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The Consistency Requirement between the ECHR and the EU Charter in the Context of Limitations of Fundamental Rights

by

Stéphanie U. Colella*

Abstract

(French version below)

In matters concerning fundamental rights in Europe, the term "dialogue" has often been used to describe the judicial dialogue between the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), mostly to refer to the mechanism through which both courts cite and borrow each other's case law. The starting point to justify such dialogue is usually the requirement to ensure an effective protection of fundamental rights in Europe by promoting consistency between the case law of both the ECtHR and the CJEU. The Charter of Fundamental Rights of the European Union (ECFR) has now crystallized this necessity by requiring the competent authorities to interpret the ECFR in a way that is consistent with the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The present contribution explores briefly the reason, the origin, the nature and the meaning of this required consistency that should be achieved between the ECHR and the ECFR. Once this concept is clarified, the paper ad-dresses the issue of how the CJEU could ensure the consistency between its case law and the ECtHR's case law. In order to illustrate the author's view, it examines the case law of both courts in the specific area of limitations of fundamental rights. Concluding that some inconsistencies exist in the way both courts interpret the justification's conditions of fundamental rights limitations, the paper ends with some suggestions beneficial to improve the consistency between both case law and, therefore, the protection of fundamental rights in Europe.

Keywords: Fundamental Rights, Limitations, ECFR, ECHR, CJEU, ECtHR, Consistency, Interpretation

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Résumé

En matière de droits fondamentaux à l'échelle européenne, le terme dialogue est couramment employé pour décrire le dialogue judiciaire entre la Cour de justice de l'Union européenne (CJUE) et la Cour européenne des droits de l'homme (CourEDH), principalement pour faire référence au mécanisme par lequel ces cours citent et empruntent mutuellement leur jurisprudence respective. Le point de départ pour justifier un tel dialogue réside généralement dans l'exigence d'assurer une protection effective des droits fondamentaux en Europe en veillant à une cohérence entre les jurisprudences de la CourEDH et de la CJUE. La Charte des droits fondamentaux de l'Union européenne (CDFUE) a désormais cristallisé cette nécessité en invitant les autorités compétentes à interpréter la CDFUE de façon cohérente avec la Convention de sauvegarde des droits de l'homme et de libertés fondamentales (CEDH).

La présente contribution explore brièvement la raison, l'origine, la nature et l'objet de cette exigence de cohérence qui devrait être atteinte entre la CEDH et la Charte. Une fois celle-ci précisée, la contribution s'intéresse à la question de savoir comment la CourEDH et la CJUE peuvent assurer cette cohérence entre leurs jurisprudences respectives. Dans le but d'illustrer son propos, l'auteur examine la jurisprudence rendue par les deux cours dans le domaine spécifique des limitations des droits fondamentaux. Relevant certaines incohérences dans la façon dont les deux cours interprètent les conditions de justification des limitations aux droits fondamentaux, l'auteur formule quelques suggestions susceptibles d'améliorer la cohérence entre ces deux jurisprudences et, par conséquent, la protection des droits fondamentaux en Europe.

Mots-clés : Droits fondamentaux, Limitations, CDFUE, CEDH, CJUE, CourEDH, Cohérence, Interprétation

The Consistency Requirement between the ECHR and the EU Charter in the Context of Limitations of Fundamental Rights

Introduction

The title of the present doctoral workshop on the "*Dialogue Between Judges : The CJEU and Other International Courts*" is very challenging. Indeed, the term "*dialogue*" is often used in the European Union (EU) and the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) literature to describe various interactions between the Court of Justice of the European Union (CJEU) and national or international courts. In fundamental rights matters and from the perspective of EU law, the literature has largely focused on the judicial development of a catalogue of EU fundamental rights as the result of a "*dialogue*" between the CJEU and national courts.[1] Most commonly, these analyses rely upon the EU's interest in protecting the primacy of EU law against threats from national courts in order to explain why the CJEU developed EU fundamental rights.[2]

But this term has also been used to describe the judicial interactions between the CJEU and the European Court of Human Rights (ECtHR), usually to refer to the meetings which take regularly place between both courts or to the mechanism through which these courts cite and borrow each other's case law.[3] Considering the latter literature, the starting observation is often the requirement to ensure consistency between the case law of the ECtHR and of the CJEU in order to improve the level of protection of fundamental rights in Europe.[4]

An earlier version of this contribution was presented at the Jean Monnet Doctoral Workshop on the topic "*Dialogue between Judges. The Court of Justice of the European Union and Other International Courts*", University of Geneva, in September 2015. I would like to thank Prof. Eleftheria NEFRAMI for her helpful comments and critiques. Many thanks also to the other participants for their comments.

[1] For instance, see the interaction between the German courts and the CJEU, well described by Juliane KOKOTT, "Report on Germany", in Anne-Marie Slaughter, Alec Stone Sweet, Joseph Weiler (eds), *The European Court and National Courts, Doctrine and Jurisprudence. Legal Change in its Social Context*", Oxford, Hart Publishing, 1998, pp. 77-131.

[2] Joseph WEILER, "Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities", *Washington Law Review* , Vol. 61, 1986, pp. 1103-1142, at p. 1118-1119.

[3] For an example of how the ECtHR refers to the case law of the CJEU, see ECtHR, app. n°28541/95, *Pellegrin v France* [1999], paras 37-41. See also Francis JACOBS, "Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice", *Texas International Law Journal*, Vol. 38, 2002, pp. 547-556; Allan ROSAS, "The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue", *European Journal of Legal Studies*, Vol. 1, 2007, pp. 1-16; Jean-Paul COSTA, "The European Court of Human Rights and Its Recent Case Law", *Texas International Law Journal*, Vol. 38, 2002, pp. 455-468.

[4] See, for instance, Rick LAWSON, "Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg", in Rick Lawson, Mathijs de Blois (eds.), *The Dynamics of the Protection of Human Rights in Europe - Essays in Honour of Professor Henry G. SCHERMERS*, Vol. 3, Dordrecht, Boston, London, Martinus Nijhoff Publishers, 1994, pp. 219-252; Dean SPIELMANN, "Jurisprudence des juridictions de Strasbourg et de Luxembourg dans le domaine des droit de l'homme : conflits, incohérences et

This requirement has also been confirmed by the Presidents of both the ECtHR and the CJEU in 2011, when they jointly declared that "*[t]hey are determined to continue their dialogue on these questions which are of considerable importance for the quality and coherence of the case-law on the protection of fundamental rights in Europe*"[5].

In the present contribution I argue that, notwithstanding its apparent willingness to enter into a "*dialogue*" with the ECtHR, understood here as a form of communication implying a reciprocal conversation focused on mutual understanding,[6] the CJEU fails to achieve the "*coherence*" mentioned in the joint communication. I will try to demonstrate, after a detailed evaluation of the recent case law of the CJEU when it interprets the Charter of Fundamental Rights of the European Union (ECFR), that this court aims at favoring the autonomy of its own case law to the detriment of the "*coherence*" with the case law of the ECtHR.

From a methodological point of view and considering the amount of the case law of both courts, I will limit the material scope of the present contribution to one specific aspect of fundamental rights protection, *i.e.* the conditions under which a limitation of a fundamental right may be justified. In the following lines, moreover, I will address the analysis of the case law from an EU point of view, more precisely from the CJEU perspective, and will not consider the dialogue between the EU and national courts, for instance.[7]

I will start my contribution by some general but necessary remarks on the origin, the nature and the meaning of the "*coherence*" between the ECFR and the ECHR aimed at by the CJEU and, especially, explore if it is really a necessary requirement (I). Then, I will examine some cases relating to two conditions to be fulfilled in order to justify an individual's fundamental rights limitations and assess the way both courts, and in particular the CJEU, deals with the requirement of consistency (II). Far from improving the coherence previously defined, I will argue that the actual case law of CJEU does not take enough into consideration the case law of the ECtHR in order to ensure a high level of protection of fundamental rights in Europe.

I. The consistency required between the ECHR and the ECFR (…)

In matters concerning fundamental rights, the requirement to ensure "*coherence*" between the case law of the CJEU and the ECtHR is not only a preoccupation of those courts'

complémentarités", in Philip Alston (dir), *L'Union européenne et les Droits de l'Homme*, Bruxelles, Bruylant, 2001, pp. 789-812 ; Joseph WETZEL, "Improving Fundamental Rights Protection in the European Union : Resolving the Conflicts and Confusion Between the Luxembourg and Strasbourg Courts Justice", *Fordham Law Review*, Vol. 71, 2003, pp. 2823-2862.

[5] See Jean Paul COSTA, Vassilios SKOURIS, *Joint communication from Presidents Costa and Skouris*, dated 24 January 2011, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf (consulted on 28th January 2016) [My emphasis].

[6] On the concept of "*dialogue*", see among others Bo GÖRANZON, Magnus FLORIN, Pehr SÄLLSTRÖM, "The Concept of Dialogue", *AI and Society, Journal Knowledge, Culture and Communication*, Vol. 2, 1988, pp. 279-286.

[7] Therefore, the interrogations raised by the "*dialogue*" between the Member States jurisdictions and the CJEU, on one hand, and the "*coherence*" that might be required between their respective decisions, as illustrated for instance by the case Melloni (CJEU, case C-399/11, *Melloni v Ministerio Fiscal* [2013]), will not be discussed in the present paper.

Presidents or a doctrinal argument: it has been a constant objective of both courts in practice. Indeed, from an EU perspective,[8] the CJEU has, despite lacking a formal relationship with the ECHR, drawn inspiration from the latter court, even after the EU fundamental rights were codified in the ECFR.[9] Therefore, not only does the CJEU refer to the content of the ECHR in its decisions, but it also explicitly refers to the case law of the ECtHR.[10] Moreover, since the entry into force of the Lisbon Treaty and the binding legal effect of the ECFR,[11] the CJEU not only draws inspiration from the ECtHR case law but is now required to ensure a "*consistency*" between the ECtHR interpretation of the ECHR and its own interpretation of the ECFR. Indeed, the Article 52 (3) ECFR states that:

> **Article 52 Scope and interpretation of rights and principles**
>
> [...]
>
> 3 In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

The explanations relating to the ECFR – that must be duly taken into consideration when interpreting the ECFR[12] – specify, as regards Article 52 (3) ECFR:

> Paragraph 3 is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. This means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR, which are thus made applicable for the rights covered by this paragraph, without thereby adversely affecting the autonomy of Union law and of that of the Court of Justice of the European Union.
>
> The reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union.[13]

From an EU perspective, it follows that the CJEU shall interpret the ECFR in a "*consistent*" way with the ECHR. However, neither the provisions of the ECFR – or its explanations – nor the case law of the CJEU clarify the nature or the purpose of this "*consistency*". Therefore, one might ask: what does "*consistency*" mean? Is it a mandatory requirement? These questions are even more justified considering the fact that there are occasional references

[8] For an analysis of the ECtHR perspective, see among others, Romain TINIÈRE, "La cohérence assurée par l'article 52 § 3 de la Charte des droits fondamentaux de l'Union. Le principe d'alignement sur le standard conventionnel pour les droits correspondants", in Caroline Picheral, Laurent Coutron (comps), *Charte des droits fondamentaux de l'Union européenne et Convention européenne des droits de l'homme*, Bruxelles, Bruylant, 2012, pp. 3-19, pp. 15 ff.

[9] At the beginning, the CJEU hesitated to develop fundamental rights jurisprudence as there was no express treaty provision requiring it. However, when the CJEU realized how the economic activities would affect the fundamental rights protection within the Community, it slowly started to build a body of human rights law that would, in the end, be codified in the ECFR. For more details, see among others Catherine BARNARD, Steve PEERS (eds), *European Union Law*, Oxford, Oxford University Press, 2014; Trevor HARTLEY, *The Foundation of European Union Law*, 7th ed., Oxford, Oxford University Press, 2010, chapter 5.

[10] For some examples, see the articles cited above, note 4.

[11] Article 6 (1) of the Treaty on European Union (TUE) states that "*The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties*" [My emphasis].

[12] See Art. 6 (1) para. 3 TUE: "*The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions*" [My emphasis] and Art. 52 (7) ECFR: "*The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States*" [My emphasis].

[13] My emphasis.

to the requirement of "*coherence*", as in the joint communication, instead of the requirement of "*consistency*", as in the ECFR, adding more ambiguity to an already very vague notion.

In order to circumscribe the requirement of consistency between the CJEU and the ECtHR[14] and their respective case law, I argue that one needs to determine more closely what distinguishes – if appropriate – "*consistency*" from "*coherence*" and also to determine what the former really implies – in particular, its nature and its object (B). But, most importantly, one must first examine why this consistency is really needed and where it comes from (A).

A. *Why* consistency is required

In the following section, I want to challenge the starting point of the requirement of consistency, which is summarized as follows by Robert HARMSEN: "*as the Court of Justice interprets fundamental rights through the prism of Community law, it is very likely that it will continue, on occasion, to strike different balances to those struck by the Court of Human Rights*".[15] In order to verify this assessment, we turn now to a brief analysis of the case law of the CJEU and the ECtHR to ascertain the risk to strike different balances (1), on one hand, and to identify its origin (2), on the other hand.

1. The reason for the requirement of consistency

In some cases heard prior to the entry into force of the Lisbon Treaty, one can effectively find some contradictions between the way the CJEU and the ECtHR interpret fundamental rights. In *Hoechst AG v Commission of the European Communities*,[16] for instance, the CJEU argued that the right to respect for the privacy of the home, protected by Article 8 ECHR, did not include private undertakings. However, in *Niemietz*,[17] the ECtHR concluded that "*the search of the applicant's office constituted an interference with his rights under Article 8*".

Another example may be find in the CJEU decision in *Orkem v Commission of the European Communities*,[18] where the court observed that, as far as Article 6 ECHR was concerned, "*neither the wording of that article nor the decisions of the European Court of Human Rights indicate that it upholds the right not to give evidence against oneself*"[19]. Nonetheless, in *Funke v France*, the ECtHR adopted a different view and observed that "*[t]he special features of customs law […] cannot justify*

[14] In the present contribution, I will only use the term "*consistency*" as it is the term formally used in the explanations relating to the ECFR which, contrary to the joint communication, must be taken into consideration when interpreting the ECFR. See above note 12.
[15] Robert HARMSEN, "National Responsibility for European Community Acts under the European Convention on Human Rights: Recasting the Accession Debate", *European Public Law*, Vol. 7, 2001, pp. 625–649, at p. 627.
[16] CJEU, case C-46/87 and C-227/88, *Hoechst v Commission* [1989], ECR I-2859. This statement was confirmed in CJEU, case C-85/87, *Dow Benelux v Commission* [1989], ECR I-3137, at p. 3157 case C-97/87, C-98/87 and C-99/87, *Dow Chemical Ibérica and Others v Commission* [1989], ECR I-3165, at pp. 3185-3186.
[17] ECtHR, app. n°13710/88, *Niemietz v Germany*, [1992], para. 33.
[18] CJEU, case C-374/87, *Orkem v Commission* [1989], ECR I-3283.
[19] *Ibid*, at para. 30.

such an infringement of the right of anyone "charged with a criminal offence", within the autonomous meaning of this expression in Article 6 (art. 6), to remain silent and not to contribute to incriminating himself".[20]

In these two cases, the CJEU and the ECtHR interpreted respectively Articles 8 and 6 ECHR in a different manner and ended with contradictory results. Sometimes, however, they might arrive at the same conclusion but by using different reasoning, *e.g.* an economic point of view for the CJEU and an individual rights point of view for the ECtHR.[21] For instance, in the case *Konstantinidis v Stadt Altensteig-Standesamt*[22] concerning a Greek person arguing that his name had been incorrectly translated, the CJEU based its decision on the potential economic impact to Mr. Konstantinidis of a wrong translation and did not consider in any way his right to private life: it did not even consider the ECtHR case law, based on Article 8 ECHR, which recognizes the fundamental right to a name and establishes that denying a person the right to change his or her name constitutes a violation of the ECHR.[23]

These cases illustrate that the risk of divergent interpretation between the ECtHR and the CJEU is more than hypothetical: it is a reality. As Laurence BURGORGUE-LARSEN puts it concerning the possibility of diverging interpretation : "*la pratique contentieuse mit plusieurs fois en évidence qu'il ne s'agissait guère d'une simple éventualité*".[24] Therefore, as long as the EU has not formally acceded to the ECHR, contradictions between the case law of the ECtHR and the CJEU or between their respective ways of reasoning on fundamental rights matters might still occur. On this point, the adoption of Article 52 (3) ECFR, without eliminating the problem of contradictory case law or reasoning altogether, encompasses a practical tool to contain it, *i.e.* by requiring a consistency between both case law[25].

[20] ECtHR, app. n°10828/84, *Funke v France*, [1993], at para. 44.

[21] On this point, see, for instance, Joseph WETZEL, cited above note 4, p. 2845.

[22] CJEU, case C-168/91, *Konstantinidis v Stadt Altensteig-Standesamt* [1993], ECR 1-1191.

[23] See, among others, ECtHR, app. n°9532/81, *Rees v United Kingdom* [1986]; ECtHR, app. n°13343/87, *B. v France* [1992]. See also Rick LAWSON, cited above note 4, p. 248-50.
On this point, one might argue that, considering the fact that the *Konstantinidis* case relates to the patronymic domain – which is a Member State competence – the CJEU shall not consider or even refer to the ECHR case law. However in this case, the CJEU expressly reminds us that "*any discrimination on grounds of nationality*" is prohibited by the treaty (para. 12). Therefore and despite the domain concerned, as long as a discrimination based on nationality is at stake – which is prohibited by the ECHR – the CJEU could and should have considered, in my opinion, this case under the light of the relevant case law of the ECtHR.

[24] Laurence BURGORGUE-LARSEN, "Article II-112", in Laurence Burgorgue-Larsen, Anne Levade, Fabrice Picod (comps), *Traité établissant une Constitution pour l'Europe. Commentaire article par article*, Vol. 2, pp. 658-688, at p. 675.

[25] Note that article 52 (3) ECFR does not require the elimination of all kind of divergent interpretation. Indeed, as in the *Brüstle* case (CJEU, case C-34/10*, Oliver Brüstle v Greenpeace eV* [2011], ECR I-9821), the CJEU developed a wide definition of the human embryo when it stated that "*any human ovum after fertilisation, any non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted, and any non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis constitute a 'human embryo'*", in comparison to the ECtHR in the *Parrillo* case (ECtHR, app. n° 46470/11, *Parrillo v Italy* [2015]) which only declared, on one hand, that "*human embryos cannot be reduced to "possessions"*"(para. 215) and, on the other hand, that "*that the "protection of the embryo's potential for life" may be linked to the aim of protecting morals and the rights and freedoms of others, in the terms in which this concept is meant by the Government […]. However, this does not involve any assessment by the Court as to whether the word "others" extends to human embryos*" (para. 167). Such divergence in the definition of the scope of protection of the human embryo – or of any fundamental rights – is allowed by the last sentence of Art. 52 (3) ECFR which states that: "*this provision shall not prevent Union law providing more extensive protection*". In other cases, however, the CJEU is not exonerated to ensure consistency between its own decisions and the case law of the ECtHR.

2. The origin of the requirement of consistency

The possibility of contradictions between the case law of the ECtHR and the case law of the CJUE on the conditions of justification of the limitation of fundamental rights may be explained by the division of competences between the EU and its Member States. As briefly mentioned in the introduction, the original EU Treaties did not include any references to fundamental rights nor did they bind the EU institutions to any fundamental rights duties[26]. As a result, no fundamental rights competence was created for the EU and each Member State retained a general fundamental rights competence. In this context however, as Samantha BESSON formulates it, "*[t]he gradual development of new EU competences in many areas and hence of the scope of EU fundamental rights, but most importantly the recognition of EU fundamental rights in EU primary law and the Charter, have been a constant worry for Member States, however*"[27]. The EU fundamental rights regime may therefore be described as a transnational regime, situated between a municipal regime, *i.e.* aimed at all EU institutions in all areas of EU law, and an international regime, *i.e.* setting only minimal standards at the institutions of the Member States[28].

The absence of a direct EU fundamental rights competence – which lies at the center of the specificity of EU fundamental rights and goes back to the Member States' motivation to set limits on the EU – created a requirement for the CJUE, when controlling the respect of the ECFR by the EU institutions and Member States, to ensure a certain level of consistency between the ECFR and the other overlapping systems of protection, *i.e.* the ECHR and the national constitutions. In interpreting the conditions of justification of fundamental rights limitations, it should therefore be clear that the CJEU had to keep in mind the competence question and, as a consequence, the interpretation of those conditions made by this court might diverge from the interpretation developed by the ECtHR, leading therefore to some contradictions.

Now that the reason and the origin of the requirement of "*consistency*" between the ECFR and the ECHR have been clarified, one still needs to examine *what* this term encompasses. Indeed, neither Article 52 (3) ECFR nor the explanations relating to the ECFR state precisely the type of consistency the ECFR is looking for.

[26] This is not the place to elaborate on the historical developments of the EU fundamental rights. For further details, see amongst others : Claude BLUMANN, "Les compétences de l'Union européenne en matière de droits de l'homme", *Revue des affaires européennes*, 2006, vol. 14, p. 11 ; Piet EECKHOUT, « The EU Charter and the Federal Question », *Common Market Law Review*, 2002, vol. 39, p. 945, Allard KNOOK, "The Court, the Charter, and the Vertical Division of Powers in the European Union", *Common Market law Review*, 2005, vol. 42, p. 367-398.

[27] Samantha BESSON, "The Human Rights Competences in the EU. The State of the Question after Lisbon", in Georg Kofler, Miguel Poiares Maduro, Pasquale Pistone (eds), *Human Rights and Taxation in Europe and the World*, Amsterdam, IBFD, 2011, p. 37-63, p. 41.

[28] *Ibid.* p. 42.

B. *What* does consistency mean

In order to clarify the concept of consistency mentioned in the Article 52 (3) ECFR, the first question that shall be addressed is "*what does consistency mean*"? To answer this question, one first needs to distinguish "*consistency*" from "*coherence*", as mentioned in the joint communication.

On this point, it is interesting to observe that, where the English version of the explanations relating to the ECFR uses the word "*consistency*", the French version contains the word "*coherence*", as if they were synonyms[29]. On this point, some authors argue that even if these words seem to have two different definitions, they are perfectly capable of encompassing a common meaning, *i.e.* an "*absence of contradiction*".[30] This meaning is strengthened if one considers the fact that, as showed above, the case law of both the CJEU and the ECtHR demonstrates a risk of divergent interpretation between both courts, which might finally lead to contradictory decisions. However, intuitively, to require a consistency between the ECFR and the ECHR or their related case law seems to be more demanding than a simple coherence as the term "*coherence*" refers to a unified whole, while the term "*consistency*" refers specifically to something not containing any logical contradictions.[31] In this context, Isabelle BOSSE-PLATIÈRE distinguishes between the static nature of the term "*consistency*" and the dynamic nature of the term "*coherence*".[32] Therefore, the adoption of the Article 52 (3) ECFR should be understood, I think, as encompassing a requirement of both an absence of contradiction between the decisions of both courts (*static* dimension) and the presence of positive connections between those decisions (*dynamic* dimension), *i.e.* that the CJEU should decide by taking due consideration of the practice of the ECtHR and of the way the latter court could have decided a case.[33]

The next question to be addressed is "*what does consistency imply*"? From an EU perspective, indeed, there are various possibilities for the CJEU to ensure consistency as, for instance, obliging itself to give to the ECFR the same interpretation as the ECtHR does to the ECHR, thus endorsing the reasoning of the ECtHR. Or the CJEU might only be willing to examine if its final conclusions on a particular case are consistent with the case law of the

[29] However, note that both the English and French version of the joint communication from Presidents COSTA and SKOURIS (cited above note 5) mention the word "*coherence*".

[30] *Pro*, see Gjermund MATHISEN, "Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement", *Common Market Law Review*, Vol. 47, 2010, pp. 1021-1048, p. 1024: "*The two basic notions of consistency and coherence are evidently connected but, importantly, they are not the same. […]. At first glance, there could seem to be an inconsistency here (pardon the pun). But after a closer inspection,* cohérence *in French and* consistency *in English are perfectly capable of taking on the same meaning, namely "an absence of contradictions"*". *Contra*, see Christian TIETJE, "The Concept of Coherence in the Treaty on the European Union and the Common Foreign and Security Policy", *European Foreign Affairs Review*, Vol. 2, 1997, pp. 211-233. p. 213: "*Summarizing, it becomes clear, that the TEU refers to coherence and not, as the English version seems to indicate, to consistency*".

[31] See, for instance, the Oxford Dictionary, available at http://www.oxforddictionaries.com/ (consulted on 28th January 2016).

[32] See Isabelle BOSSE-PLATIÈRE, *L'article 3 du traité UE : recherche sur une exigence de cohérence de l'action extérieure de l'Union européenne*, Bruxelles, Bruylant, 2009, p. 18 ss, who explains that the word "*consistency*" refers merely to an absence of contradiction and has a static nature, whereas the word "*coherence*" has a dynamic nature and "*postule ainsi une exigence que l'on pourrait qualifier d'éthique selon laquelle il importe d'assurer la conformité entre "un engagement juridique et son accomplissement par celui qui y a souscrit" et, plus largement, le respect entre ce qui est affiché et ce qui est réalisé*" (p. 24).

[33] For more details, see Samantha BESSON, "From European Integration to European Integrity: Should European Law Speak with Just One Voice?", *European Law Journal*, Vol. 10, n°3, 2004, pp. 257-281, p. 263.

ECtHR without, however, entering into a deep analysis of the latter. To answer this question I argue that one needs to ascertain the nature of this consistency (1), *i.e.* if it is a legally binding requirement or only a general objective, and its object (2), *i.e.* what is to be rendered consistent.

1. The nature of consistency

Regarding the nature of consistency, we must clarify whether it is a binding requirement implying a legal sanction in case it is not achieved, or only a general objective to fulfill, but which does not entail consequences should it not be achieved. Indeed, the requirement of consistency is not mentioned in the ECFR itself – in that scenario, considering its binding effect, it would have been mandatory – but only in the explanations relating to the ECFR.

As regards the latter explanations, one must admit that their binding force is debatable. Following Guy BRAIBANT, it should not be given "*une importance excessive à l'« explication » de l'article 52.3, qui ne doit pas avoir plus de portée qu'un exposé des motifs ou qu'une circulaire interprétative*"[34]. Nonetheless, as he admitted, the fact that these explanations do not have a legally binding force does not prevent them from constituting an interpretative tool intended to clarify the provisions of the ECFR.[35]

From my point of view, any questions regarding the binding force of these explanations can be easily answered if one agrees to define, in a first step, the perspective adopted. Indeed, from the perspective of international law, and more particularly from the point of view of the judges at the ECtHR, it is important to know expressly which text of law is suitable to be applied in a specific case and whether or not it is binding, because not respecting it might constitute an infringement. Nevertheless, in the point of view of the EU (more precisely for the CJEU) the binding nature or not of the explanations is unproblematic, because the latter must be taken into consideration when interpreting every provision of the ECFR[36]. Both the national jurisdictions and the EU jurisdictions are, indeed, obliged to adopt their decisions following the directives imposed by their respective constitutive treaties, and hence the doctrinal controversies on the binding force of the explanations do not influence the possibility for these authorities to make references to these explanations.

More precisely, concerning the nature of the consistency mentioned in the explanations relating to the ECFR, I argue that it is a legal principle, as opposed to a legal rule. Even if an in-depth study of the distinction between the concept of "*rule*" and "*principle*" would go far beyond the scope of the present contribution, I cannot avoid some brief theoretical considerations in order to explain my argument.

[34] Guy BRAIBANT, *La Charte des droits fondamentaux de l'Union européenne*, Paris, Editions de Seuil, 2001, p. 263.
[35] *Id.*
[36] See Art. 6 (1) para. 3 TUE and 52 (7) ECFR cited above note 12.

The concept of "*principle*" in the legal sphere has been extensively examined by various legal theorists and philosophers, amongst whom Ronald DWORKIN was a pioneer in proposing criteria to distinguish a principle from a rule. For him, the origin of principle "*lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time*".[37] Hence, the principle identifies preoccupations and moral and political traditions underlying established rules and are identifiable towards an analysis of various sources, mostly of the debates preceding the adoption of a rule and the interpretation given to a rule.[38] In others words, principles "*evolve rather like a custom and are binding only if they have considerable authoritative support in a line of judgments*".[39] Ronald DWORKIN's reflections on the concept of principle have inspired many others scholars, including Robert ALEXY. Both authors think that principles should not be obligatorily promulgated by a normative authority – in contrast to rules – but are moral principles applied by judges and hence acquiring the status of "*legal principle*"[40].

Considering the previous case law of both the CJEU and the ECtHR showing real risks of contradictions, on one hand, and this brief analysis of the concept of principle, on the other hand, I argue that the consistency mentioned in the explanations relating to the ECFR is an answer to the preoccupations of the EU not to see the level of protection of fundamental rights reduced due to the specificity of its division of competences. Therefore, as far as the requirement for consistency is expressly mentioned in the explanations relating to the ECFR and implicitly in the ECFR itself, it encompasses a legal principle, which has been consecrated in – and not promulgated by – those instruments after having been developed especially by the CJEU as a reply to the real risks of contradiction with the ECHR, which are incompatible with the moral value that the CJEU recognized to the protection of fundamental rights[41].

This principle should therefore guide the interpretation of the ECFR by the CJEU and invite it to consider, when appropriate, the relevant provision of the ECHR and the related case law; or in others words, to enter into a dialogue with the ECtHR. However, if the

[37] Ronald DWORKIN, *Taking Rights Seriously*, London, Bloomsbury, 2011. pp. 22 ff. For a critique, see Joseph RAZ, "Legal Principles and the Limits of Law", *Yale Law Journal*, Vol. 81, 1972, pp. 823-854; Riccardo GUASTINI, "Les principes de droit en tant que source de perplexité théorique", in Sylvie Caudal (comp), *Les principes en droit*, Paris, Economica, 2008, pp. 113-123.

[38] See Stéphanie U. COLELLA, "Les justifications des mesures portant atteinte à l'interdiction des discriminations dans l'UE. Vers une (ré-) conciliation entre la Charte et la CEDH?", in Samantha Besson, Andreas Ziegler (eds), *Equality and Non-Discrimination in International and European Law*, Geneva, Zurich, Basel, Schulthess, 2014, pp. 37-54.; Guillaume TUSSEAU, "Métathéorie de la notion de principe dans la théorie du droit contemporaine. Sur quelques écoles de définition des principes", in Sylvie Caudal (comp), *Les principes en droit*, Paris, Economica, 2008, pp. 75-112, at p. 80.

[39] Ronald DWORKIN, cited above note 37, p. 40.

[40] Robert ALEXY, *A Theory of Constitutional Rights*, traduced by Julian Rivers, Oxford, Oxford University Press, 2002, chapter 3; Robert ALEXY, "On the Structure of Legal Principles", *Ratio Juris*, Vol. 13, 2000, pp. 294-304. Even if Robert ALEXY's concept of principle diverges on some points from Ronald DWORKIN's concept, this is mostly due, in my view, to the fact that the latter develops his argument from a *common law* perspective while Robert ALEXY's adopts a German constitutional law approach.

[41] Note that the principle of consistency is understood as an *interpretative* principle, which should be respected by the CJEU and both national and EU legislators, but is not as such a "*general principle of EU law*", like the principle of proportionality or fundamental rights, prior to their recognition in the ECFR.

objective of the interpretative principle of consistency is clear, the object to be rendered consistent is not clearly specified in the ECFR and deserves some observations.

2. The object of consistency

Until now, when referring to the object that needed to be rendered consistent, I mentioned without further explanations both the ECFR and the ECHR, and their respective case law. However, from what has previously been seen, Article 52 (3) ECFR specifies that, in so far as a right guaranteed in the ECFR corresponds to a right contained in the ECHR,[42] their meaning and their scope shall be the same. The principle of consistency shall therefore primarily be applied to the texts of the ECFR and the ECHR, duly taking into consideration, nevertheless, the case law interpreting those texts.

Indeed, the explanations relating to the Article 52 (3) ECFR, cited above, state that the "*meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union*". On this point, I think that the precision provided by the explanations is in fact superfluous because the meaning and the scope of a fundamental right stem from its judicial interpretation. Therefore, as the content of the fundamental rights guaranteed by the ECHR and the ECFR – which need to be rendered consistent – is defined by the case law, it is obvious that it is, in fact, the case law of both courts that need primarily to be rendered consistent. In other words, as Steve PEERS formulates it, "*[l]aws are not just words on sheets of paper; the crucial question is how those words are interpreted*".[43] So, the object of consistency should include both past decisions of the ECtHR and the CJEU (*diachronic* consistency) and present decisions of those courts in order for the CJEU, in concrete cases, to adjust its own decisions so as to make them fit with the former as much as possible (*synchronic* consistency)[44]. In other words, as Samantha BESSON formulates it, consistency at the EU level "*requires a form of consistency in principle that goes beyond strict consistency with the content of precedents and extends to all principles underlying a decision*"[45].

The extent to which the case law shall be rendered consistent is mentioned neither in the ECFR nor in its explanations. The question remains open whether the consistency shall apply to the reasoning of the CJEU and the ECtHR when interpreting fundamental rights cases, or if it merely concerns the results of it, *i.e.* the conclusions of a case. Indeed, as we

[42] The issue of the "*correspondance*" between two fundamental rights is of great importance in this context but goes ahead the scope of the present contribution. For further reading, see, among others, Romain TINIÈRE, cited above note 8 ; Stéphanie U. COLELLA, "Des droits de la Charte *correspondant* aux droits de la CEDH ? Quelques réflexions sur l'article 52 (3) de la Charte", in Samantha Besson, Nicolas Levrat (eds), *L'Union européenne et le droit international*, Geneva, Zurich, Basel, Schulthess, 2015, pp. 179-198.

[43] Steve PEERS, Sacha PRECHAL, "Article 52", in Steve Peers *et al.* (eds.), *The EU Charter of Fundamental Rights – A Commentary*, Oxford, Portland, Hart Publishing, 2014, pp. 1455-1521. p. 1459.

[44] In this sense, see Samantha BESSON, cited above note 33, p. 259.

[45] Samantha BESSON, *The Morality of Conflict. Reasonable Disagreement and the Law*, Oxford, Portland, Hart Publishing, 2005, p. 383.

have already seen, a brief analysis of their respective case law showed that there exists a risk of contradiction at both levels.

On this point, one should specify, on one hand, that arguing for consistency in the way both courts reason on fundamental rights provisions would amount to a requirement upon the judges of both courts to develop an organized process of interpretation, making inferences and combining them in a certain and determined way[46]. Even if the appropriateness of this kind of consistency is debatable,[47] it does not seem, in my opinion, that it will be suitable to exclude the risk of contradictory decisions between the CJEU and the ECtHR. Indeed, when reasoning on a case and interpreting a provision, a judge is strongly influenced by the legal system to which he or she belongs and by the legal system – if not the same – where the provision has been enacted. Therefore, to require from the judges of the CJEU – which has often developed its case law on fundamental rights on the basis of economic arguments – to reason in a consistent way with the ECtHR would imply a shift of paradigm which go far beyond the spirit of the explanations relating to Article 52 (3) ECFR.

On the other hand, it seems problematic to require from the CJEU a general and *ex ante* consistency on the result of the interpretation of the ECFR provisions. Indeed, as previously mentioned, the content of these provisions is not defined *in abstracto* in the ECFR but, precisely, depends on how the judges of the CJEU will interpret them in the light of the circumstances of each case. Therefore I argue that the principle of consistency does not refer to the way inferences are combined into a specific reasoning, nor to the concrete content of the fundamental right guaranteed by the provision: it concerns the "*object*" of a ECFR's provision. Indeed, the object of a fundamental right might be defined as follows: "*[t]o assert that an individual has a right is to indicate a ground for a requirement for action of a certain kind, i.e. that an aspect of his well-being is a ground for a duty on another person*".[48] Hence, if the identification of the "*object*" of the fundamental rights, namely the individual interest(s) or the aspect of the well-being protected by that right, might be done *in abstracto* in a legal provision, the "*content*" of that right, *i.e.* the obligations deriving from the need to protect these interests, must be determined in each concrete case.

To sum up so far, a brief examination of the case law rendered both by the CJEU and the ECtHR has demonstrated a real risk of contradiction which might reduce the level of protection of fundamental rights in Europe. To face this reality, Article 52 (3) ECFR and its

[46] Stéphanie MURENZI, "La cohérence dans le raisonnement des juges européens", in Samantha Besson, Andreas Ziegler (eds.), *Le juge en droit européen et international*, Geneva, Zurich, Basel, Schulthess, 2013, pp. 173-192, p. 182.

[47] *Pro*, see, for instance, Amalia AMAYA, "Ten Theses on Coherence and Law", *Working papers series*, 21 May 2012, available at http://dx.doi.org/10.2139/ssrn.2064295 (consulted on 28th January 2016), who thinks that in Law, it is imperative that the decisions adopted by judges are based on a reasoned process and not merely the result of an intuition. *Contra*, see, for instance, Hilary PUTNAM, *Reason, Truth and History*, Cambridge, Cambridge University Press, 1985, pp. 132-133, who thinks that there is no algorithm to amount to consistency, the latter being only a matter of intuition.

[48] Joseph RAZ, "On the Nature of Rights", *Mind*, Vol. 93, 1984, pp. 194-214, p 207-208. For further reading on the "Interest Theory" of rights adopted in the present contribution, see *e.g.* Joseph RAZ, *The Morality of Freedom*, Oxford, Oxford University Press, 1986, p. 166; Neil MACCORMICK, *Legal Rights and Social Democracy*, Oxford, Clarendon Press, 1982.

explanations require that both the rights contained in the ECFR and their limitations, as interpreted by the CJEU, shall be rendered consistent with the ECHR and the relevant case law of the ECtHR. However, the nature and the object of consistency are not defined in the ECFR and remain, therefore, open to extensive question. Concerning the latter, I argued that consistency should be understood as a legal interpretative principle essentially aimed at avoiding contradictions between the case law of the ECtHR and of the CJEU.

However, in order to move from the abstract level and to assess more concretely the principle of consistency and how the CJEU implements it or should implement it, I will take a specific provision of the ECFR and analyze how the CJEU can render it consistent with the corresponding ECHR's provision, as interpreted by the ECtHR. Moreover, as I simply do not have enough time or space to analyze all the relevant case law on a specific right contained both in the ECFR and the ECHR, I will limit the scope of the present contribution to the limitation regimes of fundamental rights. This regime applies to the whole ECFR and should, therefore, allow me to develop conclusions applicable to the whole ECFR instead of a particular fundamental right only.

II. (…) in the context of limitations of fundamental rights

The above-mentioned Article 52 (3) ECFR states that in case of corresponding rights between the ECFR and the ECHR, the meaning and scope of those rights "*including authorised limitations*" are the same as those laid down by the ECHR. Therefore, from an EU perspective, to examine the case law of the CJEU and the ECtHR on the conditions of justification of fundamental rights limitations contained in both instruments will allow me to reduce notably the impressive amount of case law.

In this specific area, the principle of consistency shall be understood as encompassing, on one hand, an absence of contradiction between the meaning of the conditions of justification of fundamental rights limitations enumerated in the ECFR – specified at Article 52 (1) ECFR – and those laid down in the ECHR and, on the other hand, an active consideration by the CJEU of the relevant case law of the ECtHR on those conditions, when two rights guaranteed by the ECFR and the ECHR correspond. The conditions of justification of fundamental rights limitations are the following:

> **Article 52 Scope and interpretation of rights and principles**
>
> 1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

However, as previously explained, the meaning of the four limitation conditions – i.e. "provided for by law", "respect the essence", "proportionality" and "objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others" –

like the content of the ECFR rights themselves, cannot be defined in abstracto. So, to analyze the effectiveness of the dialogue between the CJEU and the ECtHR, I will examine how both courts interpret their respective conditions of justification of fundamental rights limitations in order to clarify their meaning. I will take into consideration cases concerning fundamental rights guaranteed by the ECFR and the ECHR which are considered as "corresponding" by both courts, following the requirement of Article 52 (3) ECFR.

Before turning to the proper analysis, I need to make three methodological remarks on the case law of both the ECtHR and the CJEU, relating to the manner in which I employ these courts' decisions. Firstly, I consider them as a source of authority that is accepted as an empirical material open to critical analysis. Therefore, whenever I analyze the case law of the ECtHR and the CJEU in order to identify the interpretation of a condition of justification of fundamental rights limitations in the ECHR and the ECFR, I use both courts' decisions as empirical material, which I critically assess against my own definition of consistency. Thus I autonomously establish whether or not a case fulfills the requirement of consistency.

Secondly, considering the fact that the conditions of justification of fundamental rights limitations are not drafted in the same way in these two instruments, I need to select conditions that may be comparable. Indeed, the Article 52 (1) ECFR provides a unique and general limitation provision applicable to the entirety of rights guaranteed in the ECFR[49]. In the ECHR, however, each right susceptible to limitation contains its own conditions of justification, enumerated in the second paragraph of the provision. On this point, one should clarify that the justification conditions listed in these two instruments are not necessary the same. For instance, the second paragraph of Articles 8 to 11 ECHR mentions that the limitation of a fundamental right must be "necessary in a democratic society". If the "necessity" requirement of the limitation is also contained in the ECFR – which states that "limitations may be made only if they are necessary" – the precision that the limitation must be necessary "in a democratic society" is not contained in the ECHR. Therefore, I choose to analyze briefly the way the ECtHR and the CJUE interpret two limitation conditions, namely the "provided for by law" or, respectively, the "prescribed by law" condition and the "proportionality" condition.

[49] Note that, in my point view, the adoption of Article 52 (1) ECFR lifts a corner of the veil on the relation between fundamental rights and fundamental freedoms. The fundamental freedoms protected by the ECFR – *i.e.* the freedom of movement and residence guaranteed by Article 45 ECFR – are fundamental rights and can be restricted following the conditions enumerated under Art. 52 (1) ECFR and Art. 52 (2) ECFR. Other fundamental freedoms, mentioned only in the EU Treaties, can be limited under the condition provided by the treaties, but can also limit the fundamental rights enumerated in the ECFR, because Art. 52 (1) allow a fundamental right to be limited in order to protect "*the rights or freedoms of others*". Illustrations of the latter situation can be found in cases like *Viking* (CJEU, case C-438/05, *International Transport Workers' Federation et Finnish Seamen's Union contre Viking Line ABP et OÜ Viking Line Eesti* [2007], ECR I-10779) or *Laval* (CJUE, case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007], ECR I-11767).
On this point, see, for instance, Jean Paul JACQUÉ, "La protection des droits fondamentaux dans l'Union européenne après Lisbonne", *L'Europe des Libertés*, n° 26, 2008, pp. 2-12.

Thirdly, as I adopt an EU perspective, I will only consider, as regards the case law of the CJEU, decisions rendered from the 1st December 2009, the date of the entry into force of the Lisbon Treaty and, most importantly, of Article 52 (3) ECFR.

A. Some actual inconsistencies between the ECHR and the ECFR

A brief description of the case law of the ECtHR on both conditions, followed by a brief description of the case law of the CJEU on the equivalent conditions should highlight the way the latter court takes into consideration the former court's case law when interpreting the ECFR in order to achieve consistency. It should nonetheless be noted that the aim of the following section is not to analyze exhaustively the approach of both courts to the conditions of justification of fundamental rights limitations, but only to describe the main features of their respective interpretation in order to be able to compare them and, then, formulate some observations. This comparison will show some inconsistencies in the way the CJEU actually engages in dialogue with the ECtHR, *i.e.* in the way it interacts with the ECtHR and decides – or not – to take into consideration the latter's case law, on one hand, and in the way it actually interprets these two conditions of limitation, on the other hand.

1. The condition of the legal basis

In the ECtHR case law, the condition "*prescribed by law*" covers not only statute but also unwritten law.[50] Moreover, the ECtHR specifies two characteristics that the law must fulfill. First, the law must be "*adequately accessible*", in the sense that "*the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case*".[51] Second, the law must be sufficiently "*precise*" to "*enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail*".[52]

On the side of the EU, since the entry into force of the Lisbon Treaty, the analysis by the CJEU of the condition "*provided for by law*" specified at Article 52 (1) ECFR has not been systematic. Indeed, the CJEU applies Article 52 (1) ECFR sometimes expressly,[53] sometimes implicitly,[54] and often without mentioning the requirement "*provided for by law*" at all, which render any analysis of its case law on this condition even more difficult. If, however,

[50] ECtHR, app. n°6538/74, *Sunday Times v United Kingdom* [1979], para. 47. See also, Martin BOROWSKY, "Artikel 52", Jürgen Meyer (ed), *Charta der Grundrechte der Europäischen Union*, 3rd edn, Baden-Baden, Nomos, 2011, pp. 667-705; Jean-François RENUCCI, *Traité de droit européen des droits de l'homme*, Paris, LGDJ, 2007, p. 762.
[51] ECtHR, *Sunday Times v United Kingdom*, cited above note 50, para. 49.
[52] *Ibid.*
[53] CJEU, case C-400/10 PPU, *J. McB. v L. E.* [2010], para. 59; CJEU, case C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk* [2013], paras 47-48.
[54] CJEU, case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL et al. v Conseil des ministres* [2011], ECR I-773; CJEU, case C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011], ECR I-11959; CJEU, case T-360/10, *Tecnimed Srl v Office de l'harmonisation dans le marché intérieur (marques, dessins et modèles) (OHMI)* [2012], para. 37.

one does not address only cases where the CJEU examines expressly this condition in the context of Article 52 (1) ECFR, but, more generally, also takes into consideration cases where this court has addressed this condition in the general context of alleged fundamental rights violations, some interesting observations might be formulated.

For instance, in the case *Knauf Gips KG v Commission européenne*,[55] confirmed later by *Fuji Electric,*[56] the CJEU examined the existence of a legal basis in the context of an alleged violation of the rights of defence and finally concluded that a legal basis was missing. However, it reached this conclusion before even mentioning the ECFR provision guaranteeing the right of defence – *i.e.* Article 47 ECFR – or Article 52 (1) ECFR. Most importantly, it neither considered nor cited the case law of the ECtHR on the corresponding ECHR's rights – *i.e.* Article 6 ECHR – on this point.[57]

A few months later, in the case *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen*,[58] the CJEU analyzed the "*provided for by law*" condition concerning a Commission Regulation and concluded that "*it is common ground that the interference arising from the publication on a website of data by name relating to the beneficiaries concerned must be regarded as 'provided for by law' within the meaning of Article 52(1) of the Charter. Articles 1(1) and 2 of Regulation No 259/2008 expressly provide for such publication*".[59] Again, the CJEU rendered its decision without even considering the above-mentioned ECtHR's case law on the "*accessibility*" and the "*precision*" of the law, and without further explanations of the criteria to be met on a legal basis in order to fulfill this condition.

The subsequent case law of the CJEU seems to be going along the same line, in particular with the case *Mohamed Trabelsi and Others v Council of the European Union*,[60] where the CJEU examined if a Council implementing Decision constituted a sufficient legal basis to restrict a fundamental right. At the end of its analysis, the court concluded that the limitation of the fundamental right at stake was based on criteria that was not included in the contested council decision.[61] Therefore, without expressly saying it, the CJEU had analyzed in detail the quality of the Council implementing Decision, as does the ECtHR when it seeks to

[55] CJEU, case C-407/08 P, *Knauf Gips KG v European Commission* [2010], ECR I-I-6375.
[56] CJEU, case T-132/07, *Fuji Electric Co. Ltd v Commission européenne* [2011], ECR II-4091.
[57] Even if Art. 6 ECHR does not have, like Art. 8 to 11, a second paragraph enumerating the limitation conditions, the ECtHR admitted that this right might be subject of limitations if they pursue a "*legitimate aim*" and if there is a "*reasonable relationship of proportionality between the means employed and the aim sought to be achieved*" (see, among others, ECtHR, app. n°8225/78, *Ashingdane v United Kingdom* [1985], para. 57). Moreover, the ECtHR also specified that the legitimate aim should be "*prescribed by law*" (see OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS (OSCE), *Legal Digest of International Fair Trial Rights*, Poland 2012, Press of the OSCE).Therefore, an examination of the ECtHR's case law could have been useful and relevant from a CJEU point of view in order to avoid contradictions between their respective case law.
[58] CJEU, case C-92/09 and C-93/09, *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen* [2010], ECR I-11063.
[59] *Ibid*., para. 66.
[60] CJUE, case T-187/11, *Mohamed Trabelsi and Others v Council of the European Union* [2013].
[61] *Ibid.* para. 96: "*It follows from this that the contested decision applied a criterion other than that laid down in Article 1(1) of Decision 2011/72 when it included the first applicant among the persons whose assets were required to be frozen pursuant to Decision 2011/72. In so doing, it infringed the provision which it was intended to implement, so that the limitation on the exercise of the first applicant's right to property, which that decision entails, cannot be regarded as being provided for by law for the purposes of Article 52(1) of the Charter of Fundamental Rights*".

establish the "*accessibility*" and "*precision*" of a legal basis, but did not pronounce itself on these requirements or even mentioned them.

From what has already been examined, the CJEU does not interact with the ECtHR, nor does it cite its case law when interpreting the "*provided for by law*" condition. So, the CJEU remains silent on the meaning, *i.e.* on the object, of this condition in the ECFR context and on its relation with the ECHR's corresponding condition. On this point, from an EU point of view, the principle of consistency seems therefore to go unheeded and the dialogue supposed to be implemented appears to be a dialogue of deafness. This observation is even more surprising considering the fact that, on one hand, both Article 52 (3) ECFR and the above-mentioned joint communication invite these courts to improve their dialogue and, on the other hand, that a consistent interpretation of Strasbourg's case law by the CJEU is totally feasible. Luckily, this near absence of dialogue between the ECtHR and the CJEU does not appear in the case law of all conditions of justification of fundamental rights limitations; the situation is indeed very different concerning the "*proportionality*" condition.

2. The condition of proportionality

In my view, the condition of proportionality, as applied within the judicial procedures, is probably the most important condition in order to manage conflict between two rights claims or between a rights provision or private interest and a public interest and merits a comparative analysis between the ECHR and the ECFR.[62] Like the previous condition of justification, I will briefly consider the case law of the ECtHR and then turn to the case law of the CJEU to evaluate the way in which the latter court apply or should apply the principle of consistency.

As already stated, one of the main differences between the ECHR and the ECFR lies in the way their limitation provisions are drafted. Indeed, the manner which the second paragraph of Articles 8 to 11 is written shows that the interferences with fundamental rights must not be "*proportionate*" to the legitimate aim, but need to be "*necessary in a democratic society*". When examining this requirement, the ECtHR seeks to condemn interferences with fundamental rights which the contracting parties seek to justify by reference to the second paragraph of Articles 8 to 11 ECHR and "*ensure that it complies with the genuine interests of democracy and is not merely political expediency in disguise*".[63]

The ECtHR has developed a framework to interpret the "*democratic necessity*" requirement. First, the interference shall be justified as a "*pressing social need*" related to a legitimate aim.[64]

[62] In this sense, see Tor-Inge HARBO, "The Function of Proportionality Principle in EU Law", *European Law Journal*, Vol. 16, pp. 158-185, p. 164.
[63] Steven GREER, *The exceptions to Articles 8 to 11 of the European Convention on Human Rights*, Strasbourg, Council of Europe Publishing, 1997, p. 14.
[64] ECtHR, *Sunday Times v United Kingdom*, cited above note 47, para. 71.

In this regards, the contracting parties have a certain "*margin of appreciation*" – a measure of discretion States are permitted in their observance of rights and, in particular, to the application of the various exceptions to the ECHR – in assessing whether such a need exists.[65] On this point, the ECtHR specified that where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted,[66] but where there is no consensus within the contracting parties at the ECHR as to the importance of the interest at stake or as to how best to protect it, the margin will be wider.[67] However, one should note that this margin of appreciation goes hand in hand with European supervision, *i.e.* although the margin of appreciation must be respected, it is ultimately for the ECtHR to determine whether both the aim and necessity of any given infringement of rights under one or more of the public interest exceptions is compatible with the ECHR.[68]

Second, if the "*pressing social need*" is established, the ECtHR examines whether the interference was proportionate to the fulfilment of that need. Indeed, in *S. and Marper v United Kingdom*, for instance, the ECtHR mentioned that "*an interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need" and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient"*".[69] However, the concrete meaning of the requirement of "*relevant and sufficient*" remains often obscure due to the fact that, in many cases, the ECtHR "*merely reviews the overall balance of interests that has been struck by the national authorities*".[70] Indeed, in *S. and Marper v United Kingdom*, the ECtHR declared that it will "*consider whether the permanent retention of fingerprint and DNA data of all suspected but unconvicted people is based on relevant and sufficient reasons*"[71] and, after a brief analysis, accepted that "*the extension of the database has nonetheless contributed to the detection and prevention of crime*".[72]

Finally, as previously mentioned, the "*democratic necessity*" formula contains a proportionality *stricto sensu* requirement, as illustrated by the ECtHR in *S. and Marper v United Kingdom*: "*The question, however, remains whether such retention is proportionate and strikes a fair balance between the competing public and private interests*".[73] One should note that, when examining the conditions

[65] Steven GREER, cited above note 63, pp. 15-16.
[66] ECtHR, 4 December 2008, *S. and Marper v United Kingdom*, n° 30562/04 and 30566/04, para. 102; ECtHR, app. n°6339/05, *Evans v United Kingdom* [2007], para. 77.
[67] ECtHR, *S. and Marper v United Kingdom*, cited above note 66; ECtHR, app. n°44362/04, *Dickson v United Kingdom* [2007], para. 78.
[68] ECtHR, app. n°29221/95 and 29225/95, *Stankov and United Macedonian Organisation ilinden v Bulgaria* [2001]. See also Murat TÜMAY, "The Concept of "Necessary in a Democratic Society" in Fundamental Rights. A Reflection from European Convention on Human Rights", *Human Rights Review*, Vol. I, pp. 1-15, p. 6.
[69] ECtHR, *S. and Marper v United Kingdom*, cited above note 66, para. 101.
[70] Janneke GERARDS, "How to improve the necessity test of the European Court of Human Rights", *International Journal of Constitutional Law*, 2013, Vol. 1, pp. 466-490, p. 468.
[71] ECtHR, *S. and Marper v United Kingdom*, cited above note 66, para. 114.
[72] *Ibid.* para. 117.
[73] *Ibid.* para. 118.

of justification of limitations of fundamental rights, the ECtHR tends to focus on the latter condition, stressing repeatedly that the search for a fair balance is inherent to the ECHR.[74]

From the EU perspective, we should recall that Article 52 (1) ECFR states that "*[s]ubject to the principle of proportionality, limitations may be made only if they are necessary*". Following the recent CJEU's case law interpreting this condition, proportionality requires that measures "*do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question*".[75] Moreover, "*when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued*"[76] In this case, the CJEU executed a step-by-step assessment of proportionality in quite some detail.[77]

Indeed, first, the CJEU assessed the suitability of Article 15 (6) of Directive 2010/13, finding that this provision was "*appropriate*" for the purpose of ensuring the objective aim, *i.e.* the freedom to receive information and the promotion of media pluralism under Article 11 of the ECFR.[78] Then, the CJEU examined the "*necessity*" of the measure, finding that less restrictive measures could have been considered. However, the court concluded that, in the present case, the EU legislature could legitimately consider that the above mentioned Article 15 (6) was necessary.[79] Finally, the CJUE turned to analyze the proportionality *stricto sensu* of this provision, *i.e.* it examined if, although suitable and necessary, the measure nevertheless imposes an excessive burden on the individual.[80] On this point, it found that the provision pursued an acceptable balance between, on one hand, the freedom to receive information and the freedom of pluralism of the media and, on the other hand, the freedom to conduct a business.[81]

The CJEU confirmed its interpretation in the case *Digital Rights Ireland* concerning the fundamental rights of data protection laid down in Article 7 and 8 ECFR,[82] and considered that the retention of data was "*appropriate*" to attain the objective pursued by Directive 2006/24, *i.e.* to contribute to the fight against serious crime and thus, ultimately, to public

[74] ECtHR, app. n°14038/88, *Soering v United Kingdom* [1989], para. 89; ECtHR, app. n°7151/75 and n°7152/75, *Sporrong and Lönnroth v Sweden* [1982], para. 69.
[75] CJEU, *Sky Österreich GmbH v Österreichischer Rundfunk*, cited above note 53, para. 50.
[76] *Ibid.*
[77] For a complete analysis of the *Sky Österreich* case, see Benedikt PIRKER, "Case C-283/11 *Sky Österreich:* Taking Proportionality Seriously", *European Law Blog*, 29 January 2013, available at http://europeanlawblog.eu/?p=1496 (consulted on 28th January 2016). For more cases where the CJEU examines proportionality, see, among others: CJEU, case C-343/09, *Afton Chemical Limited v Secretary of State for Transport* [2010], ECR I-7027, para. 45; CJUE, *Volker und Markus Schecke and Eifert* , cited above note 55, para. 74; CJEU, case C-581/10 and C-629/10, *Emeka Nelson and Others v Deutsche Lufthansa AG and TUI Travel plc and Others v Civil Aviation Authority* [2012], para. 71; CJEU, case C-101/12, *Herbert Schaible v Land Baden-Württemberg* [2013], para. 46.
[78] CJEU, *Sky Österreich GmbH v Österreichischer Rundfunk*, cited above note 53, para. 53.
[79] *Ibid.* para. 57.
[80] Tor-Inge HARBO, cited above note 62, p. 165.
[81] See CJEU, *Sky Österreich GmbH v Österreichischer Rundfunk*, cited above note 53, paras 62-65. See also Benedikt PIRKER, cited above note 77.
[82] CJEU, case C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [2014]. For an analysis on this topic, see Orla LYNSKEY, "Joined Cases C-293/12 and 594/12 Digital Rights Ireland and Seitlinger and Others: The Good, the Bad and the Ugly", *European Law Blog,* 8 April 2014, available at http://europeanlawblog.eu/?p=2289 (consulted on 28th January 2016).

security.[83] Then, it analyzed the necessity of the retention and recalled that "*limitations in relation to the protection of personal data must apply only in so far as is strictly necessary*".[84] On this point, the CJEU recognized that the Directive 2006/24 entailed a serious interference with the fundamental rights enshrined in Articles 7 and 8 ECFR without such an interference being circumscribed by provisions to ensure that it is limited to what is strictly necessary.[85] Once the CJEU stated that the EU directive was unnecessary, the directive was declared invalid and, therefore, the court did not have to examine the proportionality *stricto sensu* of the limitation.

In both cases, the CJEU addressed the issue of proportionality in situations involving specific ECFR rights corresponding to rights guaranteed by the ECHR. Indeed, following the list of correspondence included in the explanations relating to the ECFR, Articles 7 and 11 ECFR – and therefore their limitations – should correspond respectively to Articles 8 and 10 ECHR.[86] However, the CJEU tends to adopt a different interpretation of the condition of proportionality according to the area in which the alleged fundamental rights violations occurred.

Indeed, from an EU perspective, the CJEU adopts a different interpretation when examining an EU regulation or a regulation of a Member States impacting upon fundamental rights. In the first scenario, as showed in the *Sky Österreich* case, the CJEU takes a broad point of view and would only consider a measure disproportionate if it is "*manifestly inappropriate*" to achieve the objective.[87] However, when assessing the proportionality of a national measure, the court adopts a narrow interpretation and will already declare a measure disproportionate if "*less restrictive measures*" existed.[88] In addition to this different way of interpreting the proportionality condition depending of the origin of the regulation impacting on fundamental rights, the CJEU also reserves itself the possibility to interpret this condition in different way depending on the ECFR right concerned.

Indeed, in the *Sky Österreich* case, this courts declared that "*in the light of the wording of Article 16 of the Charter […] the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest*"[89] and precised that *"[t]hat circumstance is reflected, inter alia, in the way in which Article 52(1) of the Charter requires the principle of proportionality to be implemented*".[90] As Steve PEERS and Sacha

[83] CJEU, *Digital Rights Ireland Ltd*, cited above note 82, para. 49: "*Consequently, the retention of such data may be considered to be appropriate for attaining the objective pursued by that directive*".
[84] *Ibid.* para. 52.
[85] *Ibid.* para. 65.
[86] For further considerations on the "*correspondance*" between two fundamental rights, see the references cited above note 42.
[87] Tor-Inge HARBO, cited above note 62, p. 172.
[87] Takis TRIDIMAS, *General Principle of EU law*, 2nd edn, Oxford, Oxford University Press, 2006, chapter 3.
[88] *Ibid.*
[89] Para. 46.
[90] Para. 47.

PRECHAL mention it, "*the Court of Justice suggested that there might be different types of proportionality review, depending on the type of Charter right at issue*".[91]

From what has already been examined, one may conclude that, contrary to its interpretation regarding the "*provided for by law*" condition, the CJEU seems to be open to considering the ECtHR's case law on the "*necessary in a democratic society*" condition when assessing the "*proportionality*" condition set in the ECFR. However, the CJUE shows a willingness to preserve its autonomy by reserving itself the possibility of modulating its interpretation of the proportionality condition. This demonstrates strong differences of approach of the CJEU when enacting dialogue with the ECtHR which render necessary, in my view, the development various tools able to ensure the principle of consistency and, therefore, a high level of protection in Europe.

B. Some proposals for improvement

With regards to the conditions of justification of fundamental rights limitations, I argue that the respect of the principle of consistency between the case law of the CJEU and the ECtHR might be ensured in an effective way by more systematic references between these courts. From an EU point of view, I consider that the interpretation of the two conditions of justification of fundamental rights limitations cited above could be rendered consistent with the case law of the ECtHR if the CJEU were to agree to make express references to the latter (1). In the long term, moreover, I argue that the best solution to ensure such consistency and improve the level of protection of fundamental rights could be the accession of the EU to the ECHR and, as a consequence of this accession, the fact that the CJEU's decisions would be subjected to the control of the ECtHR (2).

1. The systematic use of references

Regarding the "*provided for by law*" condition, the actual case law of the CJEU is quite vague, and should be clarified in order to prevent any risks of diverging interpretation with the ECtHR's case law. To this end, the CJEU should make explicit references to those elements of the ECtHR case law which explain the meaning of this condition, *i.e.* the "*accessibility*" and "*precision*" criteria that a legal basis should fulfill in order to justify a limitation to a fundamental right. On this point it should be observed that, in its recent case law, the CJEU has shown some willingness to analyze the quality of the legal basis at stake,[92] therefore

[91] Steve PEERS, Sacha PRECHAL, cited above note 43, p. 1484.

[92] CJUE, case C-419/14, *WebMindLicenses Kft. v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság*, [2015], not yet published, para. 81: "*In that regard, the requirement that any limitation on the exercise of that right must be provided for by law implies that the legal basis which permits the tax authorities to use the evidence referred to in the preceding paragraph must be sufficiently clear and precise […]*".

getting a step closer to the ECtHR's case law; the next step being, in my view, to make explicit and systematic reference to it.

Regarding the proportionality condition, the CJEU has gone a step further and has entered into a dialogue with the ECtHR, in *Digital Rights Ireland,* by quoting *S. and Marper v United Kingdom.*[93] On this point, even if the CJEU did not endorse the reasoning of the ECtHR on the "*necessary in a democratic society*" condition when interpreting the "*proportionality*" condition of the ECFR, it ended by applying materially similar criteria. Indeed, the "*appropriate*" and "*necessary*" character of limitative measures can also be found in the ECtHR case law, as shown in *S. and Marper v United Kingdom.* Moreover, as previously argued, the principle of consistency should not concern the inferences at the basis of the reasoning of both courts, but the meaning of the various conditions of justification of fundamental rights limitations. That is, regarding the "*provided for by law*" condition, the criteria of "*accessibility*" and "*precision*" of the legal basis and, regarding the "*proportionality*" condition, the "*appropriate*" character of the measure, among other criteria.

In situations such as those outlined above where the results of cases concerning corresponding rights were similar between the CJEU and the ECtHR, but where their respective manner of interpreting the conditions of limitation differed, I argue that it is in the interest of both the transparency of the case law, on one hand, and the protection of individual rights at the European level, on the other hand, that the CJUE adopts a more systematic approach. In other words, from an EU perspective, the CJEU should enact real and effective dialogue, as mentioned in the joint communication and as recalled in Article 52 (3) ECFR, in order to ensure consistency between both bodies of case law.

2. The EU accession to the ECHR

The perspective of the EU accession of the ECHR may substantially improve the consistency between the ECHR and the ECFR in the context of the limitations of fundamental rights. After the accession, the relevance of Article 52 (1) ECFR will be diminished as the EU will formally be bound by the ECHR and the case law of the ECtHR. The ECtHR will indeed become the last jurisdiction of control of the application of both the ECHR and the ECFR and will be allowed to review the decisions of the CJEU.

Therefore, regarding the "*provided for by law*" condition, the accession may somehow encourage the CJEU to make more systematic reference to the case law of the ECtHR in order to discourage any potential recourse against its decisions before the ECtHR and, should it be the case, any divergences between their respective case law. The same thing may be said concerning the "*proportionality*" condition, even if the CJUE tries to maintain a certain level

[93] CJEU, *Digital Rights Ireland Ltd*, cited above note 82, para. 47.

of autonomy when interpreting this condition. After the accession, decisions where the CJEU reserves itself the possibility of modulating its interpretation of one condition of justification of fundamental rights limitations, as in the *Sky Österreich* case, should not be possible anymore.

On this point, even if in its recent opinion 2/13,[94] the CJEU strongly emphasizes the importance of respect for the autonomy of EU law and its specific nature, I argue that one needs to distinguish between the various areas of EU law concerned. After the accession, in cases where fundamental rights are involved, a consistency – in the sense previously defined – is needed between the case law of the CJEU and the ECtHR, which do not prevent however the former court to developed different interpretation in other areas of EU law. For instance, the "*proportionality*" condition is also known as a general principle of EU law and should be respected, among others, when the EU institutions or Member States respectively apply or implement measures related to the four freedoms of movement. However, it is well known that the CJEU interprets the proportionality requirement of a measure in significantly diverging manners in cases concerning, respectively, fundamental rights or the four freedoms of movement.[95]

This situation should not be seen as problematic, as long as when fundamental rights are concerned, the CJEU implements the required consistency with the ECtHR's case law. Indeed once the ECtHR becomes the last jurisdiction allowed to review the decisions taken by the CJEU, I argue that the former court may be willing to minimize the risks of diverging interpretation of the conditions of justification of fundamental rights limitations and, as a consequence, the reservation of the possibility of diverging interpretation made by the CJEU in the *Sky Österreich* case, would not be tolerated any more, but would remain acceptable in other areas of EU law.

Conclusion

The main argument of the present contribution, *i.e.* that the CJEU should enter into a more systematic dialogue with the ECtHR when interpreting the conditions of justification of fundamental rights limitations contained in the ECFR, relies on the assumption that a legal interpretative principle of consistency – enshrined in the ECFR and its explanations – invite it to proceed in such way. However, one should keep in mind that this dialogue might face difficulties linked to the nature of the EU and to the specific division of competences it encompasses.

[94] CJEU, Opinion 2/13 of 18 December 2014 on the compatibility of the draft agreement with the EU and FEU Treaties.
[95] On this point, see the recent dissertation of Antonio Marzal YETANO, *La dynamique du principe de proportionnalité. Essai dans le contexte des libertés de circulation de l'Union européenne*, Paris, LGDJ, 2004, available at https://tel.archives-ouvertes.fr/tel-01085669 (consulted on 28 January 2016).

Moreover, it must be kept in mind that the above-mentioned case law cannot be fully representative of the way both courts assess the conditions of limitation provided in the ECHR and in the ECFR. Indeed, the CJEU's case law, in particular, is not always systematic and is far from being transparent. Nevertheless, in my opinion, one possibility to ensure quickly and effectively the consistency between the case law of both courts in the interpretation of fundamental rights limitations is for the CJEU to take more into consideration the ECtHR case law by making explicit and systematic reference to it when interpreting Article 52 (1) ECFR. Therefore, there is no need for the CJEU to wait for the EU to be bound by the ECHR after the accession process in order to improve such consistency.

* * *

List of abbreviations

app.	application
Art.	Article
CJEU	Court of Justice of the European Union
comp(s)	compiler(s)
ECFR	Charter of Fundamental Rights of the European Union
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECR	European Court Report
ECtHR	European Court of Human Rights
edn	edition
ed(s)	edited by / editors
e.g.	for example
EU	European Union
f. / ff.	and the following
ibid.	in the same place
id.	the same
i.e.	that is
n°	number
OSCE	Organization for Security and Cooperation in Europe
p. /pp.	page(s)
para(s)	paragraph(s)
TUE	Treaty on European Union
v	against
Vol.	volume

Bibliography

Books

ALEXY Robert, *A Theory of Constitutional Rights*, traduced by Julian Rivers, Oxford, Oxford University Press, 2002.

ALEXY Robert, *On the Structure of Legal Principles*, Ratio Juris, Vol. 13, 2000, pp. 294-304.

AMAYA Amalia, *Ten Theses on Coherence and Law*, Working papers series, 21 May 2012, available at: http://dx.doi.org/10.2139/ssrn.2064295 (consulted on 28th January 2016).

BARNARD Catherine, PEERS Steve (eds), *European Union Law*, Oxford, Oxford University Press, 2014.

BESSON Samantha, *The Human Rights Competences in the EU. The State of the Question after Lisbon*, in Georg Kofler, Miguel Poiares Maduro, Pasquale Pistone (eds), "Human Rights and Taxation in Europe and the World", Amsterdam, IBFD, 2011, pp. 37-63.

BESSON Samantha, *The Morality of Conflict. Reasonable Disagreement and the Law*, Oxford, Portland, Hart Publishing, 2005.

BESSON Samantha, *From European Integration to European Integrity: Should European Law Speak with Just One Voice?*, European Law Journal, Vol. 10, n°3, 2004, pp. 257-281.

BLUMANN Claude, *Les compétences de l'Union européenne en matière de droits de l'homme*, Revue des affaires européennes, Vol. 14, 2006, pp. 11-30.

BOROWSKY Martin, *Artikel 52*, Jürgen Meyer (ed), "Charta der Grundrechte der Europäischen Union", 3rd edn, Baden-Baden, Nomos, 2011, pp. 667-705.

BOSSE-PLATIÈRE Isabelle, *L'article 3 du traité UE : recherche sur une exigence de cohérence de l'action extérieure de l'Union européenne*, Bruxelles, Bruylant, 2009.

BRAIBANT Guy, *La Charte des droits fondamentaux de l'Union européenne*, Paris, Editions du Seuil, 2001.

BURGORGUE-LARSEN Laurence, *Article II-112*, in Laurence Burgogue-Larsen, Anne Levade, Fabrice Picod (comps), « Traité établissant une Constitution pour l'Europe. Commentaire article par article », Vol. 2, pp. 658-688.

COLELLA Stéphanie U., *Les justifications des mesures portant atteinte à l'interdiction des discriminations dans l'UE. Vers une (ré-)conciliation entre la Charte et la CEDH?*, in Samantha Besson, Andreas Ziegler (eds), "Equality and Non-Discrimination in International and European Law", Geneva, Zurich, Basel, Schulthess, 2014, pp. 37-54.

COLELLA Stéphanie U., *Des droits de la Charte correspondant aux droits de la CEDH ? Quelques réflexions sur l'article 52 (3) de la Charte*, in Samantha Besson, Nicolas Levrat (eds), "L'Union européenne et le droit international", Geneva, Zurich, Basel, Schulthess, 2015, pp. 179-198.

COSTA Jean-Paul, *The European Court of Human Rights and Its Recent Case Law*, Texas International Law Journal, Vol. 38, 2002, pp. 455-468.

DWORKIN Ronald, *Taking Rights Seriously*, London, Bloomsbury, 2011.

EECKHOUT Piet, *The EU Charter and the Federal Question*, Common Market Law Review, Vol. 39, 2002, pp. 945-994.

GERARDS Janneke, *How to improve the necessity test of the European Court of Human Rights*, International Journal of Constitutional Law, 2013, Vol. 1, pp. 466-490.

GÖRANZON Bo, FLORIN Magnus, SÄLLSTRÖM Pehr, *The Concept of Dialogue*, AI and Society, Journal Knowledge, Culture and Communication, Vol. 2, 1988, pp. 279-286.

GREER Steven, *The exceptions to Articles 8 to 11 of the European Convention on Human Rights*, Strasbourg, Council of Europe Publishing, 1997.

GUASTINI Riccardo, *Les principes de droit en tant que source de perplexité théorique*, in Sylvie Caudal (comp), "Les principes en droit", Paris, Economica, 2008, pp. 113-123.

HARTLEY Trevor, *The Foundation of European Union Law*, 7th ed., Oxford, Oxford University Press, 2010.

HARBO Tor-Inge, *The Function of Proportionality Principle in EU Law*, European Law Journal, Vol. 16, pp. 158-185.

HARMSEN Robert, *National Responsibility for European Community Acts under the European Convention on Human Rights: Recasting the Accession Debate*, European Public Law, Vol. 7, 2001, pp. 625–649.

JACOBS Francis, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice*, Texas International Law Journal, Vol. 38, 2002, pp. 547-556.

JACQUÉ Jean Paul, *La protection des droits fondamentaux dans l'Union européenne après Lisbonne,* L'Europe des Libertés, n° 26, 2008, pp. 2-12.

KNOOK Allard, *The Court, the Charter, and the Vertical Division of Powers in the European Union*, Common Market law Review, Vol. 42, 2005, pp. 367-398.

KOKOTT Juliane, *Report on Germany*, in Anne-Marie Slaughter, Alec Stone Sweet, Joseph WEILER (eds), "The European Court and National Courts, Doctrine and Jurisprudence. Legal Change in its Social Context", Oxford, Hart Publishing, 1998, pp. 77-131.

LAWSON Rick, *Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg*, in Rick Lawson, Mathijs de Blois (eds.), "The Dynamics of the Protection of Human Rights in Europe - Essays in Honour of Professor Henry G. SCHERMERS", Vol. 3, Dordrecht, Boston, London, Martinus Nijhoff Publishers, 1994, pp. 219-252.

LYNSKEY Orla, *Joined Cases C-293/12 and 594/12 Digital Rights Ireland and Seitlinger and Others: The Good, the Bad and the Ugly*, European Law Blog, 8 April 2014, available at http://europeanlawblog.eu/?p=2289 (consulted on 28th January 2016).

MACCORMICK Neil, *Legal Rights and Social Democracy*, Oxford, Clarendon Press, 1982.

MATHISEN Gjermund, *Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement*, Common Market Law Review, Vol. 47, 2010, pp. 1021-1048.

MURENZI Stéphanie, *La cohérence dans le raisonnement des juges européens*, in Samantha Besson, Andreas Ziegler (eds.), "Le juge en droit européen et international", Geneva, Zurich, Basel, Schulthess, 2013, pp. 173-192.

PEERS Steve, PRECHAL Sacha, *Article 52*, in Steve Peers *et al.* (eds.), "The EU Charter of Fundamental Rights – A Commentary", Oxford, Portland, Hart Publishing, 2014, pp. 1455-1521.

PIRKER Benedikt, *Case C-283/11 Sky Österreich: Taking Proportionality Seriously*, European Law Blog, 29 January 2013, available at http://europeanlawblog.eu/?p=1496 (consulted on 28th January 2016).

PUTNAM Hilary, *Reason, Truth and History*, Cambridge, Cambridge University Press, 1985.

RAZ Joseph, *Legal Principles and the Limits of Law*, Yale Law Journal, Vol. 81, 1972, pp. 823-854.

RAZ Joseph, *On the Nature of Rights*, Mind, Vol. 93, 1984, pp. 194-214.

RAZ Joseph, *The Morality of Freedom*, Oxford, Oxford University Press, 1986.

RENUCCI Jean-François, *Traité de droit européen des droits de l'homme*, Paris, LGDJ, 2007.

ROSAS Allan, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue,* European Journal of Legal Studies, Vol. 1, 2007, pp. 1-16.

SPIELMANN Dean, *Jurisprudence des juridictions de Strasbourg et de Luxembourg dans le domaine des droit de l'homme : conflits, incohérences et complémentarités*, in Philip Alston (dir), "L'Union européenne et les Droits de l'Homme", Bruxelles, Bruylant, 2001, pp. 789-812

TINIÈRE Romain, *La cohérence assurée par l'article 52 § 3 de la Charte des droits fondamentaux de l'Union. Le principe d'alignement sur le standard conventionnel pour les droits correspondants*, in Caroline Picheral, Laurent Coutron (comps), "Charte des droits fondamentaux de l'Union européenne et Convention européenne des droits de l'homme", Bruxelles, Bruylant, 2012, pp. 3-19.

TIETJE Christian, *The Concept of Coherence in the Treaty on the European Union and the Common Foreign and Security Policy*, European Foreign Affairs Review, Vol. 2, 1997, pp. 211-233.

TRIDIMAS Takis, *General Principle of EU Law*, 2nd ed., Oxford, Oxford University Press, 2006.

TÜMAY Murat, *The Concept of "Necessary in a Democratic Society" in Fundamental Rights. A Reflection from European Convention on Human Rights*, Human Rights Review, Vol. I, pp. 1-15.

TUSSEAU Guillaume, *Métathéorie de la notion de principe dans la théorie du droit contemporaine. Sur quelques écoles de définition des principes*, in Sylvie Caudal (comp), "Les principes en droit", Paris, Economica, 2008, pp. 75-112.

WEILER Joseph, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities*, Washington Law Review , Vol. 61, 1986, pp. 1103-1142.

WETZEL Joseph, *Improving Fundamental Rights Protection in the European Union : Resolving the Conflicts and Confusion Between the Luxembourg and Strasbourg Courts Justice*, Fordham Law Review, Vol. 71, 2003, pp. 2823-2862.

YETANO Antonio Marzal, *La dynamique du principe de proportionnalité. Essai dans le contexte des libertés de circulation de l'Union européenne*, Paris, LGDJ, 2004, available at https://tel.archives-ouvertes.fr/tel-01085669 (consulted on 28 January 2016

Case of the CJEU

CJEU, case C-46/87 and C-227/88, *Hoechst v Commission* [1989], ECR I-2859, ECLI:EU:C:1989:337.

CJEU, case C-85/87, *Dow Benelux v Commission* [1989], ECR I-3137, ECLI:EU:C:1989:379.

CJEU, case C-97/87, C-98/87 and C-99/87, *Dow Chemical Ibérica and Others v Commission* [1989], ECR I-3165, ECLI:EU:C:1989:380.

CJEU, case C-374/87, *Orkem v Commission* [1989], ECR I-3283, ECLI:EU:C:1989:387.

CJEU, case C-168/91, *Konstantinidis v Stadt Altensteig-Standesamt* [1993], ECR 1-1191, E-CLI:EU:C:1993:115.

CJEU, case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007], ECR I-10779, ECLI:EU:C:2007:772.

CJUE, case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007], ECR I-11767, ECLI:EU:C:2007:809.

CJEU, case C-400/10 PPU, *J. McB. v L. E.* [2010], ECLI:EU:C:2010:582.

CJEU, case C-407/08 P, *Knauf Gips KG v European Commission* [2010], ECR I-I-6375, ECLI:EU:C:2010:389.

CJEU, case C-343/09, *Afton Chemical Limited v Secretary of State for Transport* [2010], ECR I-7027, ECLI:EU:C:2010:419.

CJEU, case C-92/09 and C-93/09, *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen* [2010], ECR I-11063, ECLI:EU:C:2010:662.

CJEU, case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL et al. v Conseil des ministres* [2011], ECR I-773ECLI:EU:C:2011:100.

CJEU, case C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011], ECR I-11959, ECLI:EU:C:2011:771.

CJEU, case T-132/07, *Fuji Electric Co. Ltd v Commission européenne* [2011], ECR II-4091, ECLI:EU:T:2011:344.

CJEU, case C-581/10 and C-629/10, *Emeka Nelson and Others v Deutsche Lufthansa AG and TUI Travel plc and Others v Civil Aviation Authority* [2012], ECLI:EU:C:2012:657.

CJEU, case T-360/10, *Tecnimed Srl v Office de l'harmonisation dans le marché intérieur (marques, dessins et modèles) (OHMI)* [2012], ECLI:EU:T:2012:517.

CJUE, case T-187/11, *Mohamed Trabelsi and Others v Council of the European Union* [2013], ECLI:EU:T:2013:273.

CJEU, case C-101/12, *Herbert Schaible v Land Baden-Württemberg* [2013], ECLI:EU:C:2013:661.

CJEU, case C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk* [2013], CLI:EU: C:2013:28.

CJEU, case C-399/11, *Melloni v Ministerio Fiscal* [2013], ECLI:EU:C:2013:107.

CJEU, case C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [2014], ECLI: EU:C:2014:238.

CJEU, Opinion 2/13 of 18 December 2014 on the compatibility of the draft agreement with the EU and FEU Treaties, [2014], ECLI:EU:C:2014:2454.

CJUE, case C-419/14, *WebMindLicenses Kft. v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság*, [2015], ECLI:EU:C:2015:832.

Cases of the ECtHR

ECtHR, app. n°6538/74, *Sunday Times v United Kingdom* [1979] ECLI:CE:ECHR:1979:0426 JUD000653874.

ECtHR, app. n°7151/75 and n°7152/75, *Sporrong and Lönnroth v Sweden* [1982], ECLI:CE: ECHR:1984:1218JUD000715175.

ECtHR, app. n°8225/78, *Ashingdane v United Kingdom* [1985], ECLI:CE:ECHR:1985:0528 JUD000822578

ECtHR, app. n°9532/81, *Rees v United Kingdom* [1986], ECLI:CE:ECHR:1986:1017 JUD000953281.

ECtHR, app. n°14038/88, *Soering v United Kingdom* [1989], ECLI:CE:ECHR:1989:0707 JUD001403888.

ECtHR, app. n°13585/88, *Observer and Guardian v United Kingdom* [1991], ECLI:CE:ECHR: 1991:1126JUD001358588.

ECtHR, app. n°13710/88, *Niemietz v Germany*, [1992], ECLI:CE:ECHR:1992:1216 JUD001371088.

ECtHR, app. n°13343/87, *B. v France* [1992], ECLI:CE:ECHR:1992:0325JUD001334387

ECtHR, app. n°10828/84, *Funke v France*, [1993], ECLI:CE:ECHR:1993:0225 JUD001082884.

ECtHR, app. n°28541/95, *Pellegrin v France* [1999], ECLI:CE:ECHR:1999:1208 JUD002854195.

ECtHR, app. n°29221/95 and 29225/95, *Stankov and United Macedonian Organisation ilinden v Bulgaria* [2001], ECLI:CE:ECHR:2001:1002JUD002922195.

ECtHR, app. n°6339/05, *Evans v United Kingdom* [2007], ECLI:CE:ECHR:2007:0410 JUD000633905.

ECtHR, app. n°44362/04, *Dickson v United Kingdom* [2007], ECLI:CE:ECHR:2007:1204 JUD004436204.

ECtHR, app. n°30562/04 and n°30566/04, *S. and Marper v United Kingdom* [2008], ECLI:CE: ECHR:2008:1204JUD003056204.

Other

COSTA Jean Paul, SKOURIS Vassilios, *Joint communication from Presidents Costa and Skouris*, dated 24 January 2011, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf (consulted on 28th January 2016)

OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS (OSCE), *Legal Digest of International Fair Trial Rights*, Poland 2012, Press of the OSCE

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