to challenge

¹²⁸ Paras. 137, 160-162, OMPI.

¹²⁹ *Ibid.*

¹³⁰ See in this respect, pp. 261-262, Cohen-Jonathan: Ryssdal.

¹³¹ *Inter alia*, paras. 58, 62, Walston; paras. 33-34, Foucher; para. 68, Brandstetter; para. 51, Jasper; paras. 140, 146, Öcalan; para. 40, Frangy. On the adversarial principle and access to documents, para. 42, Kerojärvi.

¹³² *Inter alia*, para. 140, Öcalan; para. 50, Kremzow; mm. par. 68, Brandstetter. Actual prejudice to defence rights must be shown, pp. 211-212, Trechsel: 2005.

¹³³ Access to the file is not an end in itself, but it is intended to protect the rights of the defence, para. 376, Atlantic Container; para. 156, Cimenteries. As to the close relation between the right of access to the file and the rights of the defence see the case law subjecting the annulment of the Commission's decision to the infringement of defence rights, *inter alia*, para. 317, Limburgse, ECJ; para. 632, GE; para. 101, Aalborg Portland.

¹³⁴ *Inter alia*, para. 316, Limburgse, ECJ; para. 76, Hercules Chemicals, ECJ; para. 58, Dalmine, ECJ; para. 68, Aalborg Portland; para. 33, Danone, CFI; para. 126, Corus; para. 62, Primex.

¹³⁵ *Inter alia*, para. 143, Cimenteries; para. 339, Atlantic Container; paras. 81, 83, Solvay; para. 171, LR AF 1998; para. 1012, Limburgse, CFI, mentioning the principle of an adversarial procedure as well.

¹³⁶ *Inter alia*, para. 36, Edwards; para. 40, Atlan; para. 51, Jasper; para. 46, Edwards and Lewis. These cases do not relate specifically to the right of access to the file, but to the general entitlement to have knowledge of all evidence which includes the right of access to the file. Under Article 5(4) ECHR access to the investigation file flows from the guarantees of Article 6 ECHR, para. 44, Schöps; para. 38, Reinprecht; para. 39, Garcia Alva.

the case against him failing which impedes the preparation of an adequate defence and compromises the equality of arms.¹³⁷ Similarly, in Community law in its main area of application, competition law,¹³⁸ the right of access to the file is considered as an essential prerequisite to preparing the defence.¹³⁹ Its purpose is to enable undertakings to acquaint themselves with the evidence in the Commission's file on the basis of which the right to be heard could be exercised.¹⁴⁰ It covers all documents in the investigation file that may be relevant for the defence¹⁴¹ enabling the defence to peruse the evidence.¹⁴²

Besides the general considerations, the particular arrangements of the right of access to the file appear to be similar in both jurisdictions. In ECHR law its application adheres to the demands of the rights (interests) of the defence.¹⁴³ The circumstances of access are examined from this perspective. In particular, the shortness of the time available to inspect the file, the length of the case file, and the inability furnish the person concerned with copies of the file were seen as hardships¹⁴⁴ which prevented identifying arguments relevant to the defence.¹⁴⁵

Community courts also approach the circumstances of access to the file from the perspective of the interests of the defence. They examine whether the time available to inspect the file prevented the preparation of the defence.¹⁴⁶ The poor organisation of access such as inadequate index, absence of summary, and missing pages can also be taken into account.¹⁴⁷ However, negligible inconveniences and a slight loss of time are not as such to jeopardise the interest of the defence.¹⁴⁸ The interests of the defence are also protected by the obligation of the Commission of making provision and

¹³⁷ Para. 36, Foucher; mm. para. 56, Guy Jaspers.

¹³⁸ Anti-trust, Article 27(2) Regulation 1/2003/EC; merger, Article 18(3) Regulation 139/2004/EC. It is also applicable in customs procedure under similar conditions, *inter alia*, para. 73, Ricosmos; para. 63, Primex; and in investigations involving Community officials, see Article 26 Staff Regulations; paras. 104-108, Cresson; paras. 94-96, Irving.

¹³⁹ See, *inter alia*, paras. 663, 678, 682-684, GE; para. 65, Endemol; paras. 376-377, Atlantic Container; para. 45, Bolloré, para. 34, Danone, CFI; para. 73, Ricosmos.

¹⁴⁰ *Inter alia*, para. 315, Limburgse, ECJ; para. 75, Hercules Chemicals, ECJ; para. 89, Baustahlgewebe; para. 11, Hoffmann-La Roche; para. 629, GE; para. 33, Danone, CFI; para. 113, Kaysersberg; para. 91, Tetra Laval.

¹⁴¹ *Inter alia*, para. 68, Aalborg Portland; paras. 125-128, Corus.

¹⁴² Para. 58, Dalmine, ECJ.

¹⁴³ *Inter alia*, paras. 62-65, Walston; para. 44, Mialhe 2; para. 53, Bendenoun.

¹⁴⁴ Paras. 142, 147, Öcalan.

¹⁴⁵ Para. 143, Öcalan; *a contrario*, para. 107, Klimentyev.

¹⁴⁶ Paras. 707-709, GE.

¹⁴⁷ Paras. 710-711, GE.

¹⁴⁸ Para. 119, Bolloré.

arrangements for access to the file on its own initiative.¹⁴⁹ It has been suggested that the generous approach under Community law as regards the right of access to the file may comply appropriately with that under ECHR law.¹⁵⁰

The distinction drawn in Community law between adverse and favourable evidence (inculpatory and exculpatory evidence) as a matter of access to the file requires further attention. Basically, it is approached on grounds informed of the rights of the defence and the principle of equality of arms¹⁵¹ that corresponds with the general requirements on access to the file under both ECHR and EC law. It provides that it is in the interest of the defence that favourable evidence must be made available¹⁵² and limiting access to inculpatory evidence to those used in the Commission's conclusions can be supported by what is required under the equality of arms (provided that the distinction between exculpatory and inculpatory documents can be sustained).¹⁵³

1(f): Restrictions to fair trial rights

ECHR law has acknowledged that fair trial guarantees might conflict with the general interest which equally demands appreciation.¹⁵⁴ In this regard, it was held that competing interests such as national security, the need to protect witnesses, or keeping police methods secret must be weighed against the rights of the accused. Fair trial rights could also be restricted on grounds of preserving the fundamental rights of others or safeguarding important public interests.¹⁵⁵ In particular, the fact that the ECHR protects

¹⁴⁹ Para. 180, LR AF 1998. An exchange of documents between the undertakings will not eliminate the Commission's own duty in this respect as the defence of one undertaking cannot depend upon the goodwill of another often harbouring competing interests, para. 184, *ibid*; para. 1014, Limburgse, CFI.

¹⁵⁰ Pp. 342-343, Wils: 1996.

¹⁵¹ *Inter alia*, para. 649, GE; para. 53-54, Hercules Chemicals, CFI; paras. 336-337, 340, Atlantic Container.

¹⁵² See, para. 36, Danone, CFI; para. 96, Solvay; para. 340, Atlantic Container.

¹⁵³ The distinction appears meaningless when inculpatory documents are defined as documents used by the Commission to support a finding of an infringement (para. 55, Bolloré; para. 284, Cimenteries) to which access must be provided. It follows that every other document will be regarded as potentially exculpatory to which the defence has access. This means that the applicant has (must have) access to all the non-confidential documents on the file which have not been used to support the Commission's objections, see, para. 72, Ricosmos; para. 64, Primex; para. 89, CAS. This corresponds with Trechsel's view that such distinction is unnecessary in ECHR law as the interest of the defence sees access to inculpatory and exculpatory evidence from a similar perspective: it is for the defence to decide whether it sees any value in the evidence, p. 229, Trechsel: 2005.

¹⁵⁴ On exceptions to defence rights see, pp. 238-241, Trechsel: 2005.

¹⁵⁵ *Inter alia*, para. 46, Edwards and Lewis; para. 61, Rowe and Davis; para. 40, Atlan. Recalled in EC law, para. 47, Varec. Confidentiality, paras. 28-30, Menet; para. 105, Reinhardt; para. 26, SCP Huglo; para. 25, Lilly. Under Article 5(4) ECHR the need for criminal investigations to be conducted efficiently is regarded as a legitimate aim, para. 47, Lietzow; para. 77, Shishkov. See in this respect in EC law the effective investigation of competition infringements as a countervailing interest, para. 394, Atlantic Container; para. 40, HFB; para. 40, Tokai Carbon.

the life, liberty, and security of witnesses (the right to private life of minor victims)¹⁵⁶ implies that those interests should not be unjustifiably imperilled.¹⁵⁷

The accommodation of such countervailing interests is kept within the scope of Article 6 ECHR. The general approach contrasts the protection of those interests with the adequate and effective exercise of the rights of the defence.¹⁵⁸ The ECtHR examines whether the reasons provided supporting the conflicting interest are sufficient¹⁵⁹ and that the restrictions on defence rights are strictly necessary demanding the application of less restrictive equivalents.¹⁶⁰ Then, the ECtHR turns to the issue whether the difficulties encountered by the defence were sufficiently counterbalanced by subsequent (judicial) procedures providing alternative means of protecting defence rights.¹⁶¹

Correspondingly, in EC law the existence of interests competing with the rights of the defence is acknowledged.¹⁶² In *Pupino* it was accepted under the influence of ECHR law that protecting the interests of vulnerable victims must be reconciled with the requirement that the procedure must be fair.¹⁶³ In *Varec* the ECJ ruled that it may be necessary to withhold certain information from the parties of a case in order to protect the fundamental rights of others or an important public interest.¹⁶⁴ Business secrets and confidentiality (concerning internal documents of the Commission or any information enabling the complainants to be identified where they wish to remain anonymous) are also regarded as countervailing interests.¹⁶⁵ In *Sison* the CFI held that the rights of the

¹⁵⁶ Para. 47, SN; para. 77, Baegen; para. 43, B; para. 69, Bocos-Cuesta.

¹⁵⁷ Para. 70, Doorson; para. 53, Van Mechelen; para. 43, Visser; para. 44, Kostovski.

¹⁵⁸ *Inter alia*, para. 47, SN; para. 77, Baegen; para. 70, Doorson; para. 53, Van Mechelen; para. 43, Visser; para. 46, Edwards and Lewis; para. 44, Kostovski.

¹⁵⁹ *Inter alia*, para. 71, Doorson; para. 61, Van Mechelen; paras. 69-72, Bocos-Cuesta; para. 44, Kostovski.

¹⁶⁰ *Inter alia*, para. 61, Rowe and Davis; para. 58, Van Mechelen; para. 43, Visser.

¹⁶¹ *Inter alia*, para. 46, Edwards and Lewis; para. 61, Rowe and Davis; para. 40, Atlan; paras. 54, 58-59, Van Mechelen; paras. 43, 47, Visser; paras. 72-75, Doorson; paras. 42-43, Kostovski; paras. 23-24, 26-29, PS; paras. 47, 49-50, SN; paras. 43-49, B. See para. 52, Schuler-Zraggen, where no access to the file was provided in the procedure before the board, but in the judicial procedure all documents were made available.

¹⁶² Para. 46-47, Varec, stating that the right to a fair trial might be balanced against other rights and interests.

¹⁶³ Paras. 59-60, Pupino.

¹⁶⁴ Para. 47, Varec; the right to private life, business secrecy and fair competition were listed, paras. 48-50, *ibid*.

¹⁶⁵ *Inter alia*, para. 68, Aalborg Portland; para. 75, Hercules Chemicals, ECJ; paras. 315, 320, Limburgse, ECJ; para. 630, GE; para. 38, Tokai Carbon; para. 335, Atlantic Container. On protecting anonymity upon request, para. 44, N, ECJ; para. 34, Adams; para. 84, Mannesmannröhrenwerke. On protecting information classified as confidential or secret, para. 273, Kadi; para. 319, Yusuf. On protecting sensitive commercial information enjoying the guarantee of confidentiality/professional secrecy, para. 198, Österreichische Postsparkasse.

defence are subject to restrictions legally justified in national law on grounds of public policy, public security, and the maintenance of international relations.¹⁶⁶

The formula under ECHR law is matched by that in EC law which requires that the protection of interests supporting restrictions should be balanced against the interest of safeguarding the rights of the defence.¹⁶⁷ In case of secret and confidential information the competing interests for each document and information must be assessed and weighed.¹⁶⁸ This leads to balancing the interest represented by secrecy and confidentiality against the legitimate concern that the necessary information for exercising procedural rights must be provided.¹⁶⁹ This would entail examining whether the countervailing interests are sufficient¹⁷⁰ as under ECHR law.

Necessity is another term in EC law describing the relationship between the conflicting interests.¹⁷¹ It could attract a narrow interpretation¹⁷² with a strong obligation to give reasons.¹⁷³ It may stand for being essential to exercising procedural rights.¹⁷⁴ Providing alternative solutions¹⁷⁵ and the possibility of subsequent counterbalancing, as suggested in ECHR law, also appear in Community law. The latter is manifested in procedural guarantees such as the right to request from the Hearing Officer to examine whether non-disclosure was justified¹⁷⁶ and judicial review by the CFI in full jurisdiction amenable to review by the ECJ.¹⁷⁷

¹⁶⁶ Para. 166, Sison. See, para. 134, OMPI, mentioning public interest, public policy, the maintenance of international relations, and the purpose of given measure as generally recognised grounds of restrictions.

¹⁶⁷ *Inter alia*, paras. 701-702, GE; mm. paras. 51-52, Varec; para. 130, Corus; para. 147, Cimenteries; para. 1016, Limburgse, CFI; para. 46, Bolloré; para. 67, Endemol; para. 13, Hoffmann-La Roche; paras. 34-42, Stanley Adams. On the balancing exercise, see, pp. 388-390, Tridimas: 2006.

¹⁶⁸ Para. 42, Hynix. Before national bodies responsible for review, paras. 40, 43, Mobistar; para. 52, Varec.

¹⁶⁹ Paras. 44-45, Hynix.

¹⁷⁰ See, *inter alia*, para. 114, Thyssen Stahl; paras. 27-28, Akzo Nobel; para. 46, Hynix. In this respect it could be considered whether the information still demands the protection of confidentiality, para. 199, Österreichische Postsparkasse.

¹⁷¹ Para. 364, HFB; para. 79, Hynix.

¹⁷² Para. 102, Tetra Laval. Exceptional circumstances and serious evidence are required, para. 40, HFB; para. 86, Hynix; para. 40, Tokai Carbon.

¹⁷³ Para. 105, Tetra Laval. See, para. 185, Sison, mentioning compelling grounds.

¹⁷⁴ Paras. 70, 72, Hynix.

¹⁷⁵ Preparing a non-confidential version, *inter alia*, para. 1017, Limburgse, CFI; paras. 98, 102, ICI, CFI; para. 147, Cimenteries; para. 46, Bolloré. Limited disclosure reconciling the opposing interests, paras. 652-653, GE. Providing a summary note of reports, para. 18, Hoffmann-La Roche, or a summary of pleadings, para. 91, API.

¹⁷⁶ See, *inter alia*, paras. 118-125, Dalmine, CFI; paras. 50-55, Mannesmannröhrenwerke; para. 74, Arizona Chemicals. The Hearing Officer's decision is subject to judicial control, para. 723, GE. Nothing indicates that under the EUCFR the Hearing Office would give effect to defence rights differently, paras. 727-729, *ibid*.

¹⁷⁷ *Inter alia*, paras. 118-125, Dalmine, CFI; paras. 24-26, Sodima; paras. 240-241, Cimenteries; paras. 652-658, GE; para. 29, Akzo Nobel; paras. 113-117, Tetra Laval; para. 125, Aalborg Portland; para. 128, Corus. For review of the CFI judgment on defence rights' restriction in appeal by ECJ, see, *inter alia*, paras. 24-27, BPB, ECJ; paras. 78 and 81, Hercules Chemicals, ECJ; paras. 46-49, Salzgitter

With regard to initial (surprise) anti-terrorism measures the restriction on fair trial rights requires closer examination. Pursuant to the general approach in both ECHR and EC law it was held that fair trial rights can be legitimately restricted¹⁷⁸ on grounds of ensuring the effectiveness of the sanctions imposed and fulfilling the Community's international obligations in fighting terrorism.¹⁷⁹ Imposing restrictions on defence rights is, however, subject to the familiar requirement of providing subsequent safeguards (counterbalancing). Communicating the evidence to the person concerned concomitantly with or as soon as possible after the adoption of the initial decision¹⁸⁰ together with a statement of reasons¹⁸¹ prepare the required immediate re-examination of the measure at issue.¹⁸² Alternatively, an action for annulment launched immediately before the CFI¹⁸³ can provide an opportunity to reassess the restriction.

In case of temporary anti-terrorism measures the grounds of restriction on defence rights may include national security or international relations.¹⁸⁴ The CFI identified national security and terrorism as grounds acknowledged under Article 6 ECHR.¹⁸⁵ In this regard, effective judicial review before Community courts constitutes the procedural safeguard ensuring that a fair balance is struck between the countervailing interests. It is, however, subject to stringent condition that it must engage in the examination of the lawfulness and the merits¹⁸⁶ of the measures involved without the possibility to raise objections that the evidence and information used is secret or confidential.¹⁸⁷ Again, alternative means of exercising defence rights can also be taken into account.¹⁸⁸

It must also be mentioned that both legal systems regard the objectives of timesaving and expediting procedures as important countervailing interests of a fair trial (the adversarial principle). They need to be duly justified and, more importantly, sufficient

Mannesmann. For a similar requirement in ECHR law, *inter alia*, para. 56, Jasper; para. 49, Fitt; para. 46, Edwards and Lewis.

¹⁷⁸ Para. 127, OMPI.

¹⁷⁹ Para. 128, *ibid*. The surprise effect and the immediate application of the measure contribute to its effectiveness, para. 54, Al-Aqsa; para. 175, Sison; mm. para. 308, Yusuf.

¹⁸⁰ Para. 129, OMPI; para. 176, Sison.

¹⁸¹ Para. 139, OMPI.

¹⁸² Para. 130, *ibid*; para. 177, Sison.

¹⁸³ *Ibid*.

¹⁸⁴ Paras. 133, 136, OMPI; paras. 180-183, Sison; mm. para. 274, Kadi; mm. para. 320, Yusuf. See also, para. 36, Rutili, as regards the duty to give reasons.

¹⁸⁵ Para. 135, OMPI.

¹⁸⁶ See, paras. 159-162, 165, 172, *ibid*.

¹⁸⁷ Paras. 154-155, *ibid*; paras. 202-203, Sison. The need to divulge evidence protected by secrecy or confidentiality was not ruled upon in the relevant cases, however, reference to relevant Strasbourg case law indicates that in the appropriate occasion it will take place (para. 158, OMPI; para. 205, Sison).

¹⁸⁸ See, para. 262 Kadi; para. 309, Yusuf; paras. 91-92, Hassan. Judicial review against the wrongful refusal by the competent national authority to submit their cases to the UN Sanctions Committee for re-examination, para. 270, Kadi; para. 317, Yusuf; para. 120, Hassan.

safeguards and guarantees must be in place to ensure that fair trial rights are not unacceptably jeopardised.¹⁸⁹

On this basis, the approaches in ECHR and EC law appear similar on resolving conflicts between defence rights and countervailing public or private interests. They both subscribe to the requirements of necessity and providing sufficient reasons. Alternative solutions and subsequent remedies counterbalancing the effects of restrictions are required in both jurisdictions. Finally, it can hardly be criticised that the ECJ refused to implement the requirements of ECHR case law on anonymous witness evidence in a case that concerned documentary evidence the author of which was anonymous.¹⁹⁰

1(g): Miscellaneous due process rights

The **similarity argument** on the scope of fair trial rights is closed with examining the similarity of a number of common due process rights in ECHR and EC law. They include the right to hear witnesses, the duty to give reasons, the right to be defended, the right to legal representation, and the protection of legal professional privilege.¹⁹¹

The right to hear witnesses

Article 6(3)(d) ECHR provides that the right to obtain the attendance and examination of witnesses. It is acknowledged in the same terms by Community law.¹⁹² It is a right subject to limitations that must be assessed in the light of the principle of equality of arms having regard to the general requirement of fairness.¹⁹³ In fact, fairness can be regarded as the dominant requirement in this respect.¹⁹⁴ The adversarial principle also applies to the hearing of witnesses.¹⁹⁵ Correspondingly, Community law accepts that no

¹⁸⁹ See in this respect, ECHR: para. 30, Niederöst-Huber; para. 40, Borisova. EC, *inter alia*, paras. 17-18, Emesa Sugar, ECJ; paras. 42-43, Fiskano; paras. 23-24, ASML; para. 43, Krombach, ECJ; para. 66, Eurofood.

¹⁹⁰ Para. 42, Salzgitter Mannesmann.

¹⁹¹ The right to a public hearing, another due process right, is also acknowledged in both legal systems: ECHR: text of Article 6(1) ECHR and, *inter alia*, para. 33, Diennet; para. 45, Exel; EC: para. 90, API.

¹⁹² Before EC courts: para. 69, Pre-Insulated Pipes, ECJ. Before the Commission: para. 383, HFB. Article 6 (3)(d) ECHR cited, para. 389, HFB; para. 86, Bolloré. See, pp. 565-566, Giannakopoulos: 2001 stating that the Commission on hearing witnesses attempts to be in line with ECHR law.

¹⁹³ *Inter alia*, para. 91, Engel; para. 33, Vidal; point c, Ninn-Hansen; para. 176, Popov/a.

¹⁹⁴ See, para. 33, Vidal; mm. para. 180, Popov/a.

¹⁹⁵ Para. 78, Barberá.

absolute right is conferred upon the accused to obtain the attendance of witnesses.¹⁹⁶ Instead, ensuring the equality of arms is aimed and that the procedure, considered in its entirety, gave the accused an adequate and proper opportunity to challenge the suspicions concerning him.¹⁹⁷

Both legal systems acknowledge that the court (adjudicative body) proceeding in the case is empowered to decide whether it is necessary to hear witnesses.¹⁹⁸ In this regard, the Strasbourg court examines whether sufficient evidence from other sources is available to secure conviction without arbitrariness in an adversarial procedure.¹⁹⁹ The defence must demonstrate that hearing witnesses is essential to the case and it would contribute towards exercising defence rights.²⁰⁰ The principle of equality of arms could require examining whether the person concerned was placed at a disadvantage *vis-à-vis* the prosecution the witnesses of which could be heard.²⁰¹

In EC law similar considerations are taken into account. Basically, it must be determined whether sufficient alternative evidence was available in a procedure providing ample opportunity to the applicant to challenge the findings.²⁰² It must be demonstrated that for want of hearing witnesses the inquiry into the matter was unduly restricted and the applicant (the defence) was prevented from providing explanations to the objections raised in the case.²⁰³ As under ECHR law, witness evidence must be relevant for the case²⁰⁴ and the party requesting the hearing of witnesses must state precisely on what facts and for what reasons the witness should be examined.²⁰⁵

The cross examination of witnesses under Article 6(3)(d) ECHR is only required where the testimony played a main or decisive role in securing the conviction.²⁰⁶ On this basis, it is difficult to criticise the approach in Community law according to which before

¹⁹⁶ Para. 70, Pre-Insulated Pipes, ECJ; para. 392, HFB; para. 87, Bolloré. The hearing of witnesses is not an offer of proof but a measure of inquiry ordered by Community courts subject to certain conditions, para. 64, Pre-Insulated Pipes, ECJ; para. 74, Baustahlgewebe.

¹⁹⁷ Para. 71, Pre-Insulated Pipes, ECJ.

¹⁹⁸ ECHR: *inter alia*, para. 89, Bricmont; para. 46, Borisova; para. 21, De Sousa; para. 33, Vidal; para. 41, Destrehem. EC: recalling the ECHR solution, para. 70, Pre-Insulated Pipes, ECJ. On the discretionary powers of EC courts in this respect, *inter alia*, paras. 67-68, *ibid*; paras. 70, 77, Baustahlgewebe; para. 47, Freistaat Sachsen; paras. 49-50, ICI, ECJ/a; paras. 19-20, Ismeri, ECJ; para. 76, Mag. On the Commission's discretionary powers in this regard, para. 383, HFB; para. 18, VBVB.

¹⁹⁹ *Inter alia*, point c, Ninn-Hansen; para. 83, Craxi; paras. 22-23, De Sousa; paras. 125-126, Klimentyev.

²⁰⁰ *Inter alia*, para. 83, Craxi; para. 46, Borisova; para. 21, De Sousa; para. 67, Bocos-Cuesta; para. 29, Perna.

²⁰¹ Paras. 47-48, Borisova.

²⁰² Paras. 72-75, Pre-Insulated Pipes, ECJ; para. 77, Mag; para. 149, Masdar. Before the Commission in anti-trust procedures, paras. 383, 385, HFB; para. 23, Eisen und Metall.

²⁰³ Para. 384, HFB.

²⁰⁴ Para. 333, CAS.

²⁰⁵ Paras. 56-57, Pre-Insulated Pipes, ECJ; para. 69, Baustahlgewebe.

²⁰⁶ Para. 45, Visser; point 1, Kok, para. 78, Krasniki.

Community courts the cross-examination of witnesses is available,²⁰⁷ but in Commission investigations it may be rejected on the basis of the circumstances of the case.²⁰⁸

The duty to give reasons

The duty to provide adequate reasons for decisions is acknowledged in both jurisdictions entailing similar obligations.²⁰⁹ Inferred from Article 6(1) ECHR²¹⁰ its extent varies according to the nature of the decision and it can only be determined in the light of the circumstances of the case.²¹¹ The reasoning given should take account of and address the arguments advanced by the applicant.²¹² It should explain the decision and examine and respond to the evidence.²¹³ However, it cannot be understood as requiring a detailed answer to every argument.²¹⁴ The duty to indicate with sufficient clarity the grounds of the decision is connected to the ability of the person concerned to exercise the rights of appeal available to him.²¹⁵

In Community law the duty to give reasons is governed by similar considerations. As regards Community courts it does not require an exhaustive and individual account of all arguments articulated by the parties. Basically, the person concerned should be provided information on the grounds of the measure taken enabling the reconsideration of the measure in appeal.²¹⁶ As under ECHR law the extent of the duty to give reasons depends on the circumstances of the case.²¹⁷ Nonetheless, the reasoning must be coherent and clear and respond to the arguments put forward by the applicant.²¹⁸ In case of administrative decisions reasons must be appropriate, clear, and unequivocally expressed enabling the person concerned to ascertain the grounds of the measure and

²⁰⁷ See, Article 47(3) Rules of Procedure of the ECJ.

²⁰⁸ Para. 200, Aalborg Portland (it was not a genuine case for cross-examining witnesses as it concerned the author of a documentary evidence, para. 201, *ibid.*).

²⁰⁹ P. 344, Wils: 1996.

²¹⁰ It is linked to the proper administration of justice, para. 26, García Ruiz; paras. 42-43, Higgins.

²¹¹ Para. 27, Hiro Balani; para. 55, Helle; para. 29, Boldea; para. 26, García Ruiz; para. 42, Higgins.

²¹² Para. 83, Perez.

²¹³ Paras. 58-59, Helle; para. 27, García Ruiz; paras. 33-34, Boldea.

²¹⁴ Para. 81, Perez; para. 29, Boldea; para. 61, Van de Hurk; para. 26, Garcia Ruíz; para. 55, Helle. Irrelevant elements of law, fact, or argument do not need to be mentioned, para. 83, Perez.

²¹⁵ Para. 33, Hadjanastassiou.

²¹⁶ *Inter alia*, para. 60, ADM, ECJ; para. 372, Aalborg Portland; para. 85, C-113/04; para. 46, Danone, ECJ; paras. 29, 34, Gómez-Reino; para. 121, Conolly.

²¹⁷ Paras. 29, 34, Gómez-Reino.

²¹⁸ Paras. 22, 28, Campogrande; paras. 47-48, Danone, ECJ. See also, paras. 10-13, Petrides; para. 30, BPB, ECJ; paras. 30-32, Gómez-Reino; para. 36, Acerinox.

turn to the competent Community court to exercise judicial review.²¹⁹ Again, the extent of the duty to give reasons depends on the circumstances of the case,²²⁰ consequently, not all issues of fact and law raised in the procedure must be discussed.²²¹

It must also be mentioned that both jurisdictions may accept implied reasoning. One can speak of implied reasons when not addressing the issue in the reasoning can be construed as an implied rejection of that matter.²²²

The right to be defended

In both legal systems the right to be defended is considered as a fair trial right.²²³ They both acknowledge that the person concerned does not lose the benefit of this right merely on account of not being present at the trial.²²⁴ A refusal to hear the defence of an accused person solely on the ground that that person is not present at the hearing constitutes a manifest breach of fundamental rights as interpreted in both ECHR and EC law.²²⁵

The right to legal representation

Article 6(3)(c) ECHR acknowledges in criminal cases the right to have recourse to legal assistance of one's own choosing.²²⁶ Correspondingly, Community law provides the right to legal representation in competition procedures,²²⁷ in disciplinary cases against Community officials,²²⁸ and before Community courts.²²⁹ Similarity with ECHR law is

²¹⁹ *Infra* fn. 218. National administrative measures, paras. 36, 39, Rutili; para. 15, Heylens. Anti-terrorism measures, paras. 57, 64, Al-Aqsa; para. 137, Sison. There is a close link between the right to an effective judicial remedy and the obligation to state reasons, para. 89, OMPI.

²²⁰ *Inter alia*, para. 385, TU, CFI; para. 28, Cimenteries; para. 124, Volkswagen, ECJ; para. 63, Sytraval; paras. 37-38, Conserve Italia; para. 93, Bolloré; para. 89, OMPI; para. 80, Sison, ECJ; para. 35, Windpark Groothusen.

²²¹ *Inter alia*, para. 127, Volkswagen, ECJ; para. 22, VBVB; para. 41, Hoechst; para. 14, Michelin; para. 81, Petrotub; para. 55, Interporc; para. 80, Sison, ECJ; para. 281, Impala.

²²² ECHR: para. 30, Ruiz Torija; para. 28, Hiro Balani. EC: para. 61, ADM, ECJ.

²²³ ECHR: para. 91, Sejdovic; para. 89, Krombach, ECtHR. EC: para. 38, Krombach, ECJ.

²²⁴ ECHR: para. 91, Sejdovic; paras. 84, 89, Krombach, ECtHR; para. 33, Lala; para. 44, Borisova. EC: para. 39, Krombach, ECJ. Under EC law a number of safeguards were indicated in regard of procedures *in absentia*, see, paras. 29-31, 38, ASML.

²²⁵ EC: paras. 40, 44, Krombach, ECJ. ECHR: it could be disproportionate, paras. 92-93, Sejdovic; paras. 84, 86, 89, 90, Krombach, ECtHR; para. 35, Poitrimol; para. 44, Borisova.

²²⁶ See, *inter alia*, para. 134, Ezech and Connors; para. 161, Popov/a; para. 34, Lala.

²²⁷ Para. 16, Hoechst; para. 27, Dow Benelux.

²²⁸ Para. 93, Irving.

²²⁹ Article 19 of the Statue of the ECJ. See, mm. para. 40, Goldstein, T-302/00, and para. 45, Goldstein, T-18/01.

also manifested in that the right of access to a lawyer in Community law includes the right of being advised, defended, and represented by a lawyer for the purpose of ensuring that the person concerned is not deprived of the rights provided under Article 6 ECHR.²³⁰

Protecting legal professional privilege

Protecting the confidentiality of communications between lawyer and client involves issues of privacy, fair trial, and legal representation.²³¹ In ECHR law it is addressed primarily from the perspective of the right to private life. Under Article 8 ECHR the concept of private life extends to professional activities²³² covering lawyers acting in the interest of their clients.²³³ Rights under Article 6 ECHR are also taken into consideration in this regard.²³⁴ In particular, it was held that the failure to protect legal professional privilege would make Article 6 ECHR rights lose their relevance.²³⁵

Legal professional privilege in Community law is approached from one's right to consult a lawyer without restraints which is an essential corollary to the rights of the defence.²³⁶ It is provided protection for the purpose of exercising defence rights²³⁷ (Article 6 ECHR rights).²³⁸ Considering that legal professional privilege is connected ultimately to fair trial rights under both jurisdictions, the difference in the points of departure is of little relevance.

Under Article 8 ECHR the confidential content of lawyer – client correspondence must be respected and sufficient safeguards must be implemented to protect confidentiality.²³⁹ In particular, correspondence can be opened under a reasonable cause, but should not be read and suitable guarantees must be in place preventing it to be read.²⁴⁰ Correspondingly, in Community law legal professional privilege prevents the

²³⁰ Paras. 31-32, OBFG.

²³¹ P. 342, Emmerson and Ashworth: 2001 and pp. 278-279, Trechsel: 2005.

²³² Paras. 31-32, Niemietz; para. 33, Campbell. See Part III/a/Chapter 5.

²³³ The privileged nature of communication between lawyer and client was found to be in the general interest, paras. 46-47, Campbell; para. 43, Foxley.

²³⁴ See, para. 37, Niemietz; para. 50, Foxley; para. 48, Smirnov; paras. 28-29, Schönenberger (defence rights).

²³⁵ Paras. 46-47, Campbell; para. 50, Foxley; para. 48, Smirnov.

²³⁶ Paras. 18, 22-23, AM&S; paras. 77-78, 87, Akzo Nobel.

²³⁷ Paras. 21, 22, 27, AM&S; paras. 117, Akzo Nobel; para. 52, Carlsen.

²³⁸ Article 6 ECHR rights would be jeopardised, if lawyers in the context of judicial proceedings were obliged to pass information to the authorities obtained in the course of legal consultations, para. 32, OBFG.

²³⁹ Paras. 47-48, Smirnov; paras. 68, 69, 72, Kopp.

²⁴⁰ Para. 48, Campbell.

person concerned from divulging the confidential content of documents under legal obligation.²⁴¹ As under the ECHR the authorities (Commission) may be allowed to take a cursory look, however, confidential information must not be revealed.²⁴² Reading the document is prohibited.²⁴³ As to safeguards, it is required that confidential documents may be kept in a sealed envelope removed from the file²⁴⁴ and upon the inspection of the documents the Commission must bring a decision that can be challenged in Community courts before the Commission will have had the opportunity to access their content.²⁴⁵ Distinguishing between legal advice given in (judicial) proceedings in progress and outside of such proceedings is another relevant matter. While it is accepted that correspondence of both types will be protected under the general scope of Article 8 ECHR,²⁴⁶ there is a clear difference between the levels of protection afforded to legal advice when lawyers proceed as a counsel to a party in a process and when it performs his tasks in a different capacity.²⁴⁷ Consequently, Community law cannot be criticised when requiring members of the legal profession to disclose legal advice relating to matters that normally fall outside judicial proceedings (investment advice),²⁴⁸ even more so when the advice was actually given outside judicial proceedings.²⁴⁹ In the case that this distinction proves to be unacceptable, it must be recalled that legitimate interferences with Article 8 ECHR are permitted. With prevention of crime being a widely accepted legitimate aim²⁵⁰ ECHR law allows in exceptional circumstances divulging the confidential content of lawyer – client correspondence, in particular, when it is reasonably believed that the privilege is being abused.²⁵¹ This might be the case when the obligation under EC law to disclose information on suspicious financial transactions aims at fighting money laundering and organised crime.²⁵²

²⁴¹ Paras. 29-31, AM&S; paras. 79-80, Akzo Nobel. Preparatory documents may also be protected when they are made to seek legal advice without the need to communicate those documents to the lawyer, paras. 122-124, *ibid.*

²⁴² Paras. 81-82, *ibid.*

²⁴³ Paras. 86-87, *ibid.*, it will be excluded from among admissible evidence as the damage caused cannot be remedied. See in ECHR law, para. 44, Foxley, accepting that only reading the document could prove that it is protected by professional privilege, however, reading the document is an outright breach of fundamental rights.

²⁴⁴ Para. 83, Akzo Nobel.

²⁴⁵ Paras. 85, 88, *ibid.*

²⁴⁶ Para. 48, Campbell.

²⁴⁷ Para. 73, Kopp.

²⁴⁸ Para. 33, OBFG.

²⁴⁹ Para. 36, *ibid.* In contrast, when the advice was connected in any way to judicial proceedings it will be protected by legal professional privilege, para. 34, *ibid.*

²⁵⁰ Para. 36, Niemietz; para. 42, Campbell; para. 25, Schönenberger; para. 40, Smirnov.

²⁵¹ Para. 48, Campbell; para. 44, Foxley.

²⁵² Para. 36, OBFG.

Finally, the position of in-house lawyers must be examined. Their lack of independence is crucial²⁵³ in justifying their exclusion from the protection of legal professional privilege in EC law.²⁵⁴ In this respect, it can be argued that under Article 8 ECHR legal advice put forward by an employee is not covered by the secrecy granted to independent professions assuming that professional secrecy is the core of the protection granted by Article 8 ECHR.²⁵⁵ In addition, legal advice not relating to a particular process (i.e. legal advice given by in-house lawyers in the normal course of business) may not attract the specific protection of legal professional privilege associated foremost with exercising defence rights in procedures under progress.²⁵⁶

2. Similarity in the language of the right to fair trial

It is common ground that in specific circumstances fair trial rights may permit restrictions in both jurisdictions. It follows that although they are predominantly of prohibitive nature, due process rights may attract a permissive language where appropriate. Nonetheless, since the matter of permissible restrictions is resolved within the component of scope, the **similarity argument** is not required to proceed with examining the functioning of these rights.

Having hopefully established similarity in the language of fair trial rights enables the conclusion that the right to fair trial is protected in EC law similar to that under ECHR law. Its implications as regards the non-divergence thesis will be examined below in the conclusions closing Part III.

²⁵³ See, paras. 167-168, Akzo Nobel.

²⁵⁴ Paras. 21, 22, 27, AM&S; paras. 117, 171-173, Akzo Nobel; para. 52, Carlsen.

²⁵⁵ Para. 37, Niemietz; para. 48, Smirnov; para. 50 Foxley. See Part III/a/Chapter 5/Point 1(a) on the rationale of extending protection to business premises.

²⁵⁶ *Supra* fn. 233, 235, and 245.

Chapter 13: The right to a hearing within a reasonable time in ECHR and EC law

The right to a hearing within a reasonable time is the first in the line of fundamental rights examined in the non-divergence thesis that do not allow interferences in the general interest. Therefore, the **similarity argument** will only have to concentrate on its scope and language. The former involves the similarity of underlying principles and values and of countervailing principles such as the proper administration of justice. In particular, similarity will be established as regards the procedural phase(s) taken into account and the criteria (and their weight) utilised in assessing the reasonableness of the duration of a procedure such as the complexity of the case, the applicant's conduct, the conduct of authorities, and the importance of what was at stake for the applicant.

1. Similarity in the scope of the right to a hearing within a reasonable time

The right to a hearing within a reasonable time under Article 6(1) ECHR requires that justice is administered without delays because delays might jeopardise its effectiveness and credibility.¹ It imposes the obligation on the Contracting States to organise their judicial systems in a way that cases are heard within a reasonable time.² Basically, it ensures legal certainty by requiring authorities to proceed within reasonable time limits.³

Correspondingly, the right to a legal process within a reasonable time is an element of a fair legal process in Community law.⁴ The influence of Article 6(1) ECHR is, however, muted.⁵ In Community administrative procedures it is considered as an emanation of the

¹ *Inter alia*, para. 22, Bottazzi; para. 61, Katte Klitsche; para. 116, Apicella. Delaying justice can also be associated with denial of justice, PC and PDO Zupancic, Papachelas.

² *Inter alia*, para. 33, Portington; para. 83, Zana; para. 80, Mattoccia; para. 45, Frydlender; para. 55, Süßmann.

³ P. 329, Van Dijk and Van Hoof: 1990 and pp. 135-136, Trechsel: 2005.

⁴ Para. 41, Corus; para. 21, Baustahlgewebe; para. 179, Limburgse, ECJ; para. 76, C-33/04; para. 27, C-523/04; see also, Article 47 EUCFR. Its close connection with the rights of the defence is acknowledged in that the duration of the process could undermine defence rights, para. 135, Limburgse, CFI; paras. 43-44, Z, ECJ. However, the reasonable time requirement may exclude the hearing of the person concerned when the court considers itself sufficiently informed from the file, para. 4, Borbely. See in this respect in ECHR law, para. 27, Massey, associating the time requirement with ensuring the effectiveness of defence, and p. 77, Stavros: 1993.

⁵ See, para. 36, JCB, CFI; para. 79, TU, CFI; para. 56, SCK and FNK; para. 169, Limburgse, ECJ. Expressly rejecting it, paras. 170-171, Limburgse, ECJ, although offering the general principle of EC law instead. Article 6(1) ECHR was cited at para. 20, Baustahlgewebe.

principle of sound administration.⁶ As a general principle of law it requires the Commission to act within a reasonable time.⁷ Legal certainty, the protection of legitimate expectations, and the need to ensure adequate judicial protection provide the background of this principle.⁸ It is also observed in Community judicial procedures.⁹

As regards national administrative procedures falling under the scope of Community law it was held that the procedural system required to be set up in domestic law must be capable of ensuring that cases are dealt within a reasonable time.¹⁰ Bearing in mind the specific relationship between Community and national authorities in ensuring that Community law is observed it must be recalled that the Community cannot be held responsible for delays imputable to national authorities when the Community institutions have discharged their obligations in this respect.¹¹ This approach can hardly be criticised under ECHR law as the breach resulted from the independent conduct of the Member States.¹²

Furthermore, it has been recognised in both jurisdictions that an inflexible interpretation of the requirement of reasonable time might compromise equally important interests inherent in a fair process. In ECHR law it is accepted that the need for expeditious judicial proceedings must be balanced against the requirement of the proper administration of justice. This suggests that expediency is not valuable in itself and the adequate administration of justice should be regarded as the benchmark on the basis of which the length of the procedure must be assessed.¹³ Similarly, in Community law the requirement of promptness is considered in the light of the interest represented by the

⁶ *Inter alia*, para. 136, Regione Siciliana; para. 58, Eagle; para. 60, Sanders; para. 37, Guérin, ECJ; para. 48, max.mobil; and Article 41(1) EUCFR. It can be inferred from the action for failure to act under Article 232 EC, p. 313, Kanska: 2004.

⁷ *Inter alia*, para. 56, SCK and FNK; para. 121, Limburgse, CFI; para. 73, TU, CFI; para. 93, Sodima.

⁸ *Inter alia*, para. 55, SCK and FNK; para. 57-58, Eagle; para. 21, Geigy. See p. 314, Kanska: 2004, mentioning due diligence, legitimate expectations, legal certainty, and the continuity of Community action. Legal certainty requires that institutions must not delay indefinitely the exercise of their powers, para. 90, Cresson; para. 46, Francois; para. 140, Falck; para. 61, Atzeni.

⁹ Para. 21, Baustahlgewebe; para. 41, Corus; para. 115, Nippon Steel and Sumitomo; paras. 179, 207, Limburgse, ECJ. See also the principle of promptitude which may be affected by the lack of procedural deadlines in judicial proceedings, paras. 52-53, Baustahlgewebe.

¹⁰ Para. 27, Panayotova; para. 90, Peerbooms; para. 35, Greenham, para. 48, Inizan; para. 85, Müller-Fauré. See also, para. 119, Hassan, on the obligation of the Member States to present the case without delay before the UN Sanctions Committee.

¹¹ Paras. 70-73, Gasser; paras. 118, 122, Branco; paras. 138-139, Regione Siciliana.

¹² See in this respect, para. 96, Pafitis, stating that the Contracting States cannot be held responsible for delays outside their competence, in this case delays caused by Article 234 TEC procedures.

¹³ *Inter alia*, para. 21, Neumeister; para. 140, Coeme; para. 97, Pafitis; para. 39, Boddaert; paras. 55-58, Süßmann. See, p. 331, Van Dijk and Van Hoof: 1990, stating that the interest in prompt decisions must be weighed against the interest in demanding a careful examination of cases and a proper conduct of the proceedings. See also, para. 95, Pafitis, suggesting that the specific aim inherent in Article 234 TEC procedures (requests for preliminary rulings) can justify increasing the duration of national procedures.

requirement of proper administration of justice.¹⁴ Finally, it must be mentioned that both legal systems acknowledge the necessity of recognising the excessiveness of the procedure when imposing sanctions in that procedure.¹⁵

1(a): The criteria of a hearing within a reasonable time

Having discussed the similarity of general considerations within the scope of the right to a hearing within a reasonable time, due attention must be paid to the similarity of criteria examined in Strasbourg and Luxembourg in determining whether the length of the procedure was reasonable. According to the general formula under ECHR law regard must be had of the circumstances of the case and the criteria laid down in case law such as the complexity of the case, the applicant's conduct, the conduct of the competent authorities, and the importance of what was at stake for the applicant.¹⁶

Correspondingly, in Community judicial processes the factors include the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity, the conduct of the applicant and of the competent authorities.¹⁷ In Community administrative procedures the general formula lists the following criteria: the background to the case, the various procedural stages followed, the complexity of the case and its importance to the various parties involved.¹⁸ Despite the apparent differences these criteria relate to the same matters. The elements of complexity and importance for the applicant are available in both tests and the element of various procedural stages concentrates on the conduct of the applicant and the authorities in those stages. The first formula has also been applied to the administrative phase of a procedure.¹⁹

In ECHR law the criteria do not receive identical emphasis. The last criterion is rarely examined and it appears that the conduct of the authorities decides the case ultimately.²⁰

It will be demonstrated below that a violation of Article 6(1) ECHR can be established irrespective of the complexity of the case and whether the applicant is responsible for

¹⁴ Para. 234, Limburgse, ECJ. See also affirming the need for the proper conduct of justice: on the basis of the specific division of tasks between the ECJ and the CFI the CFI is allowed a relatively longer period to investigate actions calling for a close examination of complex facts, paras. 41-42, Baustahlgewebe.

¹⁵ ECHR: para. 54, Hozee; para. 44, Pietilainen; para. 66, Eckle. EC: paras. 202-203, TU, C-113/04 P; paras. 437-438, TU, CFI.

¹⁶ *Inter alia*, para. 19, Comingersoll; para. 21, Portington; para. 54, Wiesinger; para. 48, Süßmann.

¹⁷ *Inter alia*, para. 29, Baustahlgewebe; para. 42, Corus; paras. 192-193, 210, Limburgse, ECJ.

¹⁸ *Inter alia*, para. 114, Branco; para. 5, Oliveira, ECJ; para. 57, SCK and FNK; para. 177, Partex.

¹⁹ Para. 187, Limburgse, ECJ.

²⁰ P. 145, Trechsel: 2005.

some delays, provided that the delays are imputable to the national authorities including the courts. Neither would Community law consider the criteria exhaustive or cumulative. In principle, complexity or the applicant's dilatory conduct can in itself justify excessive duration and the conduct of authorities can alone entail that the duration of the process was unreasonable.²¹ Nevertheless, it follows from the relationship between the criteria that the delay being imputable to Community institutions will be the most decisive element as in ECHR law.

Now, similarity needs to be established in connection with the individual criteria influencing the assessment of the length of a particular procedure.

The complexity of the case

Under the ECHR the degree of complexity can vary from undoubted,²² to certain,²³ and to lack of complexity.²⁴ On the whole, this is of little significance as in most cases complexity in itself is not capable of justifying the length of the procedure²⁵ as it can hardly counterbalance the other criteria indicating unreasonable delay. It will only be capable of providing an adequate justification when the delay is not imputable to the domestic authorities.²⁶

In Community law complexity is subject to similar considerations. As regards the judicial phase of Community competition proceedings it appears that complexity in itself cannot justify the extensive duration of procedures. Although the ECJ would accept that the duration of the proceedings before the CFI was justified in the light of the particular complexity of the case,²⁷ it is clear that the ECJ takes into account the fact that no delay could be imputed to the CFI.²⁸ In *Baustahlgewebe* despite the complexity

²¹ See, para. 117, *Nippon Steel and Sumitomo*; para. 43, *Corus*; para. 188, *Limburgse*, ECJ, para. 156, *Thyssen Stahl*, ECJ.

²² *Inter alia*, para. 99, *Lavents*; para. 98, *Reinhardt*; para. 52, *Hozee*; para. 134, *IJL*; para. 32, *Schweighofer*.

²³ *Inter alia*, para. 39, *Papachelas*; para. 35, *Kangasluoma*; para. 25, *Portington*; para. 72, *Phocas*.

²⁴ *Inter alia*, para. 91, *Kress*; para. 79, *Deumeland*; para. 33, *Schumacher*; para. 28, *Németh*; para. 58, *Foti*.

²⁵ *Inter alia*, para. 98, *Reinhardt*; para. 75, *Foti*; para. 25, *Portington*; para. 33, *Schweighofer*; para. 91, *Pafitis*.

²⁶ *Inter alia*, para. 137, *IJL*; para. 53, *Hozee*; para. 139, *Coeme*; para. 80, *Gast and Popp*; para. 41, *Papachelas*. See, para. 99, *Lavents*, stating that the great complexity of the case is an *a priori* favourable element in justifying the duration, but at paras. 103-104 it was held that it was not sufficient to justify the duration due to the delays imputable to the authorities.

²⁷ Para. 221, *Limburgse*, ECJ; para. 122, *Nippon Steel and Sumitomo*; para. 166, *Thyssen Stahl*, ECJ; para. 56, *Corus*.

²⁸ Para. 117, *Nippon Steel and Sumitomo*; para. 188, *Limburgse*, ECJ; para. 156, *Thyssen Stahl*, ECJ; paras. 53-55, *Corus*.

of the case the duration of the procedure was found unreasonable on grounds of unaccounted inactivity by the CFI.²⁹ Similarly, in Community administrative procedures the duration of the procedure can only be justified on grounds of complexity, if no delay can be imputed to the authority proceeding in the case.³⁰ When the administrative phase is examined conjoined with the judicial phase the same conclusions apply.³¹

The applicant's conduct

This criterion is derived from the principle that only delays for which the state can be held responsible may justify a finding that a reasonable time has been exceeded.³² It is rarely the principal factor as in many cases the delay caused by the applicant was regarded irrelevant in the light of the total length of delays.³³ In this respect, the attitude and actions of the applicant demonstrating unwillingness to cooperate with the authorities could be considered.³⁴ In contrast, exercising defence rights and exploiting the remedies available will not be considered as causing undue delays.³⁵ It follows that the relevant delays attributed to the applicant, irrespective whether it is the result of legitimate or illegitimate conduct, are delays originating from a source on which the authorities in the process had no influence and for which they cannot be held responsible. In Community law similar considerations apply. Delays attributable to the person concerned, either as a result of dilatory conduct³⁶ or of exercising procedural (defence) rights,³⁷ are considered as extensions to the duration of the procedure for which the Community institutions cannot be held responsible.

²⁹ Para. 47, *Baustahlgewebe*. See, para. 44, *ibid*, stating that complexity does not justify every delay.

³⁰ *Inter alia*, paras. 280-281, *Irish Sugar*; para. 61, *SCK and FNK*; paras. 127-128, *Limburgse*, CFI. The importance of complexity can also be compromised by the dilatory conduct of the persons concerned, para. 238, *APT*; para. 196, *Haladjian Frères*.

³¹ Paras. 231, 233-234, *Limburgse*, ECJ.

³² *Inter alia*, para. 49, *Pedersen*; para. 100, *Lavents*; para. 66, *Humen*; para. 82, *Eckle*; para. 29, *Németh*. The person concerned is only required to show diligence in relation to procedural steps relating to him, to refrain from using delaying tactics, and to avail himself of the scope afforded by domestic law for shortening the proceedings, para. 35, *UAS*; para. 34, *Guincho*.

³³ *Inter alia*, para. 99, *Reinhardt*; para. 42, *Pietilainen*; para. 130, *Kudła*; para. 29, *Németh*; para. 57, *Buchholz*.

³⁴ *Inter alia*, para. 41, *Papachelas*; para. 99, *Reinhardt*; para. 130, *Kudła*, para. 29, *Portington*.

³⁵ *Inter alia*, para. 99, *Reinhardt*; para. 103, *König*; paras. 57-58, *Wiesinger*; paras. 51-53, *Baraona*.

³⁶ Para. 151, *Österreichische Postsparkasse*; paras. 232, 235-238, *APT*.

³⁷ Paras. 37-40, *Baustahlgewebe*; para. 196, *Haladjian Freres*; para. 65, *SCK and FNK*; para. 281, *Irish Sugar*. In conjoined administrative and judicial procedures, para. 232, *Limburgse*, ECJ.

The conduct of authorities

In ECHR law the reasonableness of a procedure's duration depends ultimately on whether the delay is imputable to the national authorities. It is derived from the responsibility of authorities for their conduct and their special responsibility to act in diligence.³⁸ In this respect, the unaccounted and unexplained inactivity by the authorities bears relevance.³⁹ However, the conduct of authorities is not open to criticism when the process was conducted without undue delay in a pace reasonable in the circumstances and the complexity of the case.⁴⁰ In exceptional circumstances the responsibility of national authorities for delays can be excluded.⁴¹

In EC law the conduct of Community courts is of primary importance in this respect. As under ECHR law, the length of the procedure cannot be regarded unreasonable provided that the procedure is not burdened by delays imputable to the courts, but conducted in an adequate pace.⁴² Conversely, unaccounted delays imputable to Community courts constitute a breach of the reasonable time requirement.⁴³ Similarly, in administrative procedures undue delays for which the authority can be held responsible will raise doubts as regards the reasonableness of the procedure's duration.⁴⁴ In contrast, the duration could be regarded reasonable in the circumstances of the case, provided that the procedure advanced in an appropriate pace⁴⁵ by taking appropriate procedural steps.⁴⁶ The administrative and judicial phases of a procedure considered together are subject to the same considerations.⁴⁷

³⁸ Para. 61, Wiesinger; para. 69, Erkner and Hofauer; para. 130, Kudła; para. 50, Buchholz; para. 49, Philis 2.

³⁹ See, *inter alia*, para. 102, König; para. 44, Éditions Périscope; para. 67, Schouten; paras. 35-36, Hennig; paras. 70-71, Vilho Eskelinen. However, para. 60, Wiesinger and para. 69, Erkner and Hofauer held that not abiding national time-limits is not decisive; see in this respect, para. 56, Irving and para. 40, Z, ECJ in EC law.

⁴⁰ *Inter alia*, paras. 72-74, Wolf; para. 20, Wemhoff; para. 53, Hozee; para. 139, Coeme; paras. 39-42, Motsnik.

⁴¹ *Inter alia*, para. 27, Zimmermann; para. 54, Baraona; para. 61, Foti; para. 19, Milasi; para. 40, Philis 2. See in EC law: even if account is taken of inherent constraints, such duration can only be justified by exceptional circumstances, para. 46, Baustahlgewebe.

⁴² Para. 117, Nippon Steel and Sumitomo; para. 53, Corus; para. 188, Limburgse, ECJ; para. 156, Thyssen Stahl, ECJ; para. 37, TEAM.

⁴³ Paras. 41-45, Baustahlgewebe.

⁴⁴ Paras. 162-164, Vainker; paras. 52-54, Francois; paras. 40-41, TU, C-105/04 P; paras. 45-46, TU, C-113/04 P; paras. 77, 85, TU, CFI; para. 169, Vieira; para. 38, JCB, CFI; para. 63, JCB, ECJ.

⁴⁵ Para. 61, SCK and FNK; para. 234, APT; para. 43, JCB, CFI; para. 66, JCB, ECJ; paras. 127-128, Limburgse, CFI; para. 45, Z, ECJ; para. 56, Irving; paras. 280-281, Irish Sugar; para. 196, Haladjian Frères, CFI; para. 139, Regione Siciliana; paras. 166-167, Ferchimex.

⁴⁶ Paras. 280-282, Irish Sugar; para. 5, Oliveira, ECJ; paras. 118-120, Branco; para. 65, Interhotel; paras. 181-187, Partex; para. 65, SCK and FNK; para. 133, Limburgse, CFI; paras. 65-66, Mediocurso.

⁴⁷ Para. 234, Limburgse, ECJ.

From the perspective of undue procedural delays some procedural decisions require further attention. Giving priority to certain cases is acknowledged in both jurisdictions as an issue falling within the discretionary powers of national authorities.⁴⁸ As regards employing measures capable of expediting the procedure both legal systems appear to adopt a sceptical stance as their actual effect is difficult to ascertain.⁴⁹ In ECHR law the positive effect of the severance of proceedings is doubted.⁵⁰ Adequate reasons such as that the cases relate to the same affair and a decision in one could affect the outcome of the other can justify a refusal to disjoin cases.⁵¹ Obtaining a comprehensive view of legal issues arising in a complex context can support joining cases.⁵² On this basis, keeping together complex cases in EC administrative (competition) law involving the conduct of numerous undertakings concerning the same infringement appears reasonable.

The problem of postponing procedures until the conclusion of parallel proceedings attracted a similar approach in both jurisdictions. In ECHR law as a matter of procedural efficiency it might be acceptable to await the outcome of parallel proceedings.⁵³ In such instances the procedures are usually closely connected and there is no need to continue with the first procedure until the conclusion of the parallel procedure.⁵⁴ However, postponement must be reasonable having regard to the special circumstances of the case.⁵⁵ Similarly, in Community law the specific circumstances of the case will inevitably affect the judicial assessment of adjournment.⁵⁶ In the available cases, since the question of liability for irregularities depended on a case pending before national courts, it was held that during that period the Commission was not required to adopt a final decision, provided that it had executed the necessary preliminary steps and continued the proceedings without further delay after the closure of the national procedure.⁵⁷ This corresponds with the above-introduced requirements of affinity, necessity, and reasonableness under ECHR law.

⁴⁸ ECHR: paras. 75, 79, *Gast and Popp*; paras. 55-56, 60, *Süssmann*. EC: para. 67, *SCK and FNK*; para. 70, *British Airways*.

⁴⁹ ECHR: para. 52, *Hozee*; para. 21, *Neumeister*. EC: para. 62, *SCK and FNK*.

⁵⁰ Para. 35, *Hennig*.

⁵¹ Para. 139, *Coeme*; para. 38, *Boddaert*.

⁵² Para. 76, *Gast and Popp*; para. 59, *Süssmann*.

⁵³ Para. 21, *Neumeister*; para. 35, *Schumacher*; para. 20, *Ikanga*; para. 43, *Pietilainen*.

⁵⁴ Para. 110, *Ringeisen*.

⁵⁵ *Inter alia*, para. 110, *König*; para. 39, *Boddaert*; paras. 97, 109, 112, *Pafitis*; para. 78, *Herbst*.

⁵⁶ See, para. 120, *Branco*; para. 67, *Mediocurso*; para. 188, *Partex*.

⁵⁷ Paras. 116-117, *Branco*; paras. 63-64, *Mediocurso*.

The stake for the applicant

This marginal criterion in ECHR law relates to the specific circumstances of the person concerned including those of financial/commercial nature.⁵⁸ Correspondingly, in Community law it may concern interests connected to the outcome of competition proceedings affecting the commercial circumstances of the undertakings involved.⁵⁹ The criterion of a grave prejudice against the individual in ECHR law⁶⁰ is matched by the factor of a permanent adverse effect arising out of the duration of the procedure in EC law.⁶¹

1(b): The issue of the relevant period

Both legal systems agree that a procedure closed with a final decision cannot be considered in assessing the duration of a fresh set of proceedings in the same matter.⁶² A more vital question is whether different procedural stages should be considered separately, conjoined, or both. In Community law the separate examination of administrative and judicial phases depended on the claims advanced by the undertakings concerned criticising either the administrative or the judicial phase.⁶³ When the claim was aimed at the procedure as a whole, the ECJ duly examined their duration conjointly.⁶⁴ Such approach can hardly be criticised under ECHR law, as the period examined in Strasbourg will also depend on the pleadings presented by the applicant. If the claims relate solely to the judicial phase, the ECtHR will consider only that period.⁶⁵

⁵⁸ Financial interests, see, para. 61, Süssmann; para. 45, Frydlender; para. 68, Schouten; para. 48, Doustaly; para. 52, Buchholz; para. 80, Herbst. See also, para. 91, Pafitis, important repercussion for the parties and for the national economy in general.

⁵⁹ See, paras. 31-33, Baustahlgewebe. It may involve the interests of persons directly and indirectly affected by the competition procedure: the undertaking, its competitors, and third parties, para. 30, *ibid.* See, for financial disadvantages, para. 58, Irving.

⁶⁰ Para. 61, Süssmann; para. 80, Herbst; para. 44, Mikulić; para. 80, Gast and Popp.

⁶¹ Para. 68, SCK and FNK.

⁶² ECHR: para. 77, Deumeland. EC: para. 123, Limburgse, CFI affirmed by paras. 202-204, Limburgse, ECJ.

⁶³ Judicial phase: para. 29, Baustahlgewebe; para. 116, Nippon Steel and Sumitomo; para. 155, Thyssen Stahl, ECJ; para. 210, Limburgse, ECJ. Administrative phase: para. 114, Branco; para. 5, Oliveira, ECJ; para. 57, SCK and FNK; para. 61, Mediocurso; para. 177, Partex; para. 136, Regione Siciliana; para. 230, APT; para. 126, Limburgse, CFI; para. 278, Irish Sugar; para. 195, Haladjian Frères; para. 187, Limburgse, ECJ.

⁶⁴ Para. 231, Limburgse, ECJ.

⁶⁵ *Inter alia*, para. 90, Kress; paras. 35-36, Papachelas; para. 73, Gast and Pop; para. 55, Süssmann.

In other instances the whole procedure will be taken into account.⁶⁶ Sometimes a separate followed by a cumulative examination of delays will be provided.⁶⁷ Finally, since separating certain procedural phases and examining their length individually is accepted in ECHR law,⁶⁸ the practice of analysing the distinct elements of the administrative phase of Community competition proceedings⁶⁹ separately appears justified.

2. Similarity in the language of the right to a hearing within a reasonable time

The right to a legal process within a reasonable time entails a prohibitive language in both ECHR and EC law excluding the possibility of proportionate interferences serving a legitimate interest.⁷⁰ On this basis, the examination of similarity is prevented from proceeding further to the remaining components of style.

Having established similarity in the component of language enables the conclusion that the protection afforded under EC law to the right to a hearing within a reasonable is similar to that under ECHR law. Its implications on the non-divergence thesis will be examined below in the conclusions closing Part III.

⁶⁶ Administrative and judicial phase: paras. 51-53, Wiesinger; para. 36, Hennig; para. 45, Stork, ECtHR. The procedure overall: para. 44, Éditions Périscope; para. 77, Deumeland; para. 98, König; paras. 40, 43, Garyfallou.

⁶⁷ Paras. 82-89 and 90, Deumeland; paras. 52, 63, Buchholz.

⁶⁸ *Inter alia*, para. 91, Kress; para. 20, Portington; para. 41, Papachelas; para. 100, Reinhardt; para. 64, Schouten.

⁶⁹ Investigation before the statement of objections and phase after the statement of objections: paras. 37-38, TU, C-105/04, P; para. 42, TU, C-113/04 P; para. 78, TU, CFI; paras. 59-60, SCK and FNK; para. 124, Limburgse, CFI; paras. 181-183, Limburgse, ECJ. It must be mentioned that the beginning and the end of the relevant period is not given consideration in EC law due to the fact that the principle of reasonable time covers procedures from the point they are commenced until they are closed by a final act. These points are of importance in ECHR law as it must address the specificity of the domestic procedures involved in this regard, *inter alia*, para. 133, Coeme; para. 93, Reinhardt; paras. 43, 45, Hozee; para. 73, Eckle; para. 26, Kangasluoma; para. 34, Corigliano.

⁷⁰ The requirement of a procedure in a reasonable time has been relied upon more as a principle than a fundamental right in EC law in cases dealing with procedures under national law, see, para. 27, Panayotova; para. 90, Peerbooms; para. 35, Greenham; para. 48, Inizan; para. 85, Müller-Fauré.

Chapter 14: The privilege against self-incrimination in ECHR and EC law

Establishing similarity in this regard involves finding a common concept of the privilege against self-incrimination and ascertaining that its applicability, in particular, the meaning of the term criminal charge and the implications of the separation of different procedural functions, is approached correspondingly. Following the structure of scrutiny under ECHR law similarity will be examined in connection with the issue of compulsion and as regards the conjoined issues of subsequent use as defined in the ECtHR judgment *Saunders* and safeguards capable of preventing incriminatory use. Similarity concerning the issue of incriminating third persons and the language of the privilege against self-incrimination will also be established.

1. Similarity in the scope of the privilege against self-incrimination

Under the ECHR, although not mentioned specifically in Article 6 ECHR, the right to silence and not to incriminate oneself are generally recognised international standards that are central to the notion of a fair procedure.¹ These principles presuppose that the prosecution in criminal cases will seek to prove its case against the accused without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.² Their rationale is to protect the accused against improper compulsion by authorities, thereby, contributing to the avoidance of miscarriage of justice and ensuring procedural fairness.³

In Community law the privilege against self-incrimination is essential to ensuring the fairness of Community (administrative) procedures. In particular, the rights of the defence preclude the Commission from compelling undertakings by means of a binding decision to submit statements that might involve the admission on their part the existence of an infringement which is incumbent upon the Commission to prove.⁴ The right of undertakings to refrain from admitting participation in (competition)

¹ *Inter alia*, para. 68, Saunders; para. 45, John Murray; para. 100, Jalloh; para. 39, Weh; para. 126, Coeme.

² *Inter alia*, para. 68, Saunders; para. 100, Jalloh; para. 40, Heaney and McGuinness; para. 39, Weh.

³ *Inter alia*, para. 68, Saunders; para. 45, John Murray; para. 100, Jalloh; para. 44, Allan; para. 39, Weh.

⁴ *Inter alia*, para. 12, Otto; paras. 63, 65, Aalborg Portland; para. 732, Cimenteries; para. 35, Orkem; para. 34, Dalmine, ECJ; para. 67, Mannesmannröhrenwerke; para. 86, Acerinox; para. 74, Société Générale; para. 49, ThyssenKrupp. The right to silence is (also) associated with the need to safeguard the rights of defence, paras. 63-64, Mannesmannröhrenwerke; paras. 32-33, Orkem; para. 73, Société Générale; paras. 445-446, Limburgse, CFI; para. 272, Limburgse, ECJ. This means that it does not extend beyond the rights of defence, para. 66, Mannesmannröhrenwerke. See, p. 28, Harding: 1993, stating that the Orkem judgment put Community law ahead of other legal systems by providing defence rights in the phase of preliminary investigations.

infringements is expressly provided.⁵ This demonstrates that there are no discernible differences between ECHR and EC law in this regard. Nevertheless, the privilege against self-incrimination has evolved independently in Community law⁶ admitting only a limited influence from ECHR law.⁷

1(a): The applicability of the privilege against self-incrimination

It is common ground that the privilege against self-incrimination under the criminal limb of Article 6 ECHR is only applicable in the determination of criminal charges. The concept of a charge attracts an autonomous meaning. It is defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence.⁸ The approach adopted in Community law appears satisfactory. It was found that the privilege against self-incrimination is only applicable when the person is subjected to a criminal charge in the sense of that term under ECHR law referring to an official notification from the competent authority of a complaint (or measures implying such complaint) that a criminal infringement has been committed.⁹ In both jurisdictions the issue whether the situation of the individual has been substantially affected is addressed.¹⁰ On this basis, it can hardly be questioned that a general obligation imposed on companies by Community legislation to disclose their annual accounts is not a charge.¹¹ It is also evident that the privilege against self-incrimination is not applicable in civil proceedings concerning private relations between individuals without the possibility of imposing penalties.¹²

⁵ Para. 273, Limburgse ECJ; para. 262, ADM, T-59/02; para. 64, Mannesmannröhrenwerke.

⁶ Para. 34, Dalmine, ECJ; paras. 28-31, 34-35, Orkem; para. 11, Otto; para. 60, Mannesmannröhrenwerke; para. 49, ThyssenKrupp. There was (is) no principle common to the Member States that could be relied upon by legal persons in relation to infringements in the economic sphere, paras. 28, 29, 31 Orkem; para. 11, Otto.

⁷ Para. 34, Dalmine, ECJ; paras. 28-31, 34-35, Orkem; para. 11, Otto; paras. 274, 276, Limburgse, ECJ; para. 59, Mannesmannröhrenwerke. Neither its wording nor the corresponding case law suggested that Article 6 ECHR would cover legal persons in relation to investigations in competition law, para. 30, Orkem; para. 11, Otto. Presently, this approach is not followed with reason, see, para. 271, Limburgse, ECJ. The usual human rights and general principle references on defence rights also appeared at para. 64, Aalborg Portland.

⁸ *Inter alia*, para. 42, Serves; paras. 42 and 46, Deweer; para. 73, Eckle.

⁹ Para. 47, Danzer.

¹⁰ ECHR: paras. 41-42, Heaney and McGuinness; para. 42, Quinn. EC: para. 47, Danzer (significant repercussion on the suspect's circumstances).

¹¹ Para. 48, Danzer (under the legislative scheme they do not qualify as accused persons or suspects). See in this respect in ECHR law, Allen, where the obligation to make a declaration of assets for tax purposes did not suffice to bring the privilege against self-incrimination into play; see also, para. 54, Weh and para. 31, Rieg, where the obligation to give information on facts was not regarded as a charge.

¹² Paras. 15-16, Otto. See in this respect in ECHR law, paras. 48-49, J.B, presenting an argument *a contrario* that irrespective of the purposes of the proceedings the fact that a penalty was imposed the procedure amounted to the determination of a criminal charge which supports the ECJ's position.

Community courts have not addressed the applicability of the privilege against self-incrimination in EC competition proceedings as a separate matter.¹³ Since they insist on applying this principle, it is not required to examine whether competition proceedings would qualify as determining a criminal charge¹⁴ despite the debate raging on whether EC competition procedures are of administrative or criminal nature.¹⁵ Nevertheless, the issue of separating investigative, prosecutive, and adjudicative functions needs to be considered. According to ECHR law Article 6 ECHR is not applicable to procedures of investigative nature that do not adjudicate either in form or substance and the purpose of which is to ascertain and record facts which might be used as the basis of the action of other competent – prosecuting, regulatory, disciplinary, or legislative – authorities.¹⁶ It follows *a contrario* that when the diverse procedural functions cannot be separated, the privilege against self-incrimination must cover information (evidence) acquired at any stage of the procedure.¹⁷ This corresponds with the situation in Community law. Since these functions are exercised by a single authority (the Commission)¹⁸ in a single procedure that may result in the imposition of considerable fines, certain defence rights including the privilege against self-incrimination are observed from the earliest stage of the preliminary inquiry.¹⁹

¹³ In *Orkem*, para. 29, the ECJ did not deny that competition law could be considered as involving a criminal charge. It only mentioned that domestic laws in general do not acknowledge the privilege against self-incrimination in the economic sphere.

¹⁴ For a similar conclusion see, Chapter 17 on double jeopardy; Chapter 15 on the presumption of innocence; Chapter 16 on no punishment without law; Chapter 11 on access to a court.

¹⁵ It is not spelt out clearly, p. 173, Harding and Joshua: 2003. See the recurring statement that fines for competition infringements are not of a criminal nature, para. 235, *Tetra Pak*; para. 86, *Bolloré*. Convinced that it is of criminal or at least quasi-criminal nature, pp. 129-130, *Green*: 1993 and pp. 333-335, *Wils*: 1996. See, p. 11.5, *Ehlermann and Oldekop*: 1978, expressing views that the privilege against self-incrimination should not be extended to the EEC competition procedure. In this respect the *Société Stenuit* and *OOO Neste* decisions in ECHR law could be of relevance (see Chapter 16) and that ECHR law holds that administrative procedures could be covered by the privilege against self-incrimination, para. 67, *Saunders*; paras. 42-47, *Deweert*.

¹⁶ Para. 67, *Saunders*; para. 82, *IJL*; para. 29, *Kansal*; paras. 61-62, *Fayed*; para. 45, *Weh*. Preliminary (administrative) investigations are not covered as the person concerned has not been charged in that phase, see, *Allen*; *King*; *Van Vondel*; *CO Matscher*, *Funke*; paras. 14-16, *DO Martens*, *Saunders*. This might be useful under EC law where it was irrelevant that national authorities used unlawful incriminatory information to decide whether to initiate subsequent proceedings in the course of which evidence was acquired in conformity with defence rights, para. 88, *Mannesmannröhrenwerke* (the breach took place before the ‘charge’).

¹⁷ See, para. 44, *Weh*; mm. paras. 32, 36, *Shannon*; *Allen*; *King*; *Van Vondel*.

¹⁸ See in this respect, pp. 35-37, *Davies*: 1998. At p. 201, *Harding and Joshua*: 2003 it was suggested that the separation of the prosecutorial (Commission) and adjudicative (CFI) functions has taken place in practice.

¹⁹ Para. 33, *Orkem*; para. 63, *Aalborg Portland*; para. 15, *Hoechst*; paras. 63-64, 77, *Mannesmannröhrenwerke*; para. 73, *Société Générale*. Its rationale is that it is necessary to prevent the right at issue from being irremediably impaired in the preliminary investigative phase which is decisive in providing evidence for the subsequent parts of the procedure, p. 91, *Lasok*: 1990.

The ensuing analysis follows the distinction applied by Strasbourg between cases where the element of compulsion dominated judicial assessment and where the subsequent use of incriminating evidence was also considered relevant. The element of compulsion often suffices in establishing a violation there being no need to consider the issue of subsequent use.²⁰ In other cases, however, the following factors are taken into account: the nature and degree of compulsion, the use to which the evidence obtained is put, and the existence of any relevant safeguards.²¹

1(b): The issue of compulsion

Since in ECHR law the right not to incriminate oneself is primarily concerned with respecting the will of the accused to remain silent,²² it must be determined in each case whether the applicant has been subject to compulsion to give evidence.²³ A (legal) compulsion is usually ascertainable when the accused is obliged by law and his refusal is threatened with the imposition of sanctions.²⁴ However, compulsion cannot be established when the person was able to remain silent and his silence was not regarded as a sign of guilt and did not amount to an offence.²⁵ Similarly, the will of the person concerned remains unfettered when there was no legal compulsion to cooperate and no penalties were to be imposed²⁶ or when the individual was not coerced into giving evidence.²⁷

In Community law legal compulsion is conceived in a similar manner as an obligation in law where non-compliance is threatened by the imposition of sanctions.²⁸ It is

²⁰ Paras. 34-35, Shannon; mm. para. 44, Funke; mm. paras. 65-68, J.B. This rule is applicable to cases where no subsequent use could be established and coercion jeopardised the very essence of the right at issue.

²¹ *Inter alia*, paras. 69-74, Saunders; para. 101, Jalloh; paras. 51-55, Heaney and McGuinness; para. 44, Allan.

²² *Inter alia*, para. 69, Saunders; para. 40, Heaney and McGuinness; para. 40, Weh; para. 110, Jalloh. People are always free to incriminate themselves, if in doing so they are exercising their own will, CO De Meyer, Saunders.

²³ *Inter alia*, para. 69, Saunders; para. 83, IJL; para. 29, Kansal; para. 51, Allan, all the circumstances of the case must be examined. See in this respect in EC law, para. 458, Limburgse, CFI, stating that it may only be assessed by reference to the nature and content of the questions in the given case.

²⁴ *Inter alia*, para. 70, Saunders; para. 49, Heaney and McGuinness; para. 44, Funke; paras. 66, 69, J.B. Other forms of compulsion: para. 50, Allan, using subterfuge to extract evidence; para. 52, Allan, psychological pressure; paras. 111-112, 118, Jalloh, physical coercion and inhuman treatment. Compulsion shall not destroy the essence of the privilege, para. 56, Quinn; para. 55, Heaney and McGuinness.

²⁵ Paras. 48-50, John Murray; para. 48, Averill.

²⁶ Paras. 58-59, Condron; para. 61, Beckles; Allen; King; Staines.

²⁷ Para. 46, Allan.

²⁸ When the undertakings denied to provide answers, it is impossible to determine that the decisions requesting information were illegal, paras. 283-284, 290, 292, Limburgse, ECJ; paras. 452, 454 Limburgse, CFI.

accepted that the exercise of coercion with the aim of obtaining information is essential to raise an issue under the privilege against self-incrimination.²⁹ As under ECHR law (legal) compulsion cannot be established when by way of a request for information an undertaking is not obliged to reply and a penalty would only be imposed when the undertaking had agreed to reply but provided inaccurate information.³⁰ In other words, if the undertaking was not compelled to provide information, it cannot effectively rely on the privilege against self-incrimination.³¹ Conversely, it is a clear example of legal compulsion when information is requested by means of binding decisions and subjecting the undertaking to penalties in the event of refusing to comply.³²

It follows that both legal systems evaluate situations similarly in which the will of the person in connection with his decision whether to provide self-incriminating evidence remained unfettered. In particular, under ECHR law offering leniency in rewarding cooperation with the authorities cannot be regarded as improper inducement.³³ Correspondingly, in the context of EC leniency policy making the reduction of fines possible on account of cooperation cannot be regarded as compelling undertakings to provide answers that might involve an admission on its part of an infringement.³⁴ In such cases the admission of an alleged infringement is entirely voluntary³⁵ and the undertakings are not in any way coerced to admit an infringement.³⁶ On this basis, it is no surprise that it was suggested that the approach on leniency in EC law raises no problems under ECHR law.³⁷

Although from the perspective of EC law the broadness of the prohibition in pure compulsion cases under the ECHR may look overwhelming,³⁸ it is suggested that the issues of subsequent use and safeguards forming part of the complete test have reduced its force.³⁹ In addition, when pure compulsion cases in ECHR law are interpreted as

²⁹ Para. 275, *Limburgse*, ECJ.

³⁰ Paras. 279, 288, *ibid*; paras. 455-457, *Limburgse*, CFI. On accepting penalties for giving inaccurate information in ECHR law, see, Allen; King; Van Vondel.

³¹ Para. 35, *Dalmine*, ECJ.

³² Para. 279, *Limburgse*, ECJ.

³³ Allen.

³⁴ Para. 324, *BPB*, CFI; para. 53, *ThyssenKrupp*; paras. 314-315, *Mayr-Melnhof*.

³⁵ The assistance is given by the undertaking of its own volition, para. 87, *Acerinox*; para. 50, *ThyssenKrupp*.

³⁶ Para. 89, *Acerinox*; para. 52, *ThyssenKrupp*; paras. 401, 417-419, *Pre-Insulated Pipes*, ECJ.

³⁷ P. 580, *Wils*: 2003.

³⁸ On the basis of para. 44, *Funke* it seems that obtaining any (real or other) evidence through compulsion is excluded under Article 6 ECHR; see also, paras. 66-67, *J.B.* On grounds of *Funke* the *Orkem* principle in EC law clearly breached the requirements of Article 6 ECHR, p. 130, *van Overbeek*: 1994; p. 315, *Willis*: 2001; pp. 271-273, *Dine*: 2004. However, this issue should be considered in the light of subsequent changes in both jurisdictions discussed below and the specificity of the *Funke* case.

³⁹ *Inter alia*, pp. 273-275, *Riley*: 2000; pp. 446-449, *Emerson and Ashworth*: 2001; pp. 315-316, *Willis*: 2001.

prohibiting only 'fishing expeditions' for evidence, the relevant Community cases do not appear any less convincing as they pursue the very same aim.⁴⁰ Finally, it must be pointed out that for the present purposes the significance of pure compulsion cases is limited as the relevant EC cases all include the element of subsequent use discussed next.

1(c): The issue of subsequent use

The subsequent incriminatory use of evidence can determine the fate of a procedure under Article 6 ECHR. Strasbourg case law provides that when the evidence has an existence independent of the will of the person concerned, its subsequent use cannot be excluded on grounds of the privilege against self-incrimination.⁴¹ The situation is different when the evidence is not independent of the will of the person concerned. When such evidence is put to incriminating use at trial, the right not to incriminate oneself applies irrespective that the evidence is not incriminatory on its face. The following belong to this category: admissions of wrongdoing, exculpatory remarks, and providing information on questions of fact.⁴² This assumes that information with any content arising from an act of will could be used to incriminate the person concerned. Correspondingly, Community law prohibits the subsequent use of self-incriminatory evidence under the privilege against self-incrimination.⁴³ In particular, Community law prohibits the incriminatory use of information⁴⁴ obtained in national proceedings where the privilege against self-incrimination was not applicable.⁴⁵ It is also excluded that

⁴⁰ See, HRC/55-57, 61, Stessens: 1997, stating that para. 44, Funke must be interpreted restrictively extending only to documents which were obtained as a result of a 'fishing expedition', where the authority attempted to improve its position by compelling the person concerned to become the primary informer against himself. At HRC/56, *ibid*, Stessens considered that EC case law also aimed at prohibiting 'fishing expeditions' thus denying their divergence in this respect. The prohibition of 'fishing expeditions' is more apparent at para. 69, J.B.

⁴¹ Para. 69, Saunders; para. 40, Heaney and McGuiness; para. 40, Weh; paras. 32, 36, Shannon; para. 40, Quinn; para. 102, Jalloh. Examples of such evidence: documents acquired pursuant to a warrant, breath, blood, urine, hair or voice samples, and bodily tissue for the purpose of DNA testing. In para. 68, J.B, it was suggested that the fact that evidence has an existence independent of the person concerned excludes that it was obtained by means of coercion; see also, point 1b, L, as regards documentary evidence.

⁴² Para. 71, Saunders; para. 29, Kansal; para. 83, IJL.

⁴³ Paras. 71-74, Mannesmannröhrenwerke; paras. 284, 318, Cimenteries; paras. 38-39, Orkem; mm. para. 451, Limburgse, CFI. It must be determined whether the answer from the undertaking is equivalent to the admission of an infringement, para. 273, Limburgse ECJ; para. 262, ADM, T-59/02; para. 64, Mannesmannröhrenwerke. Community law also prohibits the use of information for purposes of which the person concerned was oblivious when providing that information, paras. 17-19, Dow Benelux; paras. 10-13, Dow Iberica; paras. 298-305, Limburgse, ECJ; otherwise, the person concerned might give away self-incriminatory information believing that it will not be used against him.

⁴⁴ Para. 20, Otto.

⁴⁵ Paras. 14-17, 21, *ibid*; mm. para. 23, DSB; mm. para. 36, Van der Wal, CFI; mm. para. 53, Delimitis.

national authorities use information obtained by the Commission in breach of the right not to incriminate oneself for the purposes of establishing a competition infringement.⁴⁶ Conversely, in Community law it is accepted that giving purely factual information and the production of documents already in existence are not covered by the privilege against self-incrimination.⁴⁷ It was held that demanding purely factual information cannot be regarded as capable of requiring the undertaking to admit the existence of an infringement.⁴⁸ Since documents obtained in investigations are considered under ECHR law as a prime example of evidence independent of the will of the person concerned, the relevant provisions in EC law on obtaining and using existing documents held by undertakings correspond to those under ECHR law.⁴⁹ However, statements of any content appear to be prohibited under the Article 6 ECHR provided that they are put to an incriminatory use.⁵⁰ Not even factual information or exculpatory remarks are allowed as their subsequent incriminatory use could jeopardise the rights of the defence. On this basis, the position of Community law on purely factual information appears to fall short of the requirements established in *Saunders*.⁵¹

However, the rule on factual information must not be isolated from the rest of the *Saunders* judgment. The approach in *Saunders* emanated from the specificity of that case. In particular, much emphasis was given to the defencelessness of the person concerned. Apart from using the defendant's (factual) statements to undermine his credibility⁵² there was no defence against the legal compulsion to answer⁵³ and the various safeguards were not able provide protection to prevent the subsequent use of those statements.⁵⁴ It follows that in circumstances different from those in *Saunders*, primarily in the presence of safeguards capable of excluding/remediating incriminatory use, factual assertions could have a different qualification under Article 6 ECHR.

⁴⁶ Paras. 85, 87, Mannesmannröhrenwerke.

⁴⁷ Paras. 70, 77-78, Mannesmannröhrenwerke; paras. 37, 40, Orkem. In this respect Article 6 ECHR and Article 48 EUCFR were found inapplicable, paras. 75-76, Mannesmannröhrenwerke. However, defence rights and the right to a fair legal process as recognised under EC law provide, in the specific field of competition law, protection equivalent to that guaranteed by Article 6 ECHR, para. 77, *ibid*.

⁴⁸ Paras. 75-77, *Société Générale*.

⁴⁹ See, pp. 277-278, Dine: 2004.

⁵⁰ Provided that it is not prevented by way of utilising safeguards excluding inculpatory use.

⁵¹ Reaching the same conclusion, p. 316, Willis: 2001; pp. 70-71, Riley: 2002; pp. 576-578, 586-587, Wils: 2003. Tridimas saw the reason behind the EC position which he, nevertheless, held to be incompatible with ECHR law, p. 377, Tridimas: 2006.

⁵² Paras. 71-72, *Saunders*.

⁵³ Para. 70, *ibid*.

⁵⁴ Para. 75, *ibid*.

Since the post-Saunders case law appears to insist on examining safeguards,⁵⁵ the position on factual and exculpatory statements in EC law is likely to survive the strict provisions of *Saunders*. The importance of safeguards is further amplified by the fact that it was the judgment in *Saunders* that shifted the focus of the case law from obtaining information to the subsequent use of that information. Since the violation of the privilege against self-incrimination depends on how the information was subsequently used, it seems appropriate that safeguards capable of excluding/remediating subsequent use should be considered as fundamental in deciding compatibility with Article 6 ECHR. Consequently, the similarity of the approach in Community and ECHR law on factual information depends on the availability of safeguards.

Before turning to the issue of safeguards it must be pointed out that the *Saunders* test on non-incriminatory (factual) statements could also be eluded, when it is ascertained that no subsequent use of the evidence was involved.⁵⁶ In ECHR law incriminatory use can be excluded provided that the conviction was not based on the evidence⁵⁷ or when the link between the information and a potential prosecution was remote, hypothetical, and not sufficiently concrete.⁵⁸ In a similar vein, in Community law when no subsequent use can be determined, Community courts are not able to address the privilege against self-incrimination from the perspective of incriminatory use.⁵⁹

1(d): The issue of safeguards

In ECHR law according to the judgment in *Saunders* the utilisation of adequate safeguards can prevent the violation of the privilege against self-incrimination by excluding the use of incriminating evidence at trial.⁶⁰ In particular, they can bring to light any oppressive investigatory conduct.⁶¹ Safeguards must be applied to serve the needs of the person concerned as providing for general safeguards against arbitrary or improper

⁵⁵ *Inter alia*, para. 51, Heaney and McGuinness; paras. 120-121, Jalloh; paras. 73, 75, Göçmen; paras. 59, 61, Örs; paras. 60, 62, Kolu; paras. 39-40, Shannon; para. 51, Quinn; paras. 48, 52, Allan. Pointing out that the lack of safeguards could be an important factor in assessing the implications of *Saunders*, p. 8, McBride: 1997. On the need for safeguards although not exploring their full significance, p. 125, Sedley: 2001.

⁵⁶ Some suggested that it is not clear what specific subsequent use of factual evidence is condemned, HRC/59, Stessens: 1997; pp. 44-45, Davies: 1998.

⁵⁷ *Inter alia*, para. 128, Coeme; paras. 53-55, Weh; para. 31, Rieg; paras. 36, 38, Shannon.

⁵⁸ Para. 56, Weh; para. 31, Rieg. See also, Allen; King; Van Vondel; where no trial followed the investigation.

⁵⁹ Para. 291, Limburgse, ECJ; para. 454, Limburgse, CFI.

⁶⁰ Para. 75, *Saunders*.

⁶¹ Paras. 51-53, Brennan; Antoine.

action will not suffice.⁶² They must be effective and sufficient to the extent that the essence of the privilege against self-incrimination is not impaired.⁶³ Safeguards include warnings, providing reasons and allowing appeal,⁶⁴ extensive review of evidence by the trial judge,⁶⁵ the presence of the legal representative,⁶⁶ and the opportunity to challenge evidence on grounds that it was not given voluntarily.⁶⁷

In connection with safeguards Community law provides that in case non-incriminatory evidence (statements of fact and documents) is put to an incriminatory use, nothing prevents the persons concerned from claiming in the administrative procedure or in the proceedings before Community courts that their defence rights have been jeopardised.⁶⁸ The actions brought against the Commission decision requesting information from the undertakings concerned can provide a safeguard leading Community courts to abandon unlawfully obtained evidence.⁶⁹

In particular, when the Commission relies on evidence collected by other authorities and that evidence contains information which the person concerned would have been able to refuse to produce, the Commission is required to guarantee safeguards enabling the exclusion of that evidence.⁷⁰ This requires the Commission to carry out *ex officio* an examination concerning whether there is *prima facie* a serious doubt that the procedural rights of the person concerned were compromised. Furthermore, if that evidence is found admissible, it must be indicated clearly (in the statement of objections) which enables the person concerned to make observations as regards its substance, or any irregularities, or special circumstances concerning the composition or submission of that evidence to the Commission.⁷¹

It follows that in both jurisdictions safeguards by excluding the incriminatory use of evidence are considered as adequate means of ensuring that the privilege against self-incrimination is observed. Provided that in Community law the incriminatory use of purely factual evidence can be prevented by means of making safeguards available, which could also exclude the use of incriminatory evidence, the judicial approach

⁶² Para. 120, Jalloh; mm. para. 39, Shannon; paras. 73, 75, Göçmen; paras. 59, 61, Örs; paras. 60, 62, Kolu.

⁶³ Para. 51, Heaney and McGuinness; para. 51, Quinn. They must be able to minimise the risk of the accused wrongfully confessing to a crime and protect against the abuse of powers, para. 51, Quinn and mm. Tirado Ortiz.

⁶⁴ Para. 51, John Murray.

⁶⁵ Paras. 51-53, Brennan.

⁶⁶ Para. 60, Condrón; para. 61, Beckles; paras. 51-53, Brennan; para. 56, John Murray.

⁶⁷ Paras. 43, 48, Allan; mm. para. 36, Khan; Ebbinge.

⁶⁸ Para. 78, Mannesmannröhrenwerke; para. 448, Limburgse, CFI, undertakings must have the opportunity to put their point of view concerning the evidence they provided.

⁶⁹ See, para. 78, Société Générale.

⁷⁰ Para. 264, ADM, T-59/02 (the same safeguards as provided under Orkem and related case law).

⁷¹ See, paras. 265-269, *ibid.*

towards the privilege against self-incrimination in Community law corresponds to that under the ECHR (as interpreted in *Saunders*).⁷² This gives way to another point of similarity according to which the right not to incriminate oneself focuses on respecting the will of the person concerned in both jurisdictions. It implores a result based on the performance of authorities and courts in preventing incriminatory use against the volition of the person concerned which is subject to an *ex post facto* assessment enabled by relying on the safeguards provided. Their application will determine that the use of evidence was contrary to will of the individual which is the essence of the privilege against self-incrimination.

1(e): The issue of incriminating others

Although the issue of incriminating other individuals is not an essential element of the privilege against self-incrimination, arguments raised in Community law demand the examination of similarity. It appears from ECHR case law that individuals can be compelled to give information as regards the conduct of a third person without raising an issue under the privilege against self incrimination.⁷³ The approach in Community law provides no real differences. It was held that the obligation of associations of undertakings to provide information/evidence on the conduct of their members does not compromise the right of the member undertaking not to give evidence against itself.⁷⁴ On similar grounds, the use of self-incriminating documents is not excluded in Community law, when that evidence is used for the sole purpose of substantiating that another undertaking has participated in the same infringement.⁷⁵

2. *Similarity in the language of the privilege against self-incrimination*

Strasbourg considers the right not to incriminate oneself as a right entailing a prohibitive language reflecting the general requirement of fairness in criminal

⁷² See, p. 591, Kühling: 2003, stating that the initial divergence between ECHR and EC law has been overshadowed by the extensive application of defence rights (in the present chapter: safeguards).

⁷³ Paras. 53-54, Weh; para. 31, Rieg. See also, on the possibility of accepting evidence from accomplices and participants incriminating the defendant, pp. 442-444, Emerson and Ashworth: 2001.

⁷⁴ Paras. 207-209, Aalborg Portland, such obligation does not go beyond what is necessary in preserving the rights of defence of those undertakings. See, p. 317, Willis: 2001, stating that the powers of the Commission to compel information from third parties cannot be questioned on this basis.

⁷⁵ Paras. 284 and 318, Cimenteries. See also, paras. 61, 207, Aalborg Portland; para. 34, Dalmine, ECJ; para. 65, Mannesmannröhrenwerke; para. 34, Orkem; para. 74, Société Générale; para. 447, Limburgse, CFI; para. 272, Limburgse, ECJ; para. 86, Acerinox; para. 49, ThyssenKrupp.

proceedings. Competing public interests do not influence the full prohibition on the use of evidence obtained under compulsion to incriminate the person concerned in a trial.⁷⁶ Public policy concerns of the Contracting States may be noticed, however, they cannot be accommodated without extinguishing the essence of the privilege against self-incrimination.⁷⁷ The assertion in case law that the right to silence and the right not to incriminate oneself are not absolute rights⁷⁸ referred to the possibility of drawing adverse inferences from the silence of the accused to determine his guilt⁷⁹ which does not imply that justifiable restrictions in the general interest would be allowed. In Community law the right not to incriminate oneself and the right to silence also provide an absolute prohibition allowing no possibility for a proportionate restriction in the public interest. Although it has been claimed that the right to silence is not an absolute right,⁸⁰ what it meant was that beyond the privilege against self-incrimination undertakings are required to assist the Commission in its investigations.

Having established the similarity of language allows the conclusion that the judicial approaches on the privilege against self-incrimination are similar in ECHR and EC law. Its general implications on the non-divergence thesis will be examined below in the conclusions to Part III.

⁷⁶ *Inter alia*, para. 74, Saunders; paras. 57-58, Heaney and McGuinness; para. 38, Shannon; paras. 58-59, Quinn; para. 119, Jalloh; CO Bratza, Jalloh. See, however, DO Valticos, Saunders and paras. 7-12, 17-26, DO Martens, Saunders, advancing a test of proportionality between the competing interests; also raised at pp. 124-125, Sedley: 2001. In paras. 97, 119, Jalloh, the Grand Chamber acknowledged that the fairness of the proceedings as a whole requires the examination of proportionality. However, this seems to be influenced by the case law on the general admissibility of evidence and not by the considerations of the privilege against self-incrimination, see, paras. 94-95, Jalloh.

⁷⁷ Paras. 57-58, Heaney and McGuinness; para. 38, Shannon; paras. 58-59, Quinn. Not even the special features of a given area of law could justify an infringement, para. 44, Funke and para. 48, Quinn.

⁷⁸ *Inter alia*, para. 47, Heaney and McGuinness; para. 47, Quinn; para. 47, John Murray; para. 46, Weh. See, in contrast: although it may provide shelter for the guilty the right to remain silent must be absolute, PC and PDO Loucaides, Averill.

⁷⁹ *Inter alia*, paras. 47-48, 52-54, John Murray; paras. 56, 61-62, 72, Condron; paras. 57-59, 61-65, Beckles.

⁸⁰ Para. 66, Mannesmannröhrenwerke.

Chapter 15: The presumption of innocence in ECHR and EC law

The **similarity argument** will examine in this respect whether the concept of the presumption of innocence is similar in both jurisdictions. It will demonstrate that ECHR and EC law both consider the presumption of innocence within the wider context of exercising defence rights and approach the premature enforcement of sanctions similarly. Similarity will also be established as regards the issues of preconception of guilt and the standard and burden of proof central to the presumption of innocence.

1. Similarity in the scope of the presumption of innocence

As an element of a fair trial¹ Article 6(2) ECHR requires that everyone charged with a criminal offence must be presumed innocent until proved guilty according to law. It holds that the burden of proof lays on the prosecution that is obliged to adduce sufficient evidence and to inform the accused of the case so that he may prepare and present his defence accordingly.² Community law might be distanced from the requirements of a fair criminal process, but in securing a case against undertakings in competition law it provides that every person accused of an infringement must be presumed to be innocent until his guilt has been established according to law.³ In line with the requirements under ECHR law it imposes the obligation on the Commission to provide sufficient proof of infringements.⁴

In both jurisdictions it is accepted that any doubt must benefit the person concerned (the accused)⁵ and that the purpose of the presumption of innocence is to facilitate the exercise of the rights of the defence.⁶ Moreover, both legal systems acknowledge that

¹ *Inter alia*, para. 66, Garycki; para. 63, Rezov; para. 37, Bernard; para. 56, Deweer; para. 96, Janosevic.

² *Inter alia*, para. 97, Janosevic; para. 15, Telfner; para. 77, Barberà; para. 109, Vastberga Taxi.

³ Para. 106, Sumitomo. See also, Article 48 EUCFR. The influence of Article 6(2) ECHR is considerable, see, para. 216, Danone, CFI; para. 104, Sumitomo; para. 149, Hüls; para. 175, Montecatini; para. 178, Nippon Steel; para. 50, JCB, CFI; para. 121, Tillack; para. 61, Dresdner Bank; para. 90, JCB, ECJ.

⁴ Para. 173, Nippon Steel; para. 58, Salzgitter Mannesmann; para. 58, Baustahlgewebe; para. 86, Anic Partecipazioni; para. 59, Dresdner Bank; para. 179, Montecatini; para. 154, Hüls. The burden of proof is put onto the Commission by virtue of Article 2 Regulation 1/2003/EC. On the burden of proof under the earlier Regulation No 17, see, p. 317, Joshua: 1987.

⁵ ECHR: *inter alia*, para. 97, Janosevic; para. 15, Telfner; para. 77, Barberà; para. 109, Vastberga Taxi. EC: para. 52, Nippon Steel and Sumitomo; para. 177, Nippon Steel; para. 265, United Brands; para. 60, Dresdner Bank.

⁶ ECHR: see in this respect, para. 30, Del Latte; para. 60, Lutz; para. 37, Englert; para. 26, Sekanina; para. 27, Baars. EC: paras. 106-107, Sumitomo; mm. 73, Solvay and para. 83, ICI, CFI; (it precludes any finding of liability unless the rights of the defence could have been fully exercised in the normal course of proceedings). See, para. 108, Sumitomo, stating that the case-law of the ECtHR confirms this finding. On such outcome oriented approach in ECHR law, see, p. 917, Dennis: 2005 and pp. 164-165, Trechsel: 2005.

the premature enforcement of sanctions – imposing fines before an independent and impartial tribunal would establish the existence of an infringement and set out the exact penalties – may be contrary to the principle of presumption of innocence.⁷

Community courts do not question its applicability to Community competition procedures. They held that given the nature of the infringements in question and the nature and the degree of severity of the ensuing penalties the presumption of innocence applies to procedures relating to competition infringements that may result in the imposition of fines or periodic penalty payments.⁸ It follows that there is no need to consider whether Community competition law would fall under the criminal limb of Article 6 ECHR containing the presumption of innocence.⁹

1(a): The issue of preconception of guilt

An important aspect of the presumption of innocence in ECHR law is that courts must not engage in a procedure with the preconceived idea of the guilt of the accused.¹⁰ When alleged evidence must be adduced in this respect and when it does not appear that during the proceedings (the trial) the court took decisions or adopted attitudes reflecting a prejudiced opinion Article 6(2) ECHR will not be jeopardised.¹¹ Similarly, in Community law preconception of guilt on part of the Commission or Community courts, prohibited by the presumption of innocence, must be substantiated by evidence.¹²

Both legal systems condemn public comments by authorities prejudging the conduct of the person concerned before a final decision is reached. ECHR law holds that premature assertions of guilt in judicial decisions or in statements made by public officials can

⁷ ECHR: paras. 106-109, *Janosevic*; paras. 118-120, *Vastberga Taxi*. EC: para. 93, *IBP* (in this case the CFI held that the premature payment of the fine can be avoided by way of providing a bank guarantee or requesting its suspension from the CFI, para. 94, *ibid.*).

⁸ *Inter alia*, para. 216, *Danone*, CFI; para. 150, *Hüls*; para. 176, *Montecatini*; para. 105, *Sumitomo*; para. 281, *Volkswagen*, CFI; para. 178, *Nippon Steel*; para. 50, *JCB*, CFI; para. 61, *Dresdner Bank*; para. 90, *JCB*, ECJ; mm. para. 93, *IBP*. It is suggested that the presumption of innocence applies to OLAF proceedings as well, para. 70, *Franchet and Byk*.

⁹ For a similar conclusion see Chapter 14 on the privilege against self-incrimination; Chapter 17 on double jeopardy; Chapter 16 on no punishment without law; Chapter 11 on access to a court.

¹⁰ *Inter alia*, paras. 15, 19, *Telfner*; para. 97, *Janosevic*; para. 77, *Barberà*; para. 109, *Vastberga Taxi*. The subjective and objective impartiality of a court is essential in this regard, para. 138, *Kyprianou*.

¹¹ *Inter alia*, para. 91, *Barberà*; para. 98, *Janosevic*; para. 110, *Vastberga Taxi*; para. 94, *Campbell and Fell*.

¹² Paras. 59-60, *JCB*, CFI; paras. 111-113, 120-121, *JCB*, ECJ. However, leaving the expiry of limitation periods out of consideration does not suggest preconception of guilt, paras. 109-110, *Sumitomo*. See also, para. 193, *Haladjian Frères*, stating that the duration of the investigation is not in itself prejudicial to the complainant.

reflect bias.¹³ Similarly, Community law accepts that prejudice is inevitable when prior to formally imposing a penalty the Commission informs the press of its findings.¹⁴ Since under ECHR law it must be proved that the prejudged statement comes from an identifiable official source,¹⁵ it appears acceptable to hold in Community law that unaccountable leaks exclude by their nature connecting the biased opinion to the public authority.¹⁶ Similar to the distinction between opinions of guilt and descriptions of suspicion in ECHR law¹⁷ EC law does not regard voicing the conviction that a case has been established against the undertaking concerned as jeopardising the presumption of innocence.¹⁸ Finally, in both jurisdictions it is acknowledged that statements made in documents internal to the investigation formulating a suspicion and not an express opinion of guilt cannot be considered as evidence of bias.¹⁹

1(b): The issue of burden and standard of proof

In ECHR law the presumption of innocence concerns the proof of guilt.²⁰ In principle, guilt must be proved beyond reasonable doubt.²¹ In cases concerning drawing adverse

¹³ *Inter alia*, paras. 66, 71, Garycki; para. 91, Barberá; para. 45, Matijasevic; para. 63, Rezov; para. 26, Baars.

¹⁴ Para. 281, Volkswagen, CFI (in connection with the principle of good administration at para. 282). Affirmed by paras. 163-165, Volkswagen, ECJ.

¹⁵ Para. 55, Kuvikas; paras. 52-53, Karakas.

¹⁶ Para. 727, Cimenteries.

¹⁷ Paras. 67, 71, Garycki; para. 62, Lutz; para. 39, Englert; para. 48, Matijasevic. In this respect the explicit and unqualified character of the statement (para. 71, Garycki; para. 51, Diamantides), its wording and context (paras. 29-31, Baars), the lack of an obvious mistake such as an imprecise formulation (paras. 47-48, Matijasevic) could suggest that the statement includes a conviction of guilt. See in this respect in EC law, para. 727, Cimenteries, suggesting that when the statement was merely unfortunately formulated prejudice cannot be established.

¹⁸ Paras. 725-726, Cimenteries.

¹⁹ ECHR: para. 64, Rezov; para. 44, Daktaras; para. 55, Kuvikas; para. 52, Butkevicius; para. 51, Karakas. EC: para. 99, JCB, ECJ, (statement of objection in competition procedures) (otherwise the opening of any proceedings would potentially be liable to infringe the principle of the presumption of innocence).

²⁰ Para. 90, Engel; para. 40, Phillips. It is not entirely clear whether the ECHR protects the *nullum crimen sine culpa* principle, pp. 157-158, Trechsel: 2005. However, if successful conviction requires the proof of *mens rea* the principle of sufficient proof extends to it, para. 30, Salabiaku; in other cases acts may be penalised irrespective whether they result from intent or negligence, para. 27, Salabiaku; para. 112, Vastberga Taxi; para. 100, Janosevic. The *nulla poena sine culpa* principle is approached similarly in Community law. When intent is required the Commission will prove that the undertaking committed the error knowingly, paras. 41-43, Estel. This is equally true in case of proving the negligence of the person concerned, paras. 78-85, GeoLogistics; mm. paras. 49-50, Spedition Wilhelm. Conversely, in case of administrative sanctions which require no culpability the application of the principle is rejected, para. 14, Maizena; paras. 42-45, 51, Hofmeister.

²¹ Para. 62, Condron; para. 62, Beckles; para. 40, Bernard; paras. 46-47, Geerings. However, it was suggested that the issue of standard of proof is left largely unexplored, p. 338, Buxton: 2000.

inferences from the silence of the accused an adequate standard of proof is required²² which demands that the evidence should constitute a formidable case against the person concerned.²³ Generally, proof does not have to be absolutely conclusive as, ultimately, the conviction of the court decides whether the evidence was sufficient.²⁴

Presenting a convincing case supported by sufficient evidence that indicates the liability of the person concerned is a requirement also shared by Community law.²⁵ Here, the presumption of innocence mainly concerns the adequate proof of infringements in competition law.²⁶ In general, proof must reach a requisite legal standard²⁷ and it must be beyond reasonable doubt²⁸ as under ECHR law. The general standard of proof appears to meet the requirements of ECHR law as it is required that sufficiently precise, convincing, and consistent evidence must be produced²⁹ subject to scrutiny by Community courts whether the evidence was adequate and sufficient.³⁰ The evidence provided must be factually accurate and reliable and adequately detailed to enable assessing complex situations.³¹ Nonetheless, as under ECHR law not every piece of evidence but the body of evidence taken as a whole will have to meet the requirement of an adequate standard of proof.³²

It follows from the general arrangements of burden of proof under the ECHR that the presumption of innocence will be compromised where the burden of proof is unduly

²² In such cases the onus of proof cannot be regarded as placed on the accused as they concern the decision of the accused not to contest evidence collected by the prosecution, see, para. 54, John Murray; para. 18, Telfner.

²³ Para. 17, Telfner; paras. 51-52, John Murray.

²⁴ P. 341, Van Dijk and Van Hoof: 1990. See also, PDO Walsh et al, John Murray.

²⁵ *Inter alia*, paras. 35-39, Volkswagen, ECJ; para. 53, JCB, CFI; paras. 82, ICI, CFI; paras. 72, Solvay.

²⁶ See, paras. 28-29, Metsä-Serla Oyj, stating that the question whether the Commission proceeded under a presumption of guilt is inseparable from the question whether adequate evidence was produced to prove the infringement.

²⁷ Paras. 173,177, Nippon Steel; para. 58, Salzgitter Mannesmann; para. 58, Baustahlgewebe; para. 86, Anic Partecipazioni; paras. 59-60, Dresdner Bank; para. 179, Montecatini; para. 154, Hüls. The definition of the standard of proof in EC law is flexible, pp. 173-174, Louveaux and Gilbert: 2005, but it is a high standard of proof, pp. 323-324, Joshua: 1987. There are no complete and coherent set of rules only the principle that the unfettered evaluation of evidence must be ensured, p. 523, Nazzini: 2006, and that adequate legal proof on the requisite legal standard must be achieved, pp. 127, 135-143, Green: 1993.

²⁸ Para. 52, Nippon Steel and Sumitomo; para. 177, Nippon Steel; para. 265, United Brands; para. 60, Dresdner Bank. This must be determined in the context of the whole case, pp. 139-143, Green: 1993.

²⁹ Para. 217, Danone, CFI; paras. 52, 56, Nippon Steel and Sumitomo; para. 179, Nippon Steel; para. 62, Dresdner Bank; para. 196, Volkswagen, CFI; para. 66-70, GM; para. 41, Tetra Laval, ECJ.

³⁰ *Inter alia*, paras. 132, 237, Aalborg Portland; paras. 266-267, United Brands; para. 59, Salzgitter Mannesmann; paras. 180-365, Nippon Steel; paras. 53-58, 64-68, 73-74, 102-109, Nippon Steel and Sumitomo; paras. 219-247, Danone, CFI; paras. 74-148, 155-166, Dresdner Bank; paras. 57-66, Acerinox.

³¹ Paras. 66-67, Dresdner Bank; paras. 39, 41, Tetra Laval, ECJ.

³² EC: para. 218, Danone, CFI; mm. paras. 768-778, Limburgse, CFI; mm. paras. 513-523, Limburgse, ECJ; para. 63, Dresdner Bank. ECHR: *supra* fn. 24 and para. 40, Bernard, stating that the shortcomings of certain pieces of evidence can be counterbalanced by the overall fairness of the case (the remaining evidence).

shifted from the prosecution to the defence.³³ Presumptions in law may be problematic in this respect as the accused is placed into a position where he is driven to adduce evidence against an assumption suggesting his guilt.³⁴ However, rebuttable presumptions of fact and liability must be contrasted with the presumption of guilt the latter having the effect of reversing the burden of proof.³⁵ As regards the former, provided that sufficient evidence of guilt has been collected,³⁶ requiring the person concerned to provide a different account of his conduct and liability does not compromise the presumption of innocence.³⁷

Community law also provides something akin to rebuttable presumptions of fact and liability. It is accepted that the undertaking concerned could be required to provide a different explanation of its conduct.³⁸ This, however, cannot be regarded as an improper reversal of the burden of proof as in such instances the Commission has proved that the applicant participated in the infringement and the applicant is only required to show that its participation was of a different spirit.³⁹ It was suggested that this is the normal operation of the respective burdens of adducing evidence when the burden of proof on the public authority has been discharged.⁴⁰ It follows that as under ECHR law the person concerned can be required to provide explanations in order to refute adequate evidence pointing towards his liability.⁴¹

2. *Similarity in the language of the presumption of innocence*

³³ Para. 15, Telfner; para. 54, John Murray. On the face of it reversing the onus of proof is incompatible with the presumption of innocence, p. 902, Dennis: 2005.

³⁴ It may be able to compromise the presumption of innocence, para. 28, Salabiaku; para. 101, Janosevic; para. 113, Vastberga Taxi.

³⁵ King. Presumptions of fact or law operate in every criminal law system and they are not prohibited in principle by the ECHR, para. 40, Phillips; para. 16, Telfner; para. 28, Salabiaku. On such evidential burden being acceptable under Article 6(2) ECHR, see, pp. 259-260, Emerson and Ashworth: 2001; p. 420, Tadros and Tierney: 2004; p. 904, Dennis: 2005, on the importance of distinguishing evidential and legal burdens.

³⁶ King; paras. 42, 44, 46, Phillips; paras. 29-30, Salabiaku; para. 36, Pham Hoang.

³⁷ Paras. 40, 47, Phillips; para. 16, Telfner; para. 28, Salabiaku.

³⁸ Paras. 131-132, 237, Aalborg Portland.

³⁹ Para. 155, Hüls; paras. 180-181, Montecatini; paras. 47-49, Nippon Steel and Sumitomo.

⁴⁰ Pp. 526-528, Nazzini: 2006.

⁴¹ On similarity in this respect between ECHR and EC law, pp. 536-537, *ibid*. Nevertheless, this conclusion (although not its merits) must be regarded with reservation as the author failed to distinguish between inferences drawn from evidence, inferences from drawn the silence of the accused, presumptions provided by law, and presumptions made on the basis of evidence. Moreover, the reversal of burden cases in EC law can be distinguished from those under ECHR law on the facts (they did not involve a presumption established by law, but the requirement the exculpatory evidence must be provided against the evidence of the Commission).

The presumption of innocence attracts a prohibitive language excluding the possibility of proportionate interferences serving a legitimate aim. ECHR law on bias and the standard of proof presents unqualified requirements. In Community law nothing indicates that the presumption of innocence would allow proportionate restrictions in the general interest.

On this basis, it can be concluded that the presumption of innocence is approached in a similar manner in ECHR and EC law. Its general implications on the **similarity argument** will be discussed below in the conclusions closing Part III.

Chapter 16: The principle of no punishment without law in ECHR and EC law

The **similarity argument** will consider in this respect the similarity of constituent principles such as the principle of *nullum crimen, nulla poena sine lege*, the prohibition of retrospective application, and the general principle of legality. Besides the examination of the relevant issue of applicability it will be demonstrated that judicial approaches in ECHR and EC law correspond as regards the requirements of foreseeability and clarity and how legal evolution is addressed under foreseeability. Establishing similarity in respect of the prohibition of retrospective application will close the chapter.

1. Similarity in the scope of the principle of no punishment without law

Article 7 ECHR embodies the principles that only law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and that criminal law must not be extensively construed to the detriment of the accused.¹ It holds that offences and penalties must be clearly defined in law enabling the individual to determine from the relevant provisions what acts or omissions would entail criminal liability.² Moreover, Article 7 ECHR prohibits the retrospective application of criminal law to the disadvantage of the accused and extending the scope of existing offences to acts that were not regarded criminal offences previously.³ The requirement of legal certainty forms the basis of the principle of legality (in criminal law) manifested in the principles above.⁴

Although only within a limited range Community law also acknowledges these principles.⁵ Legal certainty (legality) and non-retroactivity are regarded as general principles of EC law⁶ inspired directly by Article 7 ECHR.⁷ EC law accepts that Article

¹ See, *inter alia*, para. 51, Kokkinakis; para. 49, Grigoriades; para. 26, Cantoni; paras. 27, 47, Achour; para. 25, Gabarri Moreno; para. 17, Radio France.

² *Inter alia*, para. 29, Cantoni; para. 145, Coeme; para. 31, Veeber; para. 41, Achour; para. 28, Pessino.

³ *Inter alia*, para. 41, Achour; para. 28, Pessino; para. 23, Gabarri Moreno, in particular the retroactive application of a heavier penalty.

⁴ See, p. 11, Popelier: 2006, stating that legal certainty requires a quality of law such as that legal rules are sufficiently accessible, calculable, and reliable, and that they can be executed and maintained. Reasons for certainty in criminal law: the citizen is entitled to know what he can do and be protected from arbitrary state action; uncertainty makes criminal trials not only unpredictable but unduly lengthy and expensive, p. 332, Buxton: 2000; see in this respect in EC law, para. 94, Sumitomo.

⁵ Tridimas claimed that EC law fully abides to Article 7 ECHR, p. 253, Tridimas: 2006.

⁶ *Inter alia*, para. 13, Kolpinghuis Nijmegen; para. 87, Danone, ECJ; paras. 61, 64, X, C-60/02; para. 44, Pupino; paras. 202, 220, Pre-insulated Pipes, ECJ. To legal certainty, *inter alia*, para. 22, 35, Gerekenis;

7 ECHR enshrines the requirement that offences and punishments are to be strictly defined by law as provided by the principles of *nulla poena, nullum crimen sine lege*.⁸ In particular, it holds that penalties including administrative penalties cannot be imposed unless they rest on a clear and unequivocal legal basis.⁹ The principle that a provision of criminal law may not be applied extensively to the detriment of the defendant precludes bringing criminal proceedings in respect to conducts not defined clearly as culpable by law.¹⁰ As under ECHR law non-retroactivity stems from the concept of legal certainty which provides that legal measures are precluded from taking effect from a point in time before their publication¹¹ and that penal provisions may not have a retroactive effect.¹²

1(a): The issue of the procedure/penalty being of criminal nature

It is common ground that Article 7 ECHR is only applicable to criminal procedures and penalties.¹³ In this respect the *Engel* principles¹⁴ provide the decisive criteria.¹⁵ The ECtHR will have regard to factors such as the legal classification of the offence under national law, the nature of the offence, and the nature and degree of severity of the measure.¹⁶ In connection with penalties it must be examined whether the purpose of the

para. 110, Adeneler; para. 3, ADM, ECJ; para. 36, Danone, ECJ; para. 22, Kent Kirk; para. 68, Berlusconi. On legal certainty in general, para. 60, Interhotel; para. 27, Van Es Douane; paras. 51-52, i-21; para. 27, Kühne.

⁷ *Inter alia*, para. 35, Gerekens; para. 68, Berlusconi; para. 205, Heubach; para. 22, Kent Kirk; para. 25, X, C-74/95 and C-129/95; para. 43, Cheil Jedang; paras. 87-88, Danone, ECJ; para. 42, FEDESA; para. 64, X, C-60/02. See also, Article 49 EUCFR. Article 7(1) ECHR cited at para. 4, Pre-insulated Pipes, ECJ; para. 3, ADM, ECJ; para. 218, LR AF 1998.

⁸ Para. 217, Pre-insulated Pipes, ECJ; para. 88, Danone, ECJ; para. 127, Sgaravatti, mentioning the principle of legality of penalties.

⁹ Para. 126, Sgaravatti; para. 11, Könecke; para. 9, Vandemoortele.

¹⁰ Para. 25, X, C-74/95 and C-129/95.

¹¹ Para. 23, Gerekens; para. 110, Adeneler; para. 45, FEDESA; para. 13, SAFA; para. 49, Süderdithmarschen. Exceptions are admitted to this principle although strictly outside criminal law, para. 49, *ibid*; para. 64, Eagle; para. 13, SAFA; para. 45, FEDESA; para. 23, Gerekens. This corresponds to the assertion that under ECHR law in non-penal cases non-retroactivity is not protected that stringently, pp. 20-22, Popelier: 2006 and pp. 251-253, Tridimas: 2006.

¹² Para. 87, Danone, ECJ, referring to para. 22, Kent Kirk.

¹³ The foremost condition is that there must be a criminal offence for which the applicant was found guilty and a criminal penalty was imposed for that reason, para. 87, Vagrancy case; mm. para. 68, Lawless; para. 126, Dogan; mm. para. 2, Porter; mm. para. 2, Sidabras; mm. para. 44, Göktan; mm. para. 2, Banfield.

¹⁴ Para. 82, Engel.

¹⁵ See, *inter alia*, para. 48, Göktan; para. 30, Jamil; para. 82, Ezech; para. 30, Jussila.

¹⁶ *Inter alia*, para. 53, Pierre-Bloch; para. 32, Escoubet; para. 50, Öztürk; paras. 31-34, Demicoli; para. 31, Jamil.

penalty was prevention, deterrence, or retribution.¹⁷ Administrative procedures and penalties could also be of criminal nature.¹⁸ Administrative penalties could be classified as being of criminal nature when the wording of national law suggests that there is a criminal element involved and non-compliance is threatened with measures of criminal nature.¹⁹

In the relevant cases in Community law the requirement of being of criminal nature is practically circumvented. First, irrespective whether the sanction can be regarded as a (criminal) penalty it is required that sanctions must rest on a clear and unambiguous legal basis²⁰ which satisfies the principle of legality. Second, as regards fines imposed for the breach of Community competition law, although it was held that they are not of criminal nature, the principle of non-retroactivity was applied to them²¹ making it unnecessary to examine whether competition fines fall within the ambit of Article 7 ECHR.²²

Nonetheless, this did not prevent Community courts from making relevant distinctions in this respect. It was held that the principle of legality is not applicable when the measure at issue cannot be regarded as entailing a (criminal) penalty.²³ A sanction is considered as a specific administrative instrument and not a penalty when imposed on a flat rate independent of any culpability.²⁴ Similarly, sanctions imposed for irregularities that were not intentional or negligent are not regarded criminal penalties.²⁵ Conversely, having a deterrent effect could result in classifying the sanction as a penalty.²⁶ This

¹⁷ See, *inter alia*, para. 66, Maszni; para. 5, Manasson; paras. 68-71, Janosevic and paras. 79-82, Västberga Taxi; para. 32, Jamil; para. 37, Escoubet; para. 1, Hangl; para. 46, Tre Traktörer; para. 38, Jussila; para. 55, Lutz.

¹⁸ See, *inter alia*, para. 37, Jussila; para. 82, Ezeh; para. 31, Weber; para. 44, Deweer; as regards sanctions in competition law: para. 58, Societé Stenuit; mm. Lilly and OOO Neste.

¹⁹ Para. 33, Pramstaller; para. 32, Pfarrmeier; para. 34, Garyfallou; para. 45, Deweer.

²⁰ Administrative measures: paras. 14-15, 18, Maizena; para. 52, Hofmesiter. Penalties: paras. 128-132, Sgaravatti. See also, imposed according to the legal framework provided by EC law, para. 351, Danone, CFI; paras. 231-232, LR AF 1998; para. 27, Bertoli; substantive law as legal basis, paras. 64-65, SGL Carbon; para. 44, FEDESA, an annulled directive cannot provide a legal basis for criminal proceedings.

²¹ *Inter alia*, para. 206, Heubach; para. 44, Cheil Jedang; para. 220, LR AF 1998; para. 40, ADM, T-224/00. See also, paras. 149-150, Hüls. Despite their qualification in Community legislation as not being of criminal nature the fate of competition fines under ECHR law is not clear, see, pp. 81-86, Harding: 1993. Some are inclined to accept that they are penalties for the purposes of Article 7 ECHR (pp. 447-448, Piernas López: 2006) others doubt the validity of such conclusions (pp. 253-254, Tridimas: 2006, referring to Societé Stenuit and OOO Neste in ECHR law (*supra* fn. 18), supported by p. 571, Einarsson: 2007).

²² For a similar conclusion see, Chapter 14 on the privilege against self-incrimination; Chapter 17 on double jeopardy; Chapter 15 on the presumption of innocence; Chapter 11 on access to a court.

²³ See, paras. 269-270, C-349/97; para. 29, Alpha Steel; para. 10, Maizena; paras. 42-44, Hofmeister; para. 14, Könecke; para. 74, Cooperativa Lattepiù; para. 59, Ribaldi.

²⁴ Paras. 12-13, Maizena; paras. 36, 46, Hofmeister. In the context of the *nulla poena sine culpa* principle it was considered whether the non-excusable infringement was committed knowingly, paras. 41-43, Estel.

²⁵ Paras. 45, 51, Hofmeister.

²⁶ Para. 127, Sgaravatti; para. 15, Könecke.

suggests that Community law is informed of the requirements of ECHR law. It considers the nature/purpose of the penalty (flat rate, deterrent effect), the nature of the offence (culpability, intentional, negligent) and its legal qualification in Community law (competition fines are not of criminal nature) as provided by the *Engel* principles.

1(b): The issue of foreseeability

In most instances the breach of Article 7 ECHR depends on whether the national penal measure at issue has the quality of law as interpreted under the ECHR. The concept of law under Article 7 corresponds to the concept used elsewhere in the ECHR which includes statutory law and case law and imposes qualitative requirements such as accessibility and foreseeability.²⁷ Foreseeability requires that legal provisions must be formulated with sufficient precision enabling the persons concerned to foresee to a degree reasonable in the circumstances the consequences a given action may entail.²⁸ Both legal systems acknowledge that this depends on the content of the text in issue, the field it is designed to cover, and the number and status of those to whom it is addressed.²⁹ Often, it will be clear from the provision what its purpose and reason was and to what instances it would be applicable.³⁰ Foreseeability may also presume an obligation on behalf of the applicant to obtain appropriate legal advice on the law enabling him to assess the legal implications of his conduct.³¹ It must be pointed out in this respect that ECHR and EC law both accept that the obligation to take legal advice is stricter in case of persons pursuing a professional activity as they can be expected to take special care in assessing the risks their activity entails.³²

In Community law the principle of legality requires that penalties must have an appropriate legal basis³³ implying that penalties must be prescribed by provisions having the quality of law. In this respect the question what qualifies as law for the purposes of Article 7 ECHR has been considered. It was found that it corresponds to the concept of law under other ECHR provisions and covers both law of legislative origin

²⁷ *Inter alia*, para. 29, Cantoni; para. 29, Pessino; para. 42, Achour; para. 52, Kokkinakis.

²⁸ Para. 37, Grigoriades.

²⁹ ECHR: para. 35, Cantoni; para. 33, Pessino. EC: paras. 219, 224, Pre-insulated Pipes, ECJ; para. 41, ADM, T-329/01; para. 44, ADM, T-59/02

³⁰ See, para. 21, Radio France; paras. 52-53, Achour; paras. 78-101, Streletz; paras. 36-39, Luca; para. 150, Coeme. *A contrario*: vague wording, mm. paras. 36-41, Hashman and Harrup.

³¹ Para. 35, Cantoni; para. 54, Achour. However, when no adequate judicial interpretation of the law was available an appropriate legal advice may not be able to improve the situation, para. 36, Pessino.

³² ECHR: para. 35, Cantoni; para. 33, Pessino; EC: paras. 219, 224, Pre-insulated Pipes, ECJ; para. 41, ADM, T-329/01; para. 44, ADM, T-59/02.

³³ Para. 214, Pre-insulated Pipes, ECJ.

and derived from case law.³⁴ It was held that a measure must have a quality of law requiring that it must be foreseeable.³⁵

As under the ECHR, foreseeability in Community law is foremost associated with the preciseness and clarity of penal provisions. As regards the clarity of penalties it was held that rules on penalties must be certain and foreseeable.³⁶ This could be ensured by the characteristics of the provisions at issue such as clear legal context, the use of familiar concepts, and the lack of unforeseeable and doubtful factors in the case. The conduct of the person concerned is also relevant. In this respect, the fact that the person concerned was aware that the infringement would entail penalties and the possibility of requesting clarification on the legal situation (legal advice from the Commission) can be taken into account.³⁷ On this basis, the approach in Community law on foreseeability can hardly be questioned under ECHR law.

As suggested above, foreseeability and clarity are flexible concepts the assessment of which depends upon the circumstances. In particular, the possibility of clarifying legal provisions by subsequent interpretation requires attention in this respect.³⁸ ECHR law holds that imprecise wording of laws of general application is acceptable.³⁹ This can be counterbalanced by judicial interpretation elucidating doubtful points which may enable laws to adapt to the changing circumstances.⁴⁰ Progressive development in criminal law through judicial interpretation is widely accepted under Article 7 ECHR, provided that it is consistent with the statutory framework (the essence of the offence) and reasonably foreseeable.⁴¹ Basically, a clear statutory framework and consistent case law can provide coherence and a unity of approach.⁴²

³⁴ Paras. 215-216, *ibid.*

³⁵ Paras. 219, 224, Pre-insulated Pipes, ECJ; para. 41, ADM, T-329/01; para. 44, ADM, T-59/02.

³⁶ Para. 4-5, Hoffmann-La Roche. See also, para. 31, X, C-74/95 and C-129/95, on precluding vague Community measures to be applied by national authorities in establishing criminal liability and para. 46, Pupino, stating that criminal procedure and liability must be based directly on national law satisfying the requirements of legality.

³⁷ Paras. 130-137, Hoffmann-La Roche; paras. 29-36, Estel.

³⁸ Under Article 7 ECHR we can speak of two closely connected but distinct principles: substantive criminal law should be sufficiently accessible and precise, and developments in criminal law by the courts must be kept within bounds of what is reasonably foreseeable, p. 282, Emmerson and Ashworth: 2001. See also, paras. 5-12, PDO Martens, Kokkinakis, stating that judicial interpretation is the secondary safeguard of Article 7 ECHR.

³⁹ See, para. 31, Cantoni; para. 40, Kokkinakis; para. 34, Larissis; para. 31, Pessino.

⁴⁰ Para. 39, Baskaya; para. 52, E.K; para. 31, Pessino. Judicial interpretation of general statutory definitions must be sufficiently clear in the large majority of cases, para. 32, Cantoni; para. 31, Pessino. A clear and firmly established legal position is required, para. 34, Cantoni; para. 40, Kokkinakis; para. 34, Larissis.

⁴¹ *Inter alia*, para. 19, Pessino; para. 50, Streletz; para. 20, Radio France; para. 43, S.W; para. 41, C.R. Criticism: such dynamic legal development challenges legal certainty, p. 291, Emmerson and Ashworth: 2001 and p. 23, Popelier: 2006; seeking legal advice is a heavy burden on individuals, p. 416, Osborne: 1996.

⁴² Taylor; Kyriakides.

Along the same line, Community law provides that although the gradual clarification of rules on criminal liability may be accepted (to the extent where an offence is not established and criminal liability is not aggravated), new (judicial) interpretation may not produce a result which was not reasonably foreseeable at the time when the offence was committed.⁴³ In particular, it was suggested that a change in policy concerning the fixing of fines is similar to taking notice of evolution in case law as accepted under the ECHR.⁴⁴ It was held that the introduction of a new general system of fixing fines for competition infringements cannot be challenged, provided that it remains within the legal framework established in Community law.⁴⁵ On this basis, Community courts concluded that the new method of calculation was reasonably foreseeable in its effect of increasing fines at the time when the infringements were committed.⁴⁶ From the perspective of the **similarity argument** this means that the importance of evolution in law is appreciated in both jurisdictions subject to the requirement of foreseeability and only within the legislative framework available.⁴⁷

1(c): The concept of retrospective application

ECHR and EC law consider retrospective application in a similar manner by excluding the criminalisation of acts which were not punishable at the time they were committed. Under ECHR law it involves the application of a new criminal provision to conducts

⁴³ Paras. 217-218, *Pre-insulated Pipes*, ECJ; para. 41, ADM, T-329/01; para. 44, ADM, T-59/02; mm. para. 130, *Hoffmann-La Roche*, mentioning previous case law as contributing to clarity. EC law accepts that the use of abstract terms in measures of general application does not render the provision incompatible with legal certainty allowing flexibility in its application, p. 245, *Tridimas*: 2006; this corresponds with ECHR law *supra* fn. 39.

⁴⁴ Para. 222, *Pre-insulated Pipes*, ECJ; para. 20, ADM, ECJ; para. 41, ADM, T-329/01; para. 44, ADM, T-59/02. Its legal effects and its general applicability ensure that such policy change can be regarded as law, para. 223, *Pre-insulated Pipes*, ECJ affirmed in paras. 207-209, *JCB ECJ* and para. 23, *Danone*, ECJ. See in this respect in ECHR law, *Ainsworth*, where policy was to be used as external guidance in determining the offence.

⁴⁵ *Inter alia*, paras. 57-60, *Cheil Jedang*; paras. 207-210, *Heubach*; paras. 229-230, *Pre-insulated Pipes*, ECJ; paras. 23-24, ADM, ECJ; paras. 24-26, *Danone*, ECJ. Regulation No 17 served as the legal basis of the fines, the policy (the Guidelines) merely provided further clarification (para. 28, *Danone*, ECJ).

⁴⁶ Paras. 231-232, *Pre-insulated Pipes*, ECJ; para. 25, ADM, ECJ; paras. 48-49, ADM, T-329/01; paras. 51-52, ADM, T-59/02; paras. 207-210, *Heubach*; para. 27, *Danone*, ECJ.

⁴⁷ In this respect Strasbourg would examine whether the margin of uncertainty surrounding the essential elements of criminal liability is so wide that it is liable to deprive the affected individual of the information necessary to regulate his conduct, p. 284, *Emerson and Ashworth*: 2001. On this basis, the introduction of the new regime of fines within the legislative framework regulating the system of competition fines can hardly be criticised as the potential parameters of the actual fines have always been provided enabling the person concerned to regulate his conduct accordingly.

that had been committed before the new measure was introduced.⁴⁸ It is considered as retroactive application when the new law disregards the conditions of an offence that were in force at the time of the criminal conduct and it is applied to acts that were committed before its introduction.⁴⁹ Conversely, it is not retrospective application when the act constituted a criminal offence at the time it was committed and the penalty imposed was not heavier than the one applicable at the time of the criminal conduct.⁵⁰

The non-retroactivity of criminal law is an important limit to the obligation of national courts and authorities in applying Community law.⁵¹ In particular, an EC directive cannot render the more lenient penalties introduced subsequent to committing the crime inapplicable and the more severe penalties, which were in force at the time when the offence was committed, applicable.⁵² Furthermore, provided that the act was not punishable at the time it was committed, it is excluded in connection with the same act to validate *ex post facto* a national measure entailing a penalty which was inapplicable at that time as a result of its incompatibility with EC law.⁵³

The above-mentioned introduction of a new method of calculating fines for competition infringements also raised the problem of non-retroactivity. In harmony with the prohibition of retroactive application Community courts held as a general rule that competition fines must correspond to those fixed at the time when the infringement was committed.⁵⁴ However, they denied that the change in the customary level of fines subsequent to the alleged conduct would constitute retrospective application to the detriment of the person concerned. It was argued that the modification was implemented according to and within the legislative framework provided by Community law regulating the criteria and limits of calculating fines that was in force at the time the infringements were committed.⁵⁵ It follows that as under ECHR law imposing

⁴⁸ Para. 43, Halis Dogan. The successive application of criminal law is distinct from retroactive application as it involves instances where the new provision (on recidivism) affected the legal qualification of a second offence linked to a first offence, para. 56-58, Achour.

⁴⁹ *Inter alia*, paras. 34-36 Veeber; paras. 29-31, 38-41, Puhk; *a contrario*, para. 1, Nelson, Commission.

⁵⁰ Paras. 50, 53-59, K.-H. W; paras. 55-64, Streletz.

⁵¹ See, para. 44, FEDESA, stating that the obligation to implement directives does not require the Member States to adopt measures conflicting with the principle that penal provisions may not have a retroactive effect; see also, para. 11, Hansen; para. 36, Ebony Maritime.

⁵² Paras. 68-69, 75-76, Berlusconi (this corresponds to the principle of retroactive application of the more lenient criminal penalty).

⁵³ Para. 21, Kent Kirk. Similarly, provided that national law did not prohibit the given conduct at the material time, it is not permitted to impose subsequently criminal penalties on the same conduct even if the national rule in question was in breach of Community law, para. 63, X, C-60/02.

⁵⁴ *Inter alia*, para. 202, Pre-insulated Pipes, ECJ; para. 18, ADM, ECJ; para. 45, Cheil Jedang; paras. 88-89, Danone, ECJ.

⁵⁵ *Inter alia*, paras. 207-210, Heubach; paras. 231-232, Pre-insulated Pipes, ECJ; paras. 25, ADM, ECJ; paras. 90-92, Danone, ECJ. The requirement of legality is met provided that the changes do not go beyond what was permitted by Community law in force at the time of the alleged infringement, *inter alia*,

(increasing the severity of) penalties available by law at the time of the alleged conduct does not qualify as retrospective application under the principle of legality.⁵⁶

2. Similarity in the language of the principle of no punishment without law

Case law under both jurisdictions suggests that the principle of legality does not attract a permissive language allowing proportionate interferences serving a legitimate interest. Consequently, similarity in its functioning and its flexibility requires no separate examination.

Having closed the **similarity argument** with the component of language enables the conclusion that the principle of no punishment without law is approached in a similar manner in ECHR and EC law. Its general implications on the non-divergence thesis will be examined below within the conclusions closing Part III.

paras. 46-56, *Cheil Jedang*; paras. 207-208, *Pre-insulated Pipes*, ECJ; paras. 19, *ADM*, ECJ. However, subsequent changes by amending the legislative framework in an inappropriate time are not acceptable, paras. 13-16, *Estel*.

⁵⁶ It could be suggested that accepting that the change in the calculation of fines was law for the purposes of the requirement of foreseeability made the conclusions as regards non-retroactivity flawed as not the general legislative framework but the amended method of calculation should have been regarded relevant in this respect. However, this approach is flawed as under both the examination of foreseeability and retroactive application, primarily, the legislative framework bore relevance in deciding the matter conclusively.

Chapter 17: The right not to be tried or punished twice in ECHR and EC law

Apart from the general prohibition of double jeopardy the examination of similarity will cover the issues of repetition and finality. The chapter will be closed with the issue of separability where similarity will be established concerning the approaches on the separability of acts and offences the latter including the essential elements test.

1. Similarity in the scope of the right not to be tried or punished twice

The relatively sparse¹ case law on *ne bis in idem* under Article 4 Protocol 7 ECHR covers situations where the same incident led to two or more convictions,² the applicant was tried twice or more for the same offence,³ and punished twice or more on the basis of identical facts.⁴ It prohibits criminal trial and punishment (under the jurisdiction of the same state) for an offence of which the person concerned has been finally convicted or acquitted.⁵ Its general aim is to prohibit the repetition of criminal proceedings that have been concluded by a final decision.⁶

Correspondingly, in Community law the principle of *ne bis in idem* provides that a second penalty may not be imposed on the same person for the same infringement.⁷ It excludes the imposition of more than one penalty for a single offence and the initiation of new proceedings with regard to the same set of facts.⁸ The direct influence of Article 4 Protocol 7 ECHR⁹ provides an adequate point of departure for the **similarity argument**.

¹ Para. 44, Göktaş.

² *Inter alia*, para. 22, Oliveira, ECtHR; Falkner; Raninen.

³ *Inter alia*, para. 27, Fadin; para. 31, Nikitin; para. 5, Zolotukhin; para. 5, Manasson; para. 3, Jerinó.

⁴ *Inter alia*, para. 48, Gradinger; para. 1, Asci; para. 20, Franz Fischer; para. 39, Göktaş; para. 78, Viola.

⁵ *Inter alia*, para. 47, Göktaş; para. 1, Bachmaier; para. 84, Viola; para. 5, Ponsetti; para. 2, Garaudy; Zigarella, referring to Article 50 EUCFR containing the principle formulated in the same terms.

⁶ *Inter alia*, para. 53, Gradinger; para. 1, Asci; para. 22, Franz Fischer; para. 23, Sailer; para. 2, Garaudy; para. 67, Maszni; para. 1, Horciag. Among the different rationales of the double jeopardy rule ensuring the effectiveness of the prosecution has been recognised in connection with both ECHR and EC law, ECHR: pp. 30-32, Consultation Paper on Double Jeopardy: 1999; pp. 780-781, van den Wyngaert and Stessens: 1999. EC: pp. 136-140, Wils: 2003a.

⁷ Para. 99, KHK; mm. para. 138, Sgaravatti and para. 149, X, T-333/99. Under Article 54 CISA (Convention Implementing the Schengen Agreement) the *ne bis in idem* principle is expressly provided as regards procedures and penalties in more than one Contracting State, see, para. 21, Van Esbroeck; para. 29, Miraglia. Its specific objective provides that no one is prosecuted for the same acts in several states when exercising the right of movement, para. 45, Van Straaten; para. 33, Van Esbroeck; para. 32, Miraglia.

⁸ Paras. 95-96, Limburgse, CFI; para. 21, Maizena; Gutmann [1966] ECR 103, at 119.

⁹ *Inter alia*, para. 184, Danone, CFI; para. 3, Boehringer, Case 7/72; para. 59, Limburgse, ECJ; para. 96, KHK; para. 50, SDK; para. 26, SGL Carbon. Article 4 Protocol 7 ECHR cited, para. 16, Van Straaten; para. 6, SGL Carbon; para. 4, ADM, ECJ.

The double jeopardy rule is applied, in particular, in Community competition law. It prevents the Commission from bringing proceedings or imposing fines for anti-competitive conducts imputable to an undertaking which Community courts have already found to be either substantiated or unproved (in a final decision) in relation to the same undertaking.¹⁰ Under this principle the same person cannot be sanctioned more than once for a single unlawful conduct designed to protect the same legal interest.¹¹ It prohibits the fresh assessment of an infringement that would result in the imposition of a second penalty when liability is established for the second time or the imposition of a first penalty when liability is established for the first time by the second assessment.¹² It is an important bar to the application of the *ne bis in idem* principle in ECHR law that it must be ascertained that the procedure or penalty at issue is of criminal nature. This question is not raised separately in Community law. Nonetheless, Community courts apply the principle regardless the nature of the procedure or penalty¹³ making the question whether EC competition procedures/fines are of criminal nature irrelevant in the present context.¹⁴

1(a): The issue of a repeated trial or punishment

Under the ECHR in this regard it must be determined whether a procedure or a penalty can be considered as initiated or imposed anew.¹⁵ Similarly, in Community law a second procedure involving complaints addressed in a previous action concerning the same infringement by the same person is regarded as a repetition.¹⁶ Both legal systems accept that a second procedure/penalty may not be considered as a repetition when it

¹⁰ *Inter alia*, para. 96, Limburgse, CFI; para. 184, Danone, CFI; para. 338, Aalborg Portland; para. 97, KHK; para. 59, Limburgse, ECJ; para. 131, Tokai Carbon; para. 86, ADM, T-224/00.

¹¹ Para. 290, ADM, T-329/01; para. 338, Aalborg Portland; para. 61, ADM, T-59/02.

¹² Para. 61, Limburgse, ECJ.

¹³ See, however, paras. 101-103, de Compte, stating in another context that it is important to ascertain that the measure constitutes a penalty since in other circumstances the *ne bis in idem* principle does not apply.

¹⁴ It seems difficult if not impossible to deny that competition fines in EC and national level are of criminal nature for the purposes of ECHR law, p. 133, Wils: 2003a. See in this respect and for a similar conclusion Chapter 14 on the privilege against self-incrimination; Chapter 15 on the presumption of innocence; Chapter 16 on no punishment without law; Chapter 11 on access to a court.

¹⁵ No repetition when there was not a genuine trial or punishment (see para. 2, Korppoo; para. 3, Matveyev; point c, Veermäe), when it concerned concurrent (not subsequent) procedures or punishments (para. 2, Garaudy), and when it concerned discontinuing then continuing a procedure (para. 6, Harutyunyan).

¹⁶ Para. 29, C-127/99. In the context of the *res judicata* principle repetition is defined as where the proceedings disposed of by a court were between the same parties, had the same purpose, and were based on the same submissions as the new case, *inter alia*, paras. 37-39, NMB; para. 9, Hoogovens Groep; para. 23, Mairiaux.

was to remedy the shortcomings of the first procedure.¹⁷ Moreover, in both jurisdictions it is acknowledged that taking into account a previous reprimand as an aggravating factor does not entail a genuine repeated penalty.¹⁸

1(b): The issue of being finally acquitted or convicted

Finality is essential in that the *ne bis in idem* principle in ECHR law can only be relied upon after an acquittal or conviction by a final decision given according to law.¹⁹ A decision is considered final when it has acquired the force of *res judicata*. This is the case when the decision is irrevocable as no further ordinary remedies are available, the parties exhausted the remedies, or allowed the time limit on remedies to expire without challenging the decision.²⁰ The concept of *res judicata*²¹ is derived from the rule of law (legal certainty) requiring that the final rulings of courts must not be called into question.²² Article 4(2) Protocol 7 ECHR, however, acknowledges an exception to finality. It permits the reopening of the case when new or newly discovered facts are presented or if there was a fundamental defect in previous proceedings that could affect the outcome of the case.²³

Correspondingly, in Community law the principle of *ne bis in idem* presupposes a final ruling.²⁴ Finality means that matters (of facts and law)²⁵ have been definitively settled and subsequent challenges are, therefore, excluded.²⁶ As under ECHR law finality or *res judicata*, ensuring the stability of law and legal relations and the sound administration

¹⁷ ECHR: Bachmaier; mm. paras. 8, 14 and 55, Gradinger; supervisory review: paras. 44-47, Nikitin and paras. 31-32, Fadin. EC: paras. 97-98, Limburgse, CFI affirmed by para. 63, Limburgse, ECJ (resumed procedure after the first decision was annulled on procedural grounds without ruling on substance, para. 62, *ibid.*)

¹⁸ ECHR: para. 5, Von Arx-Derungs, Commission (a double conviction). EC: paras. 187, 358-369, 361-362, Danone, CFI; mm. para. 402, Pre-Insulated Pipes, ECJ. See a detailed discussion of recidivism and setting fines in EC competition law at pp. 450-455, Piernas López: 2006.

¹⁹ Para. 1, Horciag, echoing Article 4 Protocol 7 ECHR.

²⁰ Para. 37, Nikitin; Sundqvist; para. 1, Horciag. See also, para. 53, Stere; para. 91, Naumenko; para. 46, Asito. A decision is not final if the process can be reinitiated, Sundqvist; para. 4, Wassdahl; para. 1, Horciag.

²¹ Addressed foremost under Article 6 ECHR protecting the proper implementation of judicial decisions, *inter alia*, para. 55, Ryabykh; para. 91, Naumenko.

²² *Inter alia*, paras. 51-52, Ryabykh; para. 91, Naumenko; para. 61, Brumarescu; para. 61, Kehaya.

²³ Finality only permits extraordinary remedies for the correction of judicial mistakes and miscarriages of justice, *inter alia*, para. 52, Ryabykh; para. 91, Naumenko; para. 46, Asito. Finality is less important in criminal law than in civil law where stable proprietary rights and contractual relations and third party interests are essential. Its value is weaker as to convictions than in case of acquittals as dictated by fairness, p. 940-941, Dennis: 2000.

²⁴ See, para. 60, Limburgse, ECJ.

²⁵ *Inter alia*, para. 50, Lenz; paras. 44-48, Limburgse, ECJ; paras. 26-27, Meyer; para. 53, AICS.

²⁶ Para. 25, Coussios; mm. paras. 51-54, Lenz; mm. paras. 42-50, P&O Ferries, ECJ. Under Article 54 CISA acquittal by a court for lack of evidence or as a result of the prosecution being time barred must be considered as a final decision, paras. 55-59, Van Straaten.

of justice, is attained, when judicial (and administrative) decisions have become definitive after all rights of appeal have been exhausted or they can no longer be called into question after the expiry of time-limits provided for redress.²⁷

In connection with the finality of national judicial decisions contravening Community law it was held that national courts are not required to 'disapply' domestic rules on *res judicata* even for the purposes of remedying a breach of EC law.²⁸ In harmony with Article 4(2) Protocol 7 ECHR Community law only requires a body in national law to review a final decision when that body is empowered under national law to reopen the procedure.²⁹ The issue of finality was also raised in connection with domestic judicial decisions of last instance when damages were claimed on grounds that they had been adopted in breach of Community law. It was held that finality is not compromised since damages actions cannot be regarded as challenging the finality of the national judgment. They have specific purposes, do not necessarily involve the same parties, and their aim is to gain reparation not revision.³⁰

1(c): The issue of separability of acts/offences

The separability of acts

Determining whether the trial or punishment concerned a single act as opposed to a number of separate conducts is crucial under Article 4 Protocol 7 ECHR.³¹ Criminal conducts can be separable, provided that they were committed one after another, directed against different persons, or differed in their degree of seriousness.³² In this respect it must be ascertained whether the cases involved different acts and different

²⁷ Para. 20, Kapferer; para. 38, Köbler; paras. 24-25, Kühne. *Res judicata* also excludes challenging the legality of an EC act via national courts when direct challenge was available and it would have been admissible, para. 31, Atzeni; paras. 17-18, TWD. Furthermore, it excludes extraordinary remedies when the ordinary remedies (an appeal) were knowingly neglected for the sake of using extraordinary remedies, paras. 92-93, Artedogan.

²⁸ Paras. 21-22, Kapferer; paras. 46-47, Eco Swiss.

²⁹ Para. 23, Kapferer; paras. 24-26 and 28, Kühne.

³⁰ Para. 39, Köbler (para. 49, *ibid*, refers to the ECHR case Dulaurans on Article 41 ECHR reparation concerning the decision of a national court acting at last instance).

³¹ According to Trechsel the criteria of separation are (similar) persons, facts, conducts, charges or offences, and the aim of the prosecution, pp. 391-392, Trechsel: 2005. See in this respect Community law stating that the application of the *ne bis in idem* principle is subject to the conditions of the identity of the facts, the unity of the offender, and the unity of the legal interest protected, para. 184, Danone, CFI; para. 290, ADM, T-329/01; para. 338, Aalborg Portland; para. 61, ADM, T-59/02.

³² See, *inter alia*, para. 1, Ascì; para. 4, Raninen; paras. 87-89, Viola; para. 2, Palaoro; para. 3, Kantner.

facts.³³ Correspondingly, in Community law the conducts of the person concerned are separable, provided that the facts are not identical and there are differences as regards the objectives of the condemned practices.³⁴ It was held that it entails no double penalty when an undertaking is treated as an actor independent from other undertakings involved in the alleged infringement on grounds of the separability of its acts.³⁵

The separability of offences

The question whether a single conduct that accounts for multiple offences can be punished more than once arose in different circumstances under ECHR and EC law. In Community law it concerned judging a single act in multiple jurisdictions.³⁶ In contrast, Article 4 Protocol 7 ECHR only covers double jeopardy within the same jurisdiction³⁷ leaving instances where multiple jurisdictions are involved out of consideration.³⁸ This, however, does not prevent establishing similarity as regards the separability of offences as the fundamental approaches appear commensurable.

Basically, in both jurisdictions separability is decided by means of taking into account the differences in the essential elements of the offences. In ECHR law avoiding double jeopardy by splitting a single criminal act into separate offences³⁹ is governed by the examination whether the alleged offences have the same essential elements.⁴⁰ In particular, it concerns the constitutive elements of offences (e.g. culpability)⁴¹ or the conditions of offences (e.g. the purpose of the offence: penalising/prevention).⁴² The denial to join procedures⁴³ or the independence and difference of procedures⁴⁴ could

³³ *Inter alia*, mm. paras. 87-89, Viola; para. 2, Garaudy; para. 3, Jerinó; *a contrario*, paras. 43-44, Hauser-Sporn; para. 9, Touvier; para. 2, J.B; para. 3, Liedermann.

³⁴ Paras. 339-340, Aalborg Portland; mm. para. 45, Heubach; paras. 27-28, Estel, distinct infringements with distinct interests; p. 65-66, Gutmann. Separability must be based on a sound assessment of fact and law, see, paras. 99-104, Salzgitter Mannesmann.

³⁵ Para. 189, KE KELIT.

³⁶ Accepting that no principle or agreement would require the Commission to consider the concurrent penalties of third states (paras. 57-59, SDK and paras. 33-35, SGL Carbon) as the scope of Article 4 Protocol 7 ECHR only extends to a single jurisdiction (para. 102, KHK; para. 135, Tokai Carbon; para. 91, ADM, T-224/00). Similarly, Article 50 EUCFR only applies to the territory of the EU excluding non-member states (para. 104, KHK; para. 137, Tokai Carbon; para. 93, ADM, T-224/00).

³⁷ *Inter alia*, para. 5, Guala; point c, Veermäe; Baragiola; Manzoni; Gestra.

³⁸ *Inter alia*, para. 1, Amrollahi; para. 1, Buzunis.

³⁹ See, *inter alia*, para. 26, Oliveira, ECtHR; para. 24, Franz Fischer; para. 44, Gökten; para. 86, Viola.

⁴⁰ *Inter alia*, para. 25, Franz Fischer; para. 1, Asci; paras. 25-28 Sailer; paras. 35-38, W.F; para. 2, Garaudy. Before Franz Fischer it appeared in dissenting opinions, DO Liddy, C.M.L.-O (Oliveira) mentioning 'essential ingredient' and DO Loucaides, C.M.L.-O (Oliveira) mentioning legal ingredients, characteristics.

⁴¹ See, para. 5, Ponsetti; para. 86, Viola; para. 5, Manasson; para. 45, Hauser-Sporn.

⁴² Rosenquist.

⁴³ Para. 2, Garaudy.

⁴⁴ Smolickis; Stanca.

imply that there were two distinct infringements. Furthermore, difference in the penalties a single conduct may attract could also suggest that the essential elements are different.⁴⁵ The latter has also been acknowledged expressly in Community law in that double jeopardy is out of question when the legal consequences of a single conduct (penalties) are separable.⁴⁶

In deciding the separability of competition infringements in Community law emphasis is placed on the different aims and objectives of those infringements regulated in different jurisdictions within the EC. In circumstances involving a potential double penalty it was held that concurrent procedures and sanctions may be acceptable considering the different means pursued by national and Community authorities in a system of shared jurisdiction over matters relating to competition infringements.⁴⁷ In case that this would not satisfy the essential elements test in *Franz Fischer*, one could rely on the possibility that on grounds of the principle of natural justice Community law may refrain from imposing concurrent penalties for the same infringement committed within the territory of the EC.⁴⁸

When double jeopardy concerns penalties imposed outside the territory of the Community the separability of offences is more obvious.⁴⁹ The specific aims and purposes of substantive competition rules and legal consequences in third states will be decisive in this respect.⁵⁰ In particular, difference in the geographical scope of competition laws could be relevant. It was held that competition laws are divergent in their objectives and purposes, as while EC competition law concentrates on the EC/EEA

⁴⁵ See, para. 2, *Zivulinskis*; *Rosenqvist*; RT; para. 35, *Nikitin*; *a contrario*, *Nilsson* and paras. 68-69, *Maszni*.

⁴⁶ Para. 152, X, T-333/99. See also, paras. 22-23, *Maizena*. In actions under Article 226, 228 TEC it was held that imposing a penalty payment and a lump sum on a single infringement is not double jeopardy as the penalties have different functions and they are determined according to those functions, para. 84, C-304/02.

⁴⁷ Para. 11, *Wilhelm*. On the difference of approaches in EC and national law as regards competition infringements, see, para. 3, *Boehringer*, Case 7/72; para. 191, *Tréfileurope*; para. 29, *Sotralentz*. Having first suggested in the light of *Franz Fischer* that there is little difference between infringements under EC and national competition law in their essential elements (pp. 143-144.) Wils conceded that they can be separable on the basis of the difference of their effects (concerning the whole of the Common Market v. the market of a single (or more) Member State), pp. 145-146, Wils: 2003a.

⁴⁸ *Inter alia*, para. 98, *KHK*; para. 11, *Wilhelm*; para. 3, *Boehringer*, Case 7/72; para. 191, *Tréfileurope*; para. 29, *Sotralentz*; para. 132, *Tokai Carbon*; paras. 87, 99, ADM, T-224/00. This can also be used to resolve the issue of double jeopardy concerning the domestic application of Articles 81 and 82 TEC which Wils considered as unavoidable (pp. 144-145, Wils: 2003a).

⁴⁹ Double jeopardy would only cover actions advanced in these jurisdictions that are identical, para. 3, *Boehringer*, Case 7/72; paras. 100-103, ADM, T-224/00; paras. 139-140, *Tokai Carbon*, CFI. In para. 46, ADM, ECJ, the ECJ held that the applicants did not plead the principle of *ne bis in idem*, but relied on the fundamental principles of justice excluding concurrent penalties for the same offences.

⁵⁰ Paras. 52-53, *SDK*; paras. 28-29, *SGL Carbon*.

market, the law of the third state would consider the market of that state.⁵¹ Provided that this would not constitute a difference in the essential elements of the offences, double jeopardy can still be avoided as within the Commission's discretionary powers fines imposed in third states could be taken into account⁵² on grounds of fairness.⁵³

2. *Similarity in the language of the right not to be tried or punished twice*

Lacking any other indication it must be concluded that the principle of *ne bis in idem* in ECHR and EC law attracts a prohibitive language permitting no proportionate interferences serving a legitimate aim.⁵⁴ It follows that the similarity of functioning cannot be examined also excluding the examination of flexibility.

Having closed the **similarity argument** with the component of language enables the conclusion that the *ne bis in idem* principle is provided protection in EC law similar to that under the ECHR. Its general implications on the non-divergence thesis will be examined next in the conclusions closing Part III.

⁵¹ Paras. 54-56, SDK; paras. 30-32, SGL Carbon; paras. 99, 101, KHK; paras. 112-115, 118-125, 133-134, Tokai Carbon; paras. 88-90, ADM, T-224/00; paras. 291-292, ADM, T-329/01; paras. 62-63, ADM, T-59/02; para. 61, Boehringer, Case 45/69; paras. 4-6, Boehringer, Case 7/72.

⁵² Paras. 61-62, SDK; paras. 37-38, SGL Carbon; mm. paras. 109-111, ADM, T-224/00.

⁵³ Para. 66, ADM, T-59/02. See also, para. 109-114, KHK.

⁵⁴ Article 4(2) Protocol 7 on reopening the procedure is certainly an exception to the rule against double jeopardy, but it affects little its general prohibitive language which is further strengthened by Article 4(3) Protocol 7 allowing no derogation under Article 15 ECHR.

Conclusions to Part III

1. On the structure of the examination of similarity

The **similarity argument** was introduced to supplement the **flexibility argument** constituting together the core arguments of the claim of non-divergence in human rights protection (adjudication) between ECHR and EC law. It was to establish that the fundamental rights common to both legal systems are approached in a similar manner. The similarity of judicial approaches was substantiated by examining the similarity of the style of human rights protection including the components of scope, language, functioning, and flexibility. As it has been asserted above on numerous occasions, establishing similarity in the flexibility of fundamental rights that incorporate the component of flexibility was essential not only to conclude the **similarity argument**, but also to close the **flexibility argument** conclusively as the two arguments merge in discussing the parameters of flexibility.¹

Selecting a general system of analysis, which examined the components of style in each chapter, might have made Part III appear repetitive, but the structure of the analysis played an important part within the **similarity argument**. It demonstrated that the judicial scrutiny of human rights disputes (the human rights solution) followed a similar pattern in both jurisdictions. In establishing similarity it was of importance that EC human rights law managed to fill with substance each component of style derived from the structure of the human rights scrutiny under the ECHR. Emphasis on similarity in the general structure of human rights solutions was necessary for the purpose of avoiding the problem of incommensurability connected with the comparison of individual cases which was considered as undermining the divergence claim.²

The issue of incommensurability was addressed within the **similarity argument** as it was feared that the comparison of distinguishable judgments will distort the examination of (non-) divergence. A general assumption was set that unrelated cases from different jurisdictions are distinguishable which was justified by subsequent occasions in Part III where individual cases from ECHR and EC law needed to be distinguished in setting an appropriate direction for the analysis of similarity.³

¹ See, Conclusions to Part II.

² See, Introduction to Part III.

³ See, Chapter 5/Points 1(a) and 4(b) on searches in business premises; Chapter 7/Point 1(d) on broadcasting activities; Chapter 7/Point 1(e) on disseminating information on abortion; Chapter 7/Point 5 on freedom of religion; Chapter 12/Point 1(c) on submitting observations on statements filed by an independent member of the national legal service; Chapter 14/Point 1(b) on distinguishing pure

Managing the problem of incommensurability led to introducing the concept of 'decontextualisation' which involved designing a system of analysis of similarity which by excluding the context and circumstances of individual human rights solutions was relieved from the burden of incommensurability. Nonetheless, the system of analysis was not devoid of context and circumstances as its elements, the components of style, were distilled from a considerable number of individual human rights solutions demonstrating sensitivity towards their peculiarities.⁴

Apart from addressing the issue of incommensurability, establishing similarity on the basis of the components of style had another advantage. Comparability was not only ensured by neutralising the particularities of individual cases, but also by utilising appropriate units of comparison. As discussed among the methodological issues of the present thesis, cross-level comparison can only be executed with success when interchangeable concepts form its basis.⁵ The key to unlocking the problem of divergence between human rights protection in ECHR and EC law was to ask the appropriate questions, in other words, to establish similarity by comparing interchangeable units of comparison. These interchangeable units were the components of style and the different issues and elements revealed within those components.⁶ For instance, in case of the privilege against self-incrimination it was essential to utilise within the component of scope the distinct but (between the two legal systems) interchangeable matters of compulsion, subsequent use, and safeguards to address divergence.⁷ As regards the right to private life the interchangeable issues of business premises, personal data, gender-change, homosexuality, human integrity, and human dignity were examined under the component of scope.⁸

The distinction and ordering of the appropriate interchangeable units of comparison also justifies maintaining the rigid system of analysis of Part III. Not only asking the right questions but also asking them in the proper order was essential to examining divergence between ECHR and EC law. The general system of analysis was capable of separating and ordering the units of comparison for the purpose of addressing every relevant issue in the right context and at the right place. For example, in case of the

compulsion and subsequent use cases; Chapter 14/Point 1a(c) on the specificity of the judgment in Saunders.

⁴ See, Introduction to Part III.

⁵ See, Methodology/Point 2.

⁶ See, Introduction to Part III/Point 2. The similarity of scope in all chapters under Part III concerned examining various issues inherent in the scope of the fundamental right in question along which similarity could be mapped.

⁷ See, Chapter 14/Points 1(b)(c)(d).

⁸ Chapter 5/Points 1(a)(b)(c)(d)(e)(f).

protection of business premises within the right to private life the potential issues of divergence were separated and examined in the appropriate contexts of scope and benchmarks of flexibility.⁹ Under the privilege of self-incrimination the different causes of divergence were separated and addressed in an order without which the conclusion of non-divergence would not have been achievable.¹⁰

Another reasons to keep the general system of analysis throughout Part III was that it managed to fit the often fragmentary human rights jurisprudence of EC courts into a system of comparison. Separating and ordering the components of style and the appropriate sub-units of comparison enabled including in an examination of similarity those manifestations of fundamental rights in Community law which do not offer every element of a human rights scrutiny. For example, the examination of similarity concerning freedom of association was not prevented by the fact that the majority of cases did not involve a full human rights solution as they could be successfully utilised within the component of scope.¹¹ Similarly, the cases where fundamental rights were relied upon as interpretative principles were scrutinised within the scope of the right leaving them out of further examination when discussing the language of the right.¹² Neither would the matter of division of competences between the EC and its Member States (the limitedness of EC competences) raise a problem as the relevant cases were fitted appropriately into the general system of analysis.¹³

In sum, the **similarity argument** owes its hoped success to the general system of analysis designed and applied in Part III. It avoided the problem of incommensurability, maintained the connection with the **flexibility argument**, utilised the appropriate units of comparison in an appropriate order, and managed to mould the specificity of human rights protection in both jurisdictions into a common framework of analysis.

2. On the characteristics of similarity in human rights protection in ECHR and EC law

Having reaffirmed that the analysis of similarity was required to accommodate a diversity of matters, it is not surprising that similarity in human rights protection in ECHR and EC law did not prove to be of an homogenous nature. In contrast to the

⁹ See Chapter 5/Points 1(a) and 4(b).

¹⁰ *Supra* fn 7.

¹¹ See Chapter 8/Points 1 and 3.

¹² See Chapter 5/Point 2; Chapter 6/Point 2; Chapter 7/Point 2; Chapter 8/Point 2; Chapter 9/Point 2; Chapter 11/Points 1(a) and 2.

¹³ See, Chapter 7/Point 1(e) (Grogan); Chapter 9/Point 1 (Annibaldi, Koua Poirrez, ECJ); Chapter 11/Point 1(e) (the deference of responsibility argument); Chapter 12/Point 1 (composite procedures and anti-terrorism measures); Chapter 13/Point 1 (breach by the independent conduct of the Member States).

comforting monotony of the general system of analysis there were significant shifts of emphasis within Part III, the **similarity argument** needed to rely on alternative reasoning in a number of instances, and the matter of subscribing to the influences of the other jurisdiction was (remains) unsettled.

First, establishing similarity attracted different considerations in case of rights in Part III/a and in Part III/b. While under Part III/a emphasis was placed on the benchmarks of flexibility serving as the ultimate proof of similarity, under Part III/b similarity concerned notions/criteria that are central to the concept of the fundamental right at issue.¹⁴ This was reflected in the difference in the purposes of the component of scope. The scope of fundamental rights with a permissive language determined what circumstances/relations are covered eliminating some and including others by way of evolution. For instance, in case of the right to property the provisions on its scope mainly concerned what entitlements are regarded proprietary rights.¹⁵ In contrast, the notions/criteria in the scope of rights with a prohibitive language determined what constitutes a breach of that fundamental right. Take the principle of *ne bis in idem* as an example where the notions of repetition, finality, and separability were decisive.¹⁶ This meant that similarity under Part III/b focused on finding identical notions/criteria.

This difference of focal points in the two units of Part III bears relevance in reaching the conclusion that it is not surprising that judicial approaches on fundamental rights protection in ECHR and EC are similar. As it was asserted in all chapters in Part III/a, the similarity of the (major) benchmarks of flexibility appears to be the consequence of applying a similar requirement of proportionality/necessity. The importance of the legitimate aim and the right of the individual, the severity of the interference, and the availability of alternatives/safeguards are obvious benchmarks in both legal systems under the proportionality test. Similarity in the other benchmarks of flexibility appears to be the result of endowing the fundamental right at issue with similar general characteristics in the two legal orders.¹⁷ As regards the notions/criteria inherent in rights covered by Article 6 ECHR it follows from the fact that they have a narrow and well-defined general meaning specific to their context that it is difficult to attach different

¹⁴ Similarity was established by means of examining notions/principles inherent in different fair trial rights such as the privilege against self-incrimination (Chapter 14); the presumption of innocence (Chapter 15); the right to a trial in a reasonable time (Chapter 13); *ne bis in idem* (Chapter 17); the principle of legality (Chapter 16); defence rights (Chapter 12); and certain elements of the right of access to a court (Chapter 11/Points 1(d)(e)).

¹⁵ See, Chapter 9/Point 1(a)(b)(c).

¹⁶ See, Chapter 17/Point 1(a)(b)(c).

¹⁷ For instance, in case of freedom of association the benchmark of breach of domestic requirements was derived from the freedom allowed in both jurisdictions to regulate this area, see, Chapter 8/Point 4(b).

notions/criteria in different jurisdictions to them. For instance, in case of the right to a hearing within the reasonable time the criteria of the complexity of the procedure, the delay being imputable to the conduct of the person or the authority concerned, and the sensitivity of the private interest threatened by the delay are difficult to avoid under any circumstances when assessing the duration of a procedure.¹⁸ In sum, the similarity of benchmarks and criteria in ECHR and EC law is the consequence of the fact that in general terms there are no other benchmarks and criteria available in human rights adjudication.

According to the second point concerning the heterogeneous nature of similarity found in Part III, in some circumstances the **similarity argument** was to be satisfied by utilising reasoning alternative to the main thrust of finding similarity. First, Community courts would claim that the scope of Community law is limited and, therefore, Community law cannot provide fundamental rights protection in the given instance.¹⁹ This cannot be regarded as jeopardising the success of the **similarity argument** as it is not a sign of difference relevant for the present purposes that Community law is not empowered to provide protection for fundamental rights. Moreover, the lacuna that may be caused by the rejection of Community courts is filled instantly as in such instances the responsibility to protect fundamental rights falls back onto the Member States. Second, Community courts would also rely upon the specific division of competences and responsibilities between the Community and the Member States in applying Community law. On this basis, they declined providing human rights protection as the matter arose in the sphere of interest of the Member States.²⁰ Again, this is irrelevant in the present context as these decisions do not represent difference from ECHR law in protecting fundamental rights. Third, the problem of divergence can be turned moot by claiming that providing human rights protection falls out of the competences of Community courts holding the Member States responsible for the failure to ensure that Community courts could exercise competences in this respect.²¹ This reasoning enabled Community courts to relieve their case law from the pressure of divergence which by no means contradicts the **similarity argument** within the present thesis of non-divergence.

¹⁸ See, Chapter 13/Point 1(a).

¹⁹ See, Chapter 7/Point 1(e) (Grogan); Chapter 9/Point 1 (Annibaldi, Koua Poirrez, ECJ); see also the early cases rejecting human rights protection entirely, para. 4, Stork, ECJ; Geitling, [1960] ECR 423 at 438; and that EC sex-discrimination law did not cover sexual orientation, Chapter 5/Point 1(d).

²⁰ See, Chapter 12/Pont 1 (composite procedures and anti-terrorism measures); Chapter 13/Point 1 (breach by the independent conduct of the Member States).

²¹ Chapter 11/Point 1(e) (the deference of responsibility argument).

The third area where the heterogeneous nature of similarity surfaced concerns the matter of external influences on judicial approaches. It is commonplace that human rights protection in EC law has evolved under the influence of ECHR jurisprudence. The general formula listing the inspirational sources of fundamental rights as general principles of Community law places ECHR law in a privileged position. However, the intensity of the ECHR's influence can hardly be regarded uniform. The influence of EC human rights jurisprudence on ECHR law is equally uncertain.²²

Generally, Luxembourg is keen on taking on board elements of Strasbourg jurisprudence. In areas like the right to private and family life, freedom of expression, the right to property, and the right to free elections recent case law openly declared its allegiance to the Strasbourg approach. It manifested in borrowing the structure of scrutiny developed in ECHR law,²³ adjusting the scope of the fundamental right according to ECHR case law,²⁴ adopting the benchmarks of flexibility available under ECHR law,²⁵ and on a few occasions Community courts espoused the reasoning produced in preceding ECtHR case law.²⁶ The text of a Convention Article has also influenced directly the approach taken in Community law.²⁷ It also appears that EC jurisprudence is informed of evolution in the case law of the Strasbourg court.²⁸ As regards core principles of criminal law such as the presumption of innocence, *ne bis in idem*, and the principle of legality Community courts are open to the considerations of ECHR law.²⁹

However, Strasbourg's influence is not homogenous. For instance, Community courts would refuse to follow Strasbourg case law that was distinguishable on the facts.³⁰ More importantly, the human rights jurisprudence of Community courts still retains (some of) its autonomy. Community human rights law evolved in a specific environment (Community administrative law) and in an era when the content of many fundamental rights was unsettled. European consensus was not definite on matters such as fair trial rights in administrative procedures or the protection of the fundamental rights of

²² The influence is sporadic though not negligible, see, the ECtHR cases influenced considerably by EC law: *Posti and Rahko* in Chapter 11; *Sørensen and Rasmussen* in Chapter 8; *Karner*, ECtHR in Chapter 5; *Kress* in Chapter 12.

²³ See, Chapter 5/Point 3(a); Chapter 6/Point 3(a); Chapter 7/Point 3(a); Chapter 9/Point 3(a); *mm.* Chapter 12/Point 1(f).

²⁴ See, Chapter 12/Point 1(d).

²⁵ See, Chapter 6/Point 4.

²⁶ See, Chapter 10/Point 1; Chapter 11/Point 1 (summary).

²⁷ See, Chapter 11/Point 5.

²⁸ See, Chapter 14 (Funke-Saunders); Chapter 17 (Oliveira-Franz Fischer).

²⁹ See, Chapter 15; Chapter 17; Chapter 16.

³⁰ Paras. 42-43, *Salzgitter Mannesmann*.

undertakings engaged in economic activities.³¹ The direction selected by Community law was often prompted by considerations different from those raised under ECHR law that remain valid without raising the issue of divergence.³² A long tradition in protecting certain rights in a specific Community context like the right to effective judicial protection or the right to a hearing also diminishes the potential for subscribing to Strasbourg's influence.³³ Reluctance in admitting Strasbourg's influence into the area of Community competition procedures is especially strong which surfaces in the recurring issue whether Article 6 ECHR is applicable to them.³⁴ Finally, irrespective whether the human rights solution is constructed according to the Luxembourg or Strasbourg approach, where applicable, Community courts retain their right to exercise their own appreciation in protecting fundamental rights.³⁵

Even though Part III was hopefully capable of demonstrating the similarity of judicial approaches on human rights protection in ECHR and EC law, the above-discussed uneven quality of similarity highlights that the **similarity argument** may be unconvincing on its own in supporting the present non-divergence claim. Moreover, the general system of comparison utilised in Part III might ignore details of individual judgments that may prove to be essential in deciding the question of non-divergence. This entails that the **similarity argument** is burdened with a degree of impreciseness. In this respect, the argument voiced in the conclusions closing Part/II must be recalled that the **flexibility argument** serves as remedying the uncertainties of the **similarity argument**. The 'buffer zone' of flexibility is able to accommodate the doubts that may surround establishing similarity in a 'decontextualised' system of analysis. Flexibility and similarity are conjoined arguments each finding its limits (standards) in the other constituting together the claim of non-divergence. This interconnectedness of similarity and flexibility must be taken into account next in Part IV when summarising the findings of the present thesis and in reassessing divergence in law.

³¹ See, Chapter 5/Point 1(a); Chapter 12/Point 1(a); Chapter 14/Point 1(a); Chapter 16/Point 1(a).

³² See, Chapter 5/Point 1(a).

³³ See, Chapter 11/Point 1(a); Chapter 12/Point 1.

³⁴ See, Chapter 13/Point 1; Chapter 14/Point 1.

³⁵ See in this respect, Part IV/ Point 1(d).

Part IV: Closing the non-divergence claim

Part IV closes the present thesis which claims that human rights protection (adjudication) in ECHR and EC law is not divergent. It revisits the main findings of previous parts on the basis of which it reassesses the problem of divergence. It reflects upon the premises of the non-divergence claim and examines whether they proved to be appropriate in the light of the arguments advanced.

1. The achievements of the non-divergence thesis (their relevance and future implications)

Concisely, the most significant achievement of the non-divergence thesis was to provide a viable alternative (opponent) to the divergence claim in describing the relationship between human rights protection in ECHR and EC law. Divergence from ECHR law has been a dominant theme in the EC human rights discourse the shortcomings of which were seldom addressed. It manifested in expressing a fear of threat of divergence and identifying a number of hardcore cases of divergence. However, the possible reactions of ECHR and EC law to difference and the methodological problems of comparison leading to claims of divergence were by and large eluded. A divergence claim is constructed on false premises when it ignores that (these) legal systems are able to react to difference flexibly as opposed to a reaction of rejection and that *tête-à-tête* comparisons of judgments in different cases from different jurisdictions will be burdened by incommensurability jeopardising the validity of their findings. Practically, the non-divergence claim propagated by the present thesis was based on exploring and turning these shortcomings against the divergence claim. Accordingly, it advanced a dual argument: the **argument of flexibility** and the **argument of similarity**.

1(a): The flexibility argument

The **flexibility argument** held that the problem of divergence between ECHR and EC law can be neutralised, provided that difference (in law) is treated flexibly in both legal systems. To this end, it relied on practical manifestations of a flexible reaction to difference labelled mechanisms of flexibility. ECHR law provides two such mechanisms, namely, the margin of appreciation doctrine and the flexibility of scope. EC law mobilises its own specific mechanism of flexibility.

Within its range of application the margin of appreciation doctrine can be regarded as a particularly effective mechanism of flexibility. It is the operational principle of a subsidiary system of human rights protection where local sensibilities are given due consideration and it enables that diverse human rights approaches (solutions) are accommodated as compatible with ECHR law. It operates a system of coexistence of legal orders where the difference of the other is not met necessarily by automatic rejection.

However, the margin of appreciation doctrine does not provide for an unlimited capacity to accommodate difference. The local appreciation in constructing human rights solutions is paired with supervision by Strasbourg determining whether it is compatible with the requirements of ECHR law. This way difference is subject to an ultimate authorisation that despite the fact that it is placed on top of a flexible framework will demand compliance by demonstrating similarity. Therefore, it was to be explored how the potentials of flexibility and the requirement of similarity in treating divergence (the different local human rights solution) could be demarcated.

In this respect, a suitable model to fathom the limits of flexibility under the margin of appreciation doctrine was needed which was found in the model of a 'contextualised' variable standard. It provides that the standards of the ECHR are variable where the actual threshold of compliance for the local human rights solution (difference) is determined by the totality of the relevant facts and circumstances of the given case. The flexibility available in the given instance under ECHR law is determined by the wider and narrower circumstances of the case.

The model determines the parameters of flexibility in the following way. The actual width of the margin appreciation (the actual degree of flexibility) is determined by combining the factor of the initial width of the margin of appreciation and the requirement of proportionality. Consequently, the actual degree of flexibility will depend upon the variables drawn from the circumstances of the case utilised in the balancing exercise inherent in the proportionality test the intensity of which is determined by the factor of initial width. These variables provide the benchmarks that establish the limits of flexibility available in the given instance. Moreover, since the accommodation of the local human rights solution is dependent upon compliance with these benchmarks, the true limits of flexibility (the ability to accommodate difference) can only be ascertained by establishing the similarity of the benchmarks of flexibility.

The flexibility of scope is a mechanism of flexibility available in case of fundamental rights under the ECHR that do not allow a margin of appreciation. Its basis is that

ECHR law leaves to the Contracting States the choice of means in ensuring that the requirements embedded in the fundamental rights involved are secured in domestic law. It enables the ECHR to accommodate diversity in regulating the areas affected. However, as in case of the previous mechanism of flexibility there are limits to its ability to embrace difference. Domestic choices are subject to compatibility with the objective intended to be achieved by the corresponding fundamental right. This makes again the potentials inherent in flexibility dependent upon the condition of similarity.

The non-divergence thesis benefited from exploring the mechanisms of flexibility available under the ECHR as follows. Primarily, it must be acknowledged that the human rights solutions of EC law could be accommodated within the flexible framework of the ECHR by treating them as part of the range of compatible solutions. It follows that any examination of (non-) divergence between ECHR and EC law must take into account that EC human rights solutions could gain the approval of the Strasbourg court irrespective that they represent a Community specific approach to fundamental rights. Nevertheless, in harmony with the conclusions drawn as to the limits of the ECHR mechanisms of flexibility the true potentials of the **flexibility argument** in supporting the non-divergence thesis can only be revealed by exploring similarity in the parameters of flexibility necessitating the introduction of the **similarity argument**.

EC law is equipped with its own specific mechanism of flexibility. It is connected to those judgments in which the ECJ transferred the responsibility of providing a human rights solution to the domestic court. This way the human rights dispute was remitted to the system of human rights protection into which ECHR law had generally been incorporated and which is directly connected to Strasbourg's subsidiary supervision. Its significance for the non-divergence claim lies in the fact that the case law of Community courts is relieved from the pressure of ensuring compatibility with ECHR law. Nevertheless, as customary under the mechanisms of flexibility it is only of limited effect requiring the non-divergence thesis to engage in examining similarity as the ultimate means of excluding divergence.

Despite the fact that its limitations were rapidly exposed, the **flexibility argument** contributed considerably to defending the present non-divergence thesis. Its achievements can be listed as follows:

1. The soundness of the divergence claim is questionable when it is considered that by means of mechanisms of flexibility human rights

solutions in EC law could be accommodated in ECHR law or EC law could be relieved from the burden of complying with ECHR law.

2. The availability of mechanisms of flexibility entails that EC human rights solutions cannot be rejected as divergent on grounds of their perceived difference as diversity in human rights solutions is valued under ECHR law.
3. Flexibility signals that neither ECHR nor EC law constructs its identity as an unparalleled authority in human rights protection, but they remain open to local variations.
4. Flexibility also demonstrates that the coexistence of ECHR and EC law is more complex than to be described in terms of conformity/non-conformity. Their relationship of compatibility, which assumes flexibility, requires the reassessment of the concept of divergence.
5. Although the **flexibility argument** cannot be complete without the **similarity argument**, the success of the latter also depends on the findings of the former. It keeps a vital 'buffer zone' for a **similarity argument** that may not provide a watertight evidence of similarity.

1(b): The similarity argument

Apart from countering the divergence claim by establishing similarity in judicial approaches to human rights protection in ECHR and EC law, the **similarity argument** was burdened with other responsibilities within the non-divergence thesis. As mentioned above, it was required to avoid the problem of incommensurability in addressing divergence in law and to conclude the **flexibility argument** by establishing similarity in the parameters of flexibility.

The issue of incommensurability, which renders conclusions of (non-) divergence based on the comparison of individual cases decided in different jurisdictions dubious, was tackled by introducing the concept of 'decontextualisation'. Decontextualisation led to constructing a general system of analysis involving the comparison of styles of human rights protection in ECHR and EC law. Comparing styles (general judicial approaches) of human rights protection eludes the problem of incommensurability and distinguishing cases as it concentrates on the general (static and dynamic) tendencies in the legal systems at issue. While the divergence claim drew generalised conclusions from comparing individual cases, the non-divergence claim made generalised

conclusions from comparing general legal approaches that remained sensitive to evolution, context, and individual circumstances. Another asset of this system of analysis was that the components of style and the elements and issues addressed within each component enabled cross-level comparison between ECHR and EC law.

The main finding of the **similarity argument** was that the general system of analysis, as broken down to the appropriate order of the units of comparison, established that judicial approaches in human rights protection are similar in ECHR and EC law. It found that as a matter of scope, language, functioning, and the parameters of flexibility the courts in the two jurisdictions follow a similar line.¹

Similarity was established, in particular, as regards the sensitive areas of divergence as highlighted by the divergence claim. It was demonstrated that the protection of business premises in EC law is similar to that in ECHR law as a matter of scope and the requirements of interferences. The similarity of the privilege against self-incrimination in the two legal systems was proved by following the scrutiny established in ECHR law where the element of safeguards provided the ultimate justification. The adversarial principle was also found to apply adequately to the case of making observations on the submissions of the Advocate General in Community law as required under Article 6 ECHR. The cases where Community courts refused to provide a human rights solution were also incorporated into the general system of analysis without giving rise to any concern of divergence.

As regards divergence in how interferences with fundamental rights are assessed, the **similarity argument**, apart from finding similarity in the functioning of the rights in question, relied upon examining similarity in the general approaches to flexibility and in the benchmarks of flexibility. It must be repeated that the similarity of the benchmarks of flexibility not only closed the **similarity argument** with success, but it also concluded the **flexibility argument** rendering it likely that human rights solutions under EC law can be accommodated within the flexible framework of ECHR law. This was based on the assumption that the balancing exercise inherent in the requirement of proportionality/necessity can be adequately captured by the benchmarks of flexibility and its possible outcome can be explored by establishing the similarity/difference of those benchmarks in the compared legal systems. Finding similarity in the benchmarks of flexibility was not surprising in most cases as the structure of the shared requirement of proportionality makes it inevitable to take similar benchmarks into account. In case

¹ In some cases the conclusion that Community law managed to evade divergence would be more appropriate.

of the flexibility of scope, the other mechanism of flexibility under the ECHR besides the margin of appreciation doctrine, establishing similarity in the scope of the fundamental rights concerned provided the parameters of flexibility.

Nonetheless, the similarity found proved to be of uneven quality. Naturally, the irregularities of EC human rights jurisprudence could not match the balanced structure of ECHR law. In particular, the specific relationship of Community law with (the law of) its Member States interferes with the direction Community human rights case law may take. Moreover, a generalised analysis of similarity is likely to be burdened by inaccuracies irrespective of its efforts to maintain sensitivity towards the circumstances and particularities of individual cases. This is where the 'buffer zone' provided by the **flexibility argument** could be relied upon maintaining that similarity is not an absolute requirement within the non-divergence thesis as difference can still qualify as being compatible.

1(c): The relevance of these findings

As apparent from Chapter 1, the claim of non-divergence between ECHR and EC law is not without precedents. A number of papers questioned that divergence is an appropriate finding; others drew attention to the potential significance of the flexibility of ECHR law in this respect.² However, a comprehensive review of the issue of divergence has not been provided. The relevance of the conclusions of the present thesis lies in a number of factors. First, the conclusions are based on a wide-range scrutiny of divergence in law enabling the proper assessment of divergence between the legal systems at issue. Second, the conclusions were reached after a comprehensive examination of judicial approaches in both jurisdictions utilising a considerable number of cases while remaining sensitive to their contexts and circumstances. Third, the thesis managed to incorporate the peculiar attributes of EC human rights protection into a system of comparison with ECHR law maintaining the comprehensiveness of the analysis. Fourth, by combining the arguments of flexibility and similarity the thesis provided a comprehensive review of the problem of (non-) divergence between human rights protection (adjudication) in ECHR and EC law capable of counterbalancing the ever-popular divergence claim in legal discourse.

² See, Part I/Chapter 1/Point 2.

1(d): The future implications of these findings

Considering that EC human rights protection is likely to be described as emerging from a troubled past, concluding that it is not divergent from ECHR law appears as a well-earned achievement. The breadth and depth of Community human rights jurisprudence matching that required under the ECHR is the result of gradual legal development executed deliberately by Community courts. However, an autonomous system of human rights protection cannot be satisfied with achieving mere non-divergence, in particular, when ECHR law is welcoming towards the sovereign considerations of autonomous legal orders.

Indeed, human rights protection before Community courts is oriented beyond the requirement of non-divergence. Non-divergence might be a significant restraint, but Community courts perform an autonomous function when protecting fundamental rights.³ Assessing the justifiability of interferences with fundamental rights remains an independent task of Community courts. The specific relationship between Community and national courts is also given recognition in Community human rights jurisprudence when the domestic human rights solution is given priority. In addition, the responsibility of domestic authorities/courts and the Member States as the constitutive authorities of the Community are included in the human rights discourse.

In this respect, it is of particular significance that Community courts are not compelled to draw inspiration solely from the law of the Convention. In the early years of supranational human rights protection in Europe the adequacy of ECHR law was often questioned from the perspective of setting an example for Community human rights law.⁴ It is still doubted that in certain respects the ECHR system would be best practice.⁵ Indeed, under Article 53 ECHR it is recognised that the law of the Convention may not be of ultimate authority in protecting human rights and fundamental freedoms. Consequently, the fact that the human rights jurisprudence of Community courts is not divergent from ECHR law is simply a minimum requirement from where Community human rights law may commence realising its (specific) purposes. Non-divergence is a

³ See, p. 132, de Búrca: 2002, stating that human rights protection in the EC is indirect and derived, but not parasitic and purely derivative: it is autonomous which makes it distinctive. Regarding EC human rights protection as an autonomous production of human rights solutions in the EC context by relying on EC interests is an attractive option, see, pp. 185, 187, Scheuner: 1975; p. 389, Phelan: 1997; pp. 114, 116, Weiler: 2000a. It is interesting that the autonomous interpretation of fundamental rights by Strasbourg is never questioned as intensively as that of Luxembourg, when one considers that the Strasbourg's balancing might be just as well unacceptable from the national point of view as that offered in EC law.

⁴ *Supra* Part I/Chapter 1/fn. 2.

⁵ P. 698, Betten: 2001.

conservative approach wishing to maintain a status quo.⁶ Some suggested that the EC/EU might have to look beyond the ECHR in providing human rights protection.⁷ It must not be forgotten that the specific aims of Community human rights protection can also be realised within (not only beyond) the status non-divergence which is enabled by the flexibility inherent the coexistence of ECHR and EC law.

Furthermore, it must be admitted that any finding of non-divergence between ECHR and EC law must face the flux of the legal environment and the endless line of new cases shedding doubt on its appropriateness. Irrespective whether the element of flexibility could be of assistance, the continuous expansion of (human rights) adjudication in both jurisdictions necessitates keeping account of the matter of non-divergence. In the light of the turbulence characterising European human rights laws it is disputable that there would be a panacea for the malady of (non-) divergence.

Sustaining non-divergence

From the present perspective, the ambitions of EC law in establishing and maintaining non-divergence can be of relevance. They provide important indications whether the fluctuant status of non-divergence is sustainable. First, offering protection of fundamental rights compatible with that required under the ECHR contributes towards strengthening the legitimacy of the Community legal order. As in case of the Eastern European states in the 1990s, the ECHR was selected with reason as a signpost for the maturing constitutional order of the EC/EU. The former president of the Luxembourg court asserted that the ECtHR's judgments served in developing the European Community to become a community of law.⁸ Second, related to the issue of legitimacy the legality of Community/Union action (measures) receives a new quality when their conformity with fundamental rights is considered in the manner it would be scrutinised under the ECHR.⁹ Third, Community courts may consider that fundamental rights protection in Community law is under a quasi-obligation to obtain compatibility with ECHR law. The responsibility of its Member States for Community action under the ECHR can be an indication in this respect. Fourth, non-divergence can be regarded as a

⁶ Borrowed from, p. 33, Bellamy: 2001, who asserted this as regards the EUCFR.

⁷ Pp. 77-81, 88-90, Weiler: 1992, suggesting that protecting humanity could be an adequate rationale for EC human rights protection; mm. pp. 39-40, I. Ward: 2001, asserting that a sense of justice must be achieved beyond the protection of fundamental rights and p. 801, Ahmed and de Jesús Butler: 2006.

⁸ P. 20, Rodríguez Iglesias: Ryssdal.

⁹ See in this respect, p. 441, Pescatore: Wiarda, stating that human rights protection as provided under the ECHR is essential in establishing the legality of the Community legal order. See also, paras. 41-42, ERT and paras. 74-75, Bosporus, ECtHR.

progressive criterion of integration within EC/EU framework. Sustaining non-divergence provides an impetus for the further refinement and development of the Community legal order. Fifth, maintaining non-divergence can be addressed as a sovereign theme in human rights protection. It can be placed on the agenda when human rights protection in the EC appears disoriented searching for a higher purpose in European integration. Sixth, compatibility with ECHR law appears as a tactical compromise as it is able to silence the objections raised against the supremacy of Community law in the Member States.¹⁰ Finally, establishing non-divergence between ECHR and EC human rights law can be regarded as an achievement of Community courts which reinforces their position as an authoritative legal actor in European integration and increases the legitimacy of its rulings.¹¹ In sum, there is a plethora of motives to sustain the dynamic status of non-divergence between ECHR and EC law.

Non-divergence or convergence

The question arises whether finding non-divergence represents convergence between ECHR and EC law at the same time. Convergence can be defined as a (long term) process of developing similarities, as instituting changes towards a common point.¹² In Jackson Pollock's famous painting¹³ convergence appears as a complex chaos of forms, colours, and empty spaces which demonstrate a tendency to move towards a dominant pattern, although the variety of the heterogeneous components still dominates the whole.

Non-divergence as presented in this thesis is built in part on taking into account similarities in ECHR and EC law. There are obvious parallel developments and a growing number of borrowing of structure and principles.¹⁴ ECHR law is increasingly referred to in constructing human rights solutions in EC law.¹⁵ Community law may

¹⁰ See in this respect, pp. 317-319, Stone Sweet: 2003, characterising EC human rights protection as a 'bulldozed' development in EC law to avoid conflicts in connection with the supremacy of Community law.

¹¹ Following Alter's neo-functionalist description of judicial behaviour at pp. 238, 240, Alter: 2003.

¹² See, pp. 3-4, Unger and van Waarden: 1995 and the references therein. See, p. 337, Birkinshaw: 2003, stating that similarity will not shoot out of the sky, but it is a folly to deny it is not taking place.

¹³ Jackson Pollock: Convergence, Albright-Knox Art Gallery, Buffalo, NY, USA.

¹⁴ This could also mean interpreting the victim requirement as provided under Article 34 ECHR and ECtHR case law in deciding a claim advanced before the ECJ, paras. 79-81, Öcalan and Vanly and para. 53, SGAE.

¹⁵ See, Conclusions to Part III/Point 2.

also offer guidance for the Strasbourg court.¹⁶ Even the intensity of judicial interference by Community courts in human rights cases can be calibrated with reference to ECHR law.¹⁷

Nonetheless, the phenomenon of non-divergence operates with the concept of compatibility which as suggested by Delmas-Marty represents only a sufficient proximity.¹⁸ This enables to qualify situations as non-divergent where instead of similarity the particularities of the local human rights solution gains emphasis. In consequence, apart from developing compatibility with ECHR law EC human rights law can retain its specificity. The above mentioned descriptions of convergence could, in principle, incorporate such fragmentation in European human rights laws as from their perspective the remnants of diversity/fragmentation are irrelevant in the process of gradual convergence.

However, in the present context maintaining diversity is not a matter of taking account of the leftovers of convergence. Sustaining diversity by means of mechanisms of flexibility is a sovereign aim of European human rights protection. As discussed in Chapter 3, ECHR law combines supranational supervision based on common rules and principles with ensuring respect to the sovereignty of individual Contracting States.¹⁹ It follows that in a relationship where diversity is wilfully sustained the dynamic status of non-divergence can hardly be equated with convergence driven to eliminate diversity.

The horizontal provisions of the EUCFR and non-divergence

There are two further issues that need to be discussed in the present context: the effects of the EUCFR and the accession of the EC/EU to the ECHR on the question of divergence. As mentioned in Chapter 1 the drafting of the EUCFR was considered as a hotbed of divergence on grounds of the growing autonomy of EC/EU human rights

¹⁶ *Ibid.* and e.g.: *supra* fn. 8 in Part III/a/Chapter 8. The ECtHR may as well come to the aid of the EC in ensuring the effective application of Community law in the Member States, p. 1461, Spielmann: Cohen-Jonathan, referring to paras. 42, 44, Hornsby.

¹⁷ Paras. 156, 159, OMPI; paras. 203, 206, Sison.

¹⁸ *Supra* fn. 5-6 in Introduction to Part II.

¹⁹ See, Points 1(a) and (b)/Chapter 3/Part II.

protection.²⁰ Nevertheless, the horizontal provisions of the EUCFR were accepted by many²¹ as capable of avoiding conflicts with ECHR law.²²

Article 52(3) EUCFR establishes the rule that the scope of fundamental rights must correspond to that provided under the ECHR allowing the imposition of a more extensive scope. Article 52(1) EUCFR provides a limitation formula which includes the elements of lawfulness, pursuing a legitimate aim, and proportionality. As to the level of protection Article 53 EUCFR holds that it must match that under the ECHR. Provided that these provisions are considered as principles of judicial interpretation, nothing suggests that by applying them Community courts would divert from established case law that was demonstrated in Part III of this thesis to be compatible with ECHR law as a matter of scope, functioning (the elements of the limitation formulas), and flexibility (the level of protection). It follows that the application of the horizontal provisions of the EUCFR by Community courts would not disturb Community human rights jurisprudence that was found non-divergent from ECHR law. These principles of 'homogeneity' are not alien from or new to Community courts as they can be regarded as manifestations of existing judicial practice in avoiding divergence. On this basis, Jacqu e was right to comment that the EUCFR will not change the relations between EC and ECHR law.²³

Accession to the ECHR and non-divergence

The accession of the European Community/Union to the ECHR has long been considered as the miraculous remedy for the disease of divergence between ECHR and EC law. The prolific literature hailed the possibility of accession as finally establishing

²⁰ See Point 1(c)/Chapter 1/Part I. See also, pp. 296-297, Lenaerts and De Smijter: 2001a, stating that the licence given by the EUCFR to the autonomous interpretation of ECHR case law will lead to divergent interpretations; p. 105, Arnall: 2004, claiming that it will introduce inconsistency and uncertainty; pp. 154-155, Peers: 2004, criticising the limitation formulas in the EUCFR on the basis of their textual interpretation.

²¹ Others were not so keen, see, p. 700, Betten: 2001, claiming that disparate interpretations are unavoidable; p. 8, Fischbach: 2000, that due the lack of supervision by Strasbourg the horizontal provisions will be ineffective in excluding divergence; p. 106, Arnall: 2004, claiming that due to their indeterminateness they will not be able to exclude divergence.

²² P. 4, Jacqu e: 2000; pp. 300-301, Mahoney: 2000; pp. 96-99, Lenaerts and De Smijter: 2001; mm. p. 1214, Goldsmith: 2001; mm. p. 77, Rodr guez Iglesias and Baquero Cruz: 2003; mm. pp. 170-171, Peers: 2004.

²³ P. 4, Jacqu e: 2000, what he really meant was that chances for interpretational conflicts remained the same, nevertheless, his conclusion is still valid in the present context.

coherence²⁴ and as filling the gap²⁵ between the two legal orders. Experts were convinced that it would reduce the risks of divergence²⁶ and Strasbourg supervision would ensure that EC human rights protection complies with the ECHR.²⁷ Some held that only accession to the ECHR could resolve the divergence problem.²⁸

However, others took a more cautious approach when assessing the implications of accession on divergence between the two legal systems. It was suggested that accession would not reduce the possibility of divergent Community specific interpretation of fundamental rights (only eventual Strasbourg supervision could attain that aim)²⁹ as accession would only provide an additional safeguard complementary to domestic (EC) human rights protection.³⁰ Others held that due to the subsidiary nature of the Convention system conflicts would arise even after accession.³¹

Solutions more radical than accession were also brought to light. The unification of the two systems (courts) was seen as the most adequate arrangement in the European human rights scene.³² Toth considered that incorporating ECHR law into EC law and Community courts exercising jurisdiction provided under the ECHR would be mutually beneficial for both legal systems.³³ The theory of succession in international law was also relied upon in questioning the rationale of accession.³⁴ Pescatore suggested that the ECHR is applicable and in force for the European Community and it is for the Strasbourg institutions to apply their prerogatives with respect to the EC.³⁵

The advantages of accession from the perspective of settling the relationship between the two legal systems are indisputable. However, it is doubted that accession would put an end to the divergence debate and that from the perspective of the problem of divergence it would alter the present situation. Supervision by Strasbourg will hardly prevent speculations about risks of divergence as Community courts retain much of their autonomy in constructing human rights solutions in the subsidiary system of

²⁴ P. 96, Cohen-Jonathan: Teitgen; pp. 369-370, Pellonpää: Wildhaber (coherence already exists); pp. 377-378, Lenaerts: 1991; p. 111, Rideau and Renucci: 1997; pp. 8-9, Fischbach: 2000; p. 4, Jacqué: 2000; pp. 700-701, Betten: 2001; pp. 3, 6, Krüger and Polakiewicz: 2001; pp. 274, 280, Benoît-Rohmer: 2005.

²⁵ P. 204, McBride and Neville Brown: 1981; p. 27, Ryssdal: 1996.

²⁶ P. 341, Oliver: Slynn; p. 17, Dutheil de la Rochère: 2001.

²⁷ Pp. 297-298, Lenaerts and De Smijter: 2001a; pp. 101, 106, Arnall: 2004.

²⁸ Pp. 1146-1147, Puissochet: Ryssdal; p. 233, Lawson: Schermers; pp. 58-59, Benoît-Rohmer: 2000; pp. 302-303, Mahoney: 2000; p. 101, Lenaerts and de Smijter: 2001; p. 786, Arnall: 2003; p. 265, van Gerven: 2004.

²⁹ P. 59, Benoît-Rohmer: 2000; mm. p. 183, Niamh Nic Shuibhne: 2002; mm. p. 532, Craig: 2006.

³⁰ Pp. 12-13, Pernice and Kanitz: 2004.

³¹ P. 570, Jacobs: Schermers; mm. p. 158, Hilf: 1976.

³² Pp. 338-340, Lecourt: Wiarda (referring to J-V. Louis in 1972 *Revue des Droits de l'Homme* p. 694); see also in this respect, Robertson: 1952 and Quinn: 2001.

³³ Pp. 512-527, Toth: 1997.

³⁴ Pp. 450-451, Pescatore: Wiarda; see also, p. 790, Ahmed and de Jesús Butler: 2006.

³⁵ P. 454, Pescatore: Wiarda.

human rights protection under the ECHR. Accession will not exclude allegations of incompatibility with ECHR law of decisions of Community courts in human rights disputes. Moreover, bearing in mind the flexible attitude of ECHR law towards difference the argument that EC human rights solutions could be accommodated under the ECHR will not lose its relevance in defining a relationship of non-divergence between two jurisdictions. The odd instances where the Community/Union would be found to contravene the Convention would hardly qualify as evidence of divergence, more likely, as a sign of misdirected balancing between countervailing interests. In essence, apart from the conflicts any Contracting Party to the ECHR has to endure, the relationship between ECHR and EC law would be generally harmonious where divergence will be part of an ongoing discourse not less or more relevant than in the present circumstances.

It appears that apart from the possibility of Strasbourg supervision in cases in which the incompatibility of the EC human rights solution is alleged, accession would be of limited significance from the perspective of divergence as conceived in the present thesis. Moreover, instituting Strasbourg supervision over EC human rights protection is not of urgent necessity. A large quantity of EC action is already under ECHR supervision.³⁶ It was suggested that by establishing the responsibility of the Member States under the ECHR for the actions of the European Community closed a large gap in the application in the Convention.³⁷

It is of particular significance that the distinction applied in this respect between situations where the Contracting State has discretionary powers in implementing Community action and where the interference with the fundamental right is imputable only to the EC³⁸ corresponds with how divergence is envisioned in this thesis pre- and post-accession. In establishing the Contracting States' responsibility or applying the equivalent protection principle to EC action³⁹ Strasbourg supervision is empowered to acknowledge the autonomy of State/Community human rights solutions.⁴⁰ Accession would affect this parallel arrangement of functionally equivalent constructions of responsibility only in that the subsidiarity principle of ECHR law would take over the

³⁶ P. 102, Cohen-Jonathan: Teitgen.

³⁷ P. 503, Alkema: 1979. See in this respect, para. 47, Prince-Hans Adam; paras. 67-68, Waite and Kennedy; mm. para. 29, Matthews; para. 135, Bosphorus, ECtHR. See also, Part II/Chapter 4/Point 2.

³⁸ See, p. 24, Bultrini: 2002, distinguishing between cases where the Contracting States were held responsible (Tête, ECHR; Procola; Cantoni; Matthews) and where the EC was to bear the responsibility (CFDT; Pafitis; SEGI, ECtHR; Senator Lines, ECtHR; Emesa Sugar, ECtHR; M&Co; Bosphorus, ECtHR); see also, p. 279, Benoît-Rohmer: 2005 and p. 527-529, Craig: 2006.

³⁹ See, Part II/Chapter 4/Point 2 as in Bosphorus, ECtHR.

⁴⁰ See, p. 61, Benoît-Rohmer: 2000, suggesting that this distinction between the responsibility of the Contracting States and the EC/EU should be kept even after accession.

principle of equivalent protection and the mechanisms of flexibility of the ECHR would replace the flexibility inherent in the manifest deficient protection principle.

2. Reassessing the problem of divergence

Unfolding the claim of non-divergence between ECHR and EC law serves as an adequate basis for reassessing the problem of divergence in law. It is apparent that divergence between distinct legal orders is an unstable claim as the adequacy of its findings will be jeopardised by the increased possibility of incommensurability on the level of individual cases paired with the probability that difference could be accommodated by means of mechanisms of flexibility.⁴¹ Nevertheless, certain forms of divergence in law remain to be expressed in terms of differences outside the reach of flexibility. The claim of threat of divergence was found unintelligible in the present context where definable concepts such as compliance and compatibility are discussed.⁴² Chapter 2 contributed to the present thesis by discussing the possible approaches to divergence in law. The point of departure was the multiplicity of laws in relation to which the monist reaction of rejection and the pluralist reaction of acceptance/accommodation were identified. For the purposes of the non-divergence thesis pluralism provided the more attractive approach as it suggested that managed (accommodated) differences in law may not qualify as divergence. Nevertheless, instead of an idyllic pluralist account of coexistence between multiple legal orders a pluralist approach was selected that held that managing the coexistence of the multiple different can be subject to a condition/requirement of similarity. This approach of ordered legal pluralism corresponded with the premise of the present thesis according to which the intertwined **arguments** of **flexibility** and **similarity** constitute the non-divergence claim.

It appears that the issue of divergence in law is positioned at the point of intersection of values inherent in legal certainty (uniformity) and diversity.⁴³ In case of supranational legal orders such as ECHR and EC law this duality is even more apparent when one considers the contradiction inherent in their characteristics. While they strive on the compliance of the plural legal orders they embrace, the dynamics of such complex systems necessitate maintaining a flexible arrangement of coexistence where inter-

⁴¹ See, Introduction to the thesis on determining which forms of difference can be regarded as divergence.

⁴² See, Part I/Chapter 1/Point 1(a). It was not the aim of the non-divergence claim to dismiss claims of threats of divergence as they are a matter of opinion and when the non-divergence claim relies of margins of flexibility the threat of divergence remains a valid opinion, but only an opinion.

⁴³ See the discussion at Part I/Chapter 1/Point 4.

systemic tensions could be resolved.⁴⁴ This was described with precision in the *Bosphorus* judgment of the ECtHR where the systemic leeway provided under the requirement of equivalent protection was paired with a genuine supervision of compatibility in the particular case.⁴⁵ The complexity of the problem of divergence was also expressed in rejecting divergence to be conceived as falling short of standards. It was held that standards are not able to circumscribe the problem of divergence when there are no predetermined standards in human rights adjudication and non-divergence depends on the assessment of the facts and circumstances of a given case.⁴⁶ Therefore, it would be a mistake to approach divergence in law with prejudice against difference and unreasonable expectations of similarity.

Divergence is a concept dependent of context and time.⁴⁷ As demonstrated in Part III, establishing similarity was often enabled by (gradual) change in case law and without the most recent decisions of Community courts the **similarity argument** would have been less comprehensive. The appearance of a new approach in one jurisdiction was often a reaction to changes that had taken place in the other. This raises the question whether divergence can be regarded as a valid concern in the case that subsequent legal developments overwrite individual instances of difference appearing at a given point of time.

Describing divergence as a process of growing dissimilarity also questions whether a complex relationship between legal orders characterised by various interactions and dotted with individual cases of alleged difference can be equated with divergence. If legal orders cannot be described solely by the collectivity of their elements, the difference of the respective elements hardly signals the divergence of the systems. It may be suggested that in the light of the totality of inter-systemic interactions between legal orders divergence is a negligible matter. Consequently, conflicts arising out of individual instances of divergence should not be overestimated. They might be confusing, unpredictable, and potentially damaging, but they are only temporary disturbances in the complex machinery of inter-systemic cooperation.

Divergence is a concept based on contradiction. It reigns over a complex and disorderly situation and attempts to categorise that situation to impose some form of order. However, the claim of divergence is undermined by the very simplification inherent in

⁴⁴ See on the complexity of the problem of divergence, Part I/Chapter 1/Point 4. One may add that the complexity which the divergence claim failed to incorporate is addressed in the non-divergence claim by introducing the element of flexibility.

⁴⁵ See, Part II/Chapter 4/Point 2.

⁴⁶ See, Part II/Chapter 4/Point 3.

⁴⁷ See, Part I/Chapter 1/Point 3.

its attempt of ordering. Divergence ceases to be an appropriate description when it can capture only a fraction of reality. It may also be suggested that divergence/convergence are in fact monist legal concepts. They represent the reaction of a closed identity to growing similarity or dissimilarity with other closed identities without savouring the possibilities offered by the interactions with the other. On this basis, it might be asserted that divergence (and convergence) is a concept the validity of which is called into question when placed from a monist to a pluralist context.

Considering that the problem of divergence in law is contingent upon defining and assessing a variety of factors, it is best to define divergence as an unidentifiable legal object.⁴⁸ It is doubted that law would be able to interpret divergence appropriately as law is designed to comprehend status the dynamics of divergence falling out of its reach.⁴⁹ The only way the dynamics of diversity can be embraced is judicial interpretation/application.⁵⁰ This was demonstrated in this thesis when examining the concepts developed by courts that contribute to facilitating the flexible coexistence of legal orders.⁵¹ The dynamics and complexity of divergence suggests that it cannot be tamed once and for all. Nonetheless, by maintaining a flexible supervision of difference the system(s) can be kept functioning without the danger of ossification. There are no special moments of harmony only toiling to maintain the fluctuant status of non-divergence in law.

3. Divergence – an unswerving argument

The *topos* of divergence between ECHR and EC law once believed to be defeated will surely rise again like a phoenix from the ashes. It is an unavoidable matter in the two most developed forms of European (legal) integration where disintegrative forces are constantly on the agenda. The temporary and contextual nature of divergence will certainly provide fresh ammunition to debating the issue of divergence.⁵² Individual cases could always be interpreted as to support a divergence claim. New developments in case law will be criticised from the conservative perspective of divergence. The propagators of divergence will target legislation and policy defenceless against allegations of divergence.

⁴⁸ The expression borrowed from Raducu and Levrat: 2007.

⁴⁹ See, p. 246, Dehousse and Weiler: 1990.

⁵⁰ *Ibid.*

⁵¹ In Part II: the doctrine of margin of appreciation; the flexibility of scope; encroachment; the flexibility offered by EC law. The examples of evolution in case law in Part III could also be mentioned here.

⁵² See the discussion at Part I/Chapter 1/Point 3.

The debate on divergence between human rights protection in ECHR and EC law resembles television series as the likes of *Twin Peaks* where no ultimate denouement will be provided. Instead, from time to time particular problems will be resolved and new issues will arise to keep the programme going and maintain the spectators' interest. It is certain that crises of divergence will be alleged in the years to come. The dynamics of human rights protection in both jurisdictions are not favourable to visions of harmonious coexistence. Importing and applying ECHR law in Community law experiences an era of expansion giving a cause for concern for the propagators of the divergence claim. However, such crises are a natural part of a coexistence characterised by the flexible status of non-divergence as described in the present thesis. It would be unwise to expect that human rights solutions of Community courts should give up their Community characteristics for the sake of an ill-conceptualised ideal of harmony between ECHR and EC law. It must be remembered that ECHR law remains open to accommodate the particularities of 'domestic' human rights solutions including those of the European Community/Union.

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