The Charter of Fundamental Rights of the European Union as a factor affecting the 'European consensus' notion (the example of *'due process'* rights)

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Summary: The Charter of Fundamental Rights of the European Union can be seen as an instrument to defend the EU legal order autonomy which facilitated the creation of the EU independent standards in the area of Human Rights protection. Nevertheless, the possible effects of the CFREU on the 'European consensus' notion have been largely understudied, although the European Union includes the majority of the European Convention on Human Rights signatories (namely 28 of 47). The aim of this paper is to explore the possible effects of the EU Charter on the notion of 'European consensus', given the incredible uncertainty surrounding this issue. The author proposes to use a group of the so-called *'due process'* rights for a case study, due to their crucial importance for the Council of Europe and EU systems of Human Rights protection functioning. To illustrate the impact of the EU Charter *'due process'* provisions on the 'European consensus' notion, an attempt is made to analyse the European Court of Human Rights jurisprudence employing the Charter as a criterion of the 'European consensus' with a special emphasis on Arts. 6, 7, 13 ECHR and Art. 4 of Protocol No. 7 ECHR. The claim of this paper is that both the corresponding EU Charter provisions (Arts. 47-50) and the EU Charter-based jurisprudence of the Court of Justice of the European Union are quite capable of *(as a minimum)* putting the European consensus under the question or *(as a maximum)* inspiring the European Court of Human Rights to follow the EU standards. Importantly, the ECtHR tends to apply the CFREU provisions and pertinent CJEU case-law not only to raise the level of Human Rights protection in accordance with Art. 52(3) CFREU, but also to transpose the EU-specific derogations from the European Convention standards on the basis of Art. 52(1) CFREU. Arguably, these trends may be explained by the ECtHR's willingness to avoid the conflicts with European Law due to the growing EU Human Rights' acquis which is being developed through the CJEU case-law after the Treaty of Lisbon entry into force.

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1. Introduction

The 'European consensus' is a concept used by the European Court of Human Rights (further – the ECtHR, the Strasbourg Court) in order to apply evolutive interpretation of the European Convention on Human Rights (further – the ECHR, the European Convention) and to keep the meaning of the ECHR rights both contemporary and effective.[1] The ECtHR summarised this interpretative technique as follows: '…The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The *consensus emerging from specialised international instruments and from the practice of Contracting States* may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases ... It will be sufficient for the Court that the relevant international instruments denote a *continuous evolution* in the norms and principles applied in international jaw or in the domestic law of the *majority of member States of the Council of Europe* and show, in a precise area, that there is *common ground* in modern societies'.[2]

Bearing in mind the interpretation given by the Strasbourg Court, there is no doubt that the Charter of Fundamental Rights of the European Union (further – the CFREU, the EU Charter) has a significant potential as a factor affecting the 'European consensus' notion. At present, the European Union includes the *majority* of the ECHR signatories (namely 28 of 47), and has a great *harmonising effect* within the national legal orders of the EU Member States[3] due the

1 DZEHTSIAROU, Kanstantsin. European Consensus and the Evolutive Interpretation of the European Convention on Human Rights. *German Law Journal*, 2011, vol. 12, no. 10, p. 1730-1733.

2 *Demir and Baykara v. Turkey,* The European Court of Human Rights (2008, no. 34503/97), paras. 85-86.

3 In that sense, see for example SCHÜTZE, Robert. An Introduction to European Law. Cambridge: Cambridge University Press, 2015, p. 88; ARNULL, Anthony, CHALMERS, Damian (eds). The Oxford Handbook of European Union Law. Oxford: Oxford University Press, 2015, p. 209; JUNGE, Fabian. Maximum Harmonization by Directives Itselves. Groningen: GRIN Verlag, 2013, pp. 3-15; HUSABØ, Erling, Johannes, STRANDBAKKEN, Asbjørn. Harmonization of Criminal Law in Europe. Antwerpen: Intersentia, 2005, pp. 79-83.

primacy[4] and *direct effect* of the European Law.[5] The EU Charter is traditionally described as the contemporary 'Bill of Rights developed explicitly for the European Union'[6] and the document that 'constitutes the expression, at the highest level, of a democratically established political consensus of what must today be considered as the catalogue of [the EU] fundamental rights guarantees'.[7] The binding legal force of the CFREU granted by the Treaty of Lisbon facilitated the creation of autonomous standards of Human Rights protection within the EU legal order, due to the increased use of the Charter provisions by the Court of Justice of the European Union[8] (further – the CJEU, the EU Court of Justice). The CJEU *Opinion 2/13* precluding the EU from accession to the ECHR in the near future and the 'survival' of the *Bosphorus* presumption[9] preventing the Strasbourg Court from the review of EU legislation will arguably contribute to the development of this trend. Although the European Court of Human Rights case-law referring to the CFREU and the Charter-based jurisprudence of the EU Court of Justice is quite voluminous, possible effects of the EU Charter provisions on the 'European consensus' have not been studied extensively. The aim of this paper is to explore the possible effects of the CFREU on the notion of 'European consensus', given the incredible uncertainty surrounding this issue.

The group of the so-called *'due process'* rights captured by Arts. 6 ('right to a fair trial'), 7 ('no punishment without law'), 13 ('right to an effective

4 Flaminio Costa v E.N.E.L., The Court of Justice of the European Union (1964, Case 6-64), *Internationale Handelsgesellschaft* mbH *v. Einfur- und Vorratstelle für Getreide und Futtermittel,* The Court of Justice of the European Union (1970, Case 11/70).

5 *Van Gend en Loos v Nederlandse Administratie der Belastingen,* The Court of Justice of the European Union (1963, Case 26/62).

6 ZETTERQUIST, Ola. The Charter of Fundamental Rights and the European Res Publica, in DI FEDERICO Giacomo (ed). The EU Charter of Fundamental Rights*: From Declaration to Binding Instrument*. Heidelberg: Springer, 2010, p. 3.

7 *Booker Aquaculture and Hydro Seafoods v Scottish Ministers* (2003, Opinion of AG Mischo *in Joined Cases C-20/00* & *C-64/00*), para. 126.

8 In that sense, see for example *DE BÚRCA*, *Gráinne*. After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator? *Maastricht Journal of European and Comparative Law*, 2013, no. 20, pp. 168-172; DOUGLAS-SCOTT, Sionaidh. The European Union and Human Rights after the Treaty of Lisbon. *Human Rights Law Review,* 2011, no. 4, pp. 645, 649; EECKHOUT Piet. Human Rights and the Autonomy of EU Law: Pluralism or Integration? *Current Legal Problems*, 2013, no. 66, pp. 169, 184-185; AUGENSTEIN, Daniel. Engaging the Fundamentals: On the Autonomous Substance of EU Fundamental Rights Law. *German Law Journal*, 2013, vol. 14, no. 10, pp. 1917, 1919; HAMULAK, Ondrej. Idolatry of Rights and Freedoms – Reflections on the Autopoietic Role of Fundamental Rights Within Constitutionalization of the European Union, Chapter in KERIKMAE, Tanel (ed). *Protecting Human Rights in the EU: Controversies and Challenges of the Charter of Fundamental Rights*. Heidelberg: Springer, 2013, pp. 190-191.

9 *Avotiņs v. Latvia,* The European Court of Human Rights (2016, App. no. 17502/07).

remedy') and Art. 4 of Protocol No. 7 ECHR ('right not to be tried or punished twice') was chosen for this study for the following reasons. The *'due process'* rights occupy a central position in the Council of Europe system of Human Rights protection due to their importance for realisation of the individual's substantive rights stemming from the European Convention, and therefore remain the procedural provisions most frequently invoked by the parties before the European Court of Human Rights.[10] However, the EU *'due process'* rights (captured by Arts. 47-50 of the EU Charter) are also crucial for proper functioning of the EU's internal market and often applied in conjunction with other CFREU rights drafted specifically for the EU legal order.[11] In view of different aims of the European Union and the Council of Europe (economic integration in the case of the EU and the protection of the individual for the CoE system), the risk of diverging interpretations of corresponding provisions of the CFREU and the ECHR is higher than in other areas of overlap – which can lead to unpredictable Charter effects on the 'European consensus' notion.

The claim of this paper is that both the corresponding CFREU provisions (Arts. 47-50) and pertinent case-law of the EU Court of Justice are quite capable of (*as a minimum*) putting the 'European consensus' under the question or (*as a maximum*) inspiring the Strasbourg Court to follow the EU standards of Human Rights protection. It will be argued that the ECtHR tends to apply the EU Charter provisions and pertinent CJEU case-law not only to raise the level of protection in accordance with Art. 52(3) CFREU, but also to transpose the EU-specific derogations from the European Convention standards on the basis of Art. 52(1) CFREU.[12] This strategy might be explained by the Strasbourg Court's willingness to avoid possible conflicts with European Law due to the growing EU Human Rights' *acquis* which is being developed through the CJEU case-law after the Treaty of Lisbon entry into force. The situation, however, turns out to be quite challenging since as many as 19 of the European Convention signatories do not currently participate in the European Union. Thus, the non-EU Council of Europe Members are arguably exposed to the risk of being forced to follow the legal standards developed within the EU legal order, which they either chose not to join or were not allowed to join.

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[10] VITKAUSKAS, Dovydas, DIKOV Grigoriy. Protecting the right to a fair trial under the European Convention on Human Rights. Strasbourg: Council of Europe, 2012, pp. 7-8.

[11] Such as, for example, Art. 15 ('Freedom to choose an occupation and right to engage in work'), Art. 16 ('Freedom to conduct a business'), Art. 17 ('Right to property') of the Charter of Fundamental Rights of the European Union.

[12] *Charter of Fundamental Rights of the European Union*, Official Journal of the European Union *(2010, OJ C83/02).*

To illustrate these developments, *firstly*, an attempt is made to analyse the Strasbourg Court's jurisprudence employing the EU Charter provisions as a criterion of the 'European consensus' before the Treaty of Lisbon, with a special emphasis on Arts. 6, 7 ECHR and Art. 4 of Protocol No. 7 ECHR. *Secondly*, this paper elaborates on existing Strasbourg case-law using the CFREU and the CJEU jurisprudence developed on the basis of Arts. 47-50 of the EU Charter, after the Treaty of Lisbon entry into force. The concluding part of the paper is devoted to the possible future impact of Arts. 52(3) and 52(1) CFREU on the notion of 'European consensus' in the area of *'due process'* rights, considering the possible after-effects on the European Convention signatories. The author does not claim to provide an exhaustive analysis of the CFREU effects on the 'European consensus', but rather to focus on the specific area of *'due process'* rights – to demonstrate if and how possible divergences between the ECHR and the EU Charter interpretation may be reflected within the Strasbourg Court's jurisprudence employing the 'European consensus' interpretative tool.

2. The Strasbourg Court before the Treaty of Lisbon: Art. 52(3) CFREU & 'European consensus'

The provisions of Art. 52(3) provide that the EU Charter rights derived from the ECHR must be interpreted *consistently* with the Convention. However, the additional clause of Art. 52(3) does not prevent Union law from providing *more extensive protection* in comparison with the ECHR and the ECtHR case-law, in light of the 'autonomy' of EU Law and the EU Court of Justice, which the ECHR's limitation rules cannot 'adversely affect.'[13] Historically, the second sentence of Art. 52(3) CFREU was considered a tool to upgrade the ECHR level of guarantees, especially on the basis of '… some articles of the Charter which, although based on the ECHR, go beyond the ECHR because Union law *acquis* had already reached a higher level of protection.' The *'due process'* rights, with a special emphasis on the 'right to an effective remedy and to a fair trial' (Art. 47 CFREU) and the 'right not to be tried or punished twice in criminal proceedings for the same criminal offence' (Art. 50 CFREU), have been seen as providing more extensive protection in comparison with corresponding Convention

[13] Explanations relating to the Charter of Fundamental Rights, Official Journal of the European Union (2007, OJ C303/02), explanatory note concerning Art. 52.

provisions in accordance with Art. 52(3) of the CFREU [14] – which later has been mirrored in the Strasbourg Court jurisprudence.

One can contend that the early European Court of Human Rights jurisprudence indicated the trend to apply pertinent CFREU *'due process'* provisions in order to raise the European Convention level of protection. As pointed out by former Strasbourg judge George Nicolaou, 'in so far as the Charter is concerned, the Strasbourg Court will, more particularly, be comparing the respective provisions in order to ascertain whether the rights depicted in the two instruments correspond or whether the Charter provides a more extensive protection: Art. 52(3). If the latter is the case, the Court will reflect on whether it can follow in the same direction through a dynamic and evolutive interpretation of the Convention text'.[15]

Initially, the EU Charter was used as a criterion of 'European consensus' in Strasbourg cases involving the Convention signatories participating in the European Union, but then it was invoked even in cases directed against non-EU ECHR State parties. One shall mention that, although the judgments of the ECtHR are compulsory only for those States, which are parties to the proceedings and therefore do not have effects *erga omnes*,[16] the binding effect of ECtHR case-law in respect of its interpretative authority (*res interpretata*) is beyond doubt.[17] This circumstance may be of lesser significance for the EU Member States (which are already obliged to follow the CFREU standards, at least in cases where the application of the EU Law is involved)[18] rather than for the non-EU Convention signatories (since the EU Charter remains a foreign law within their legal systems).

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[14] Final report of Working Group II, 'Incorporation of the Charter/ accession to the ECHR' (Constitution for Europe Official Website, 2002) <http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00354.en02.pdf>, accessed 6 February 2018, 7.

[15] NICOLAOU George. The Strasbourg View on the Charter of Fundamental Rights, *Research Paper in Law,* 2013, no. 3, p. 7.

[16] Art. 46 of the European Convention on Human Rights (1950, 213 U.N.T.S. 222).

[17] CHRISTOU, Theodora, RAYMOND, Juan, Pablo (eds). *European Court of Human Rights, remedies and execution of judgments*. London: British Institute of International and Comparative Law, 2005, pp. 1-3.

[18] Art. 51 CFREU 'Field of application', para. 1 reads as follows: 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties'.

2.1. The EU Charter, 'European consensus' and the EU Member States

Even before the obtaining binding legal force, the EU Charter was used for the identification of an 'international consensus,' enabling the Strasbourg Court to extend the scope of a right guaranteed by the European Convention. As argued by Groussot, the Charter of Fundamental Rights of the European Union is a more progressive and innovative instrument than the European Convention, and the first ECtHR's mentions of the Charter were made in relation to 'progressive' rights,[19] including several references to Arts. 47-50 CFREU. For instance, in the joint concurring opinion in case of *Martinie v. France* three judges pointed out the inconsistency in the application of Art. 6(1) ECHR and advocated for a fundamental reconsideration of the Strasbourg Court's case-law in light of Art. 47 CFREU, in order to expand the Convention right to a fair trial to all categories of public servants.[20] This Opinion demonstrated the willingness of the ECtHR to consider the CFREU as a relevant indicator of 'European consensus' for the development of the ECHR guarantees in line with the 'living instrument' doctrine, as well as the great potential of Art. 47 as a key provision of the EU Charter in the area of *'due process'* rights.

In fact, the reasoning in the progressive concurring opinion was recognised a year later in case of *Eskelinen and Others v. Finland*. The case of *Eskelinen* concerned eight Finnish policemen; upon transfer to a remote part of Finland they were, after more than seven years of proceedings, denied the right to monthly individual wage supplements. The applicants alleged violation of Art. 6(1) ECHR on account of denial of an oral hearing and the excessive length of the proceedings. The consensual value of the EU Charter is particularly obvious in *Eskelinen* judgment since the Strasbourg Court supported its spectacular overruling of its previous Pellegrin jurisprudence[21] by reference to the right to a fair trial of Art. 47 of the CFREU, and to the CJEU jurisprudence dedicated to the principle of effective judicial protection.[22]

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[19] AROLD LORENZ, Nina-Louisa, GROUSSOT Xavier, PETURSSON, Thor Petursson. The European Human Rights Culture – A Paradox of Human Rights Protection in Europe? Leiden: Martinus Nijhoff Publishers, 2013, p. 64.

[20] *Martinie v. France*, The European Court of Human Rights (2006, App. no. 58675/00, Joined concurring opinion of Judges Tulkens, Maruste and Fura-Sandström), para. 2.

[21] In accordance with *Pellegrin* line of reasoning, the actions concerning access to services, unlawful dismissal, or the reinstatement of public officials who occupied their functions as depositaries of the state power were regarded as falling outside of the scope of Art. 6 ECHR. See *Pellegrin v. France*, The European Court of Human Rights (1999, App. no. 28541/95), paras. 64-71.

[22] VAN DROOGHENBROECK Sebastien. Labour Law Litigation and Fair Trial under Art. 6 ECHR, in DORSSEMONT, Filip, LÖRCHER Klaus, SCHÖMANN Isabelle (eds.). The

Referring to the *Johnston* judgment,[23] the European Court of Human Rights noted that if an individual can rely on a material right guaranteed by the EU Law, his or her status as a holder of public power does not render the requirements of judicial control inapplicable. The ECtHR also took into consideration the Explanations annexed to the EU Charter, stating that they constitute a *'valuable tool of interpretation intended to clarify the provisions of the Charter.'* The Court concluded that in the context of EU Law the guarantees stemming from Art. 47 of the EU Charter (corresponding to Art. 6 ECHR) are not only confined to civil and criminal matters and that the CFREU provides for a codification of the wider approach taken by the CJEU in its case-law.[24] Thus it established a new presumption of the applicability of Art. 6 ECHR for public law disputes and decided in the favour of applicants' claim on account of the length of the proceedings.[25]

Next, in the case of *Scoppola v. Italy (No.2),* Art. 49 (1) of the EU Charter rights were also used to progress Convention rights in the interpretation of *'no punishment without law'* principle. The Strasbourg Court in *Scoppola* held with respect to Art. 7 ECHR that 'a consensus has gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law'.[26] The ECtHR accepted the more beneficial principle of the retrospective application of more lenient criminal law, which is embodied in Art. 49 CFREU and also forms a part of the general principles of European Law as decided by the CJEU in the *Berlusconi* case. Thus, the reliance of the Strasbourg court on the EU Charter rights has resulted in emergence of another common European standard of Human Rights protection. In light of that consensus, the European Court of Human Rights considered that it was necessary to depart from its previous case-law and to affirm that Art. 7 (1) of the European Convention guaranteed not only the principle of 'non-retrospectiveness' of more stringent criminal laws but also, implicitly, the principle of retrospectiveness of the *more lenient* criminal law.

Subsequent practice of the ECtHR demonstrated the readiness of the Strasbourg Court to extend the usage of the EU Charter as an indicator of the European

European Convention on Human Rights and the Employment Relation. London: Bloomsbury Publishing, 2014, p. 174.

[23] *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, The Court of Justice of the European Union (1986, Case 222/84).

[24] *Vilho Eskelinen and Others v. Finland,* The European Court of Human Rights (2007, App. no. 63235/00), paras. 28-30.

[25] *Vilho Eskelinen and Others v. Finland* (no. 24), paras. 62-64.

[26] *Scoppola v Italy (no. 2),* The European Court of Human Rights (2009, App. no. 10249/03), para. 106.

consensus on other ECHR provisions in the area of *'due process'* rights. In *Micallef v. Malta*, decided just before the Lisbon Treaty entry into force, a reference was made to Art. 47 CFREU for identifying *consensus* under the section 'Comparative and EU Law and practice'. In some respects, this judgment correlates to the *Eskelinen* case as the Grand Chamber again extended the scope of application of Art. 6 ECHR, yet may be with a more cautious reasoning. In this case the ECtHR had to decide whether Art. 6 of the European Convention (the right to a fair trial) should cover pre-trial stages of proceeding. The ECtHR established that there is a consensus among the Member States to guarantee the right to fair trial on the pre-trial stage, stating that Art. 47 of the Charter of Fundamental Rights of the European Union guarantees the right to a fair trial and, unlike Art. 6 of the Convention, the provision of the EU Charter does not confine this right to disputes relating only to civil rights and obligations or to criminal charges but also to any rights and freedoms.

It could be argued that the broader scope of the CFREU provision was decisive and essential for the new approach taken by the European Court of Human Rights. After explaining why there is a need to develop its jurisprudence, the ECtHR extended the application of guarantees in Art. 6 ECHR to include interim measures and injunction proceedings.[27] The ECtHR seems to have used the EU Charter as 'an updated version of the Convention'[28] to indicate the newly shaped common values and emerging consensus in International Law, therefore developing the jurisprudence in accordance with the 'living instrument' doctrine and improving the position of the EU individual.

2.2. The EU Charter, 'European Consensus' and the Non-EU ECHR Signatories

However, the reference to the EU Charter to reverse the ECtHR's case-law as an indicator of the European consensus, even on the basis of Art. 52(3) CFREU may sometimes be considered as rather problematic. It is important to remember that when the EU Charter is used as a legal basis for such modifications, it unfolds an impact also on those ECHR signatories which do not currently participate in the European Union. The key argument against basing an evolutive interpretation of Convention rights on developments under EU Law may be that non-EU Member States deliberately steered clear of these developments by not acceding to the

[27] *Micallef v Malta,* The European Court of Human Rights (2009, App. no. 17056/06), para. 32.

[28] LOCK, Tobias. The Influence of EU Law on Strasbourg Doctrines. [online]. Available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2922462>, accessed 6 February 2018, p. 21; DICKSON, Brice. The EU Charter of Fundamental Rights in the case law of the European Court of Human Rights. *European Human Rights Law Review*, 2015, no. 1, pp. 27, 40.

EU.[29] Moreover, as said by Chalmers, since the European Convention covers forty-seven states, '…it is committed to a *less intense* form of political integration and governs a *more diverse* array of situations than the European Union. Under these circumstances, it is quite doubtful that the judgments of a court such as the European Court of Human Rights, using higher CFREU standards in such a different context, can be accepted almost unquestionably'.[30] Nevertheless, the Charter of Fundamental Rights of the European Union has showed itself as a valuable tool for identification of the 'European consensus' even in cases involving the non-EU Convention signatories.

The case of *Salduz v. Turkey* related to the interpretation of Art. 6(3)c *('right to legal assistance'*) of the European Convention may be quite illustrative in this regard. In this case the connection to Art. 48 CFREU (*'the rights of the defence'*) was made in the operational part of the judgment, listing this provision as having the same scope as the equivalent right guaranteed by the Convention providing for the right of access to a lawyer during police custody. Further, the horizontal provision of Art. 52(3) CFREU providing for an interpretative bridge to the ECHR right of Art. 6(1) (*'right to a fair trial'*) was mentioned.[31] These comparably brief first remarks can be explained by the fact that the EU Charter provisions almost fully corresponded to the Convention rights, and that the relevant Contracting Party was not the EU Member State and hence not subjected to the rights stemming from the EU Charter. However, one can argue that the Strasbourg Court also emphasised the severity of alleged violations of the ECHR rights in the *Salduz* case, by relating to the pertinent International Law sources (including the CFREU).

In subsequent case of *Pishchalnikov v. Russia* regarding the access to legal aid, the ECtHR continued to use the EU Charter as the criterion of the international consensus. The Strasbourg Court was forced to interpret the possibility of the limitation of the right to legal assistance within the framework of criminal investigation. The Court again said that, following Art. 52 (3) of the Charter, the right guaranteed under its Art. 48 CFREU (*'presumption of innocence and right of defence'*) is among those which have the same meaning and the same scope as the equivalent right guaranteed by the European Convention on Human Rights.[32] Following the Charter approach, the ECtHR concluded that the lawfulness of restrictions on the right to legal assistance during the initial stages of

[29] LOCK (no. 28), p. 6.

[30] CHALMERS, Damian, DAVIES, Gareth, MONTI, Giorgio (eds). European Union Law*: Text and Materials*. Cambridge: Cambridge University Press, 2010, p. 244.

[31] *Salduz v. Turkey,* The European Court of Human Rights (2008, App. no. 36391/02), para. 44.

[32] *Pishchalnikov v Russia,* The European Court of Human Rights (2009, App. no. 7025/04), para. 42.

police interrogation should be considered in light of their overall impact on the right to a fair hearing, and it unlikely that the applicant could reasonably have appreciated the consequences of being questioned without legal assistance. It thus found a violation of Art. 6 of the Convention because there had been no valid waiver of the right to legal assistance.[33]

It is worthy of being mentioned that the ECtHR relied on the CFREU as a criterion of consensus between the majority of the European Convention signatories to provide fundamental guidelines for the interpretation of the *ne bis in idem* principle. In famous case of *Zolotukhin v. Russia*, the ECtHR has decided to interpret the concept *'idem'* in light of the CFREU and the CJEU case-law, which marked a clear departure from the earlier Strasbourg jurisprudence. Art. 50 CFREU protecting *ne bis in idem principle* was listed among the International Law sources when the applicant's complaint (that he had been tried twice for the same disorderly conduct) was considered.[34] After demonstrating that both sanctions were of a criminal nature, the ECtHR examined the meaning of the right not to be tried or punished twice.

As to whether the offences were the same, the Court noted that it had adopted a variety of approaches in the past and that the demand for legal certainty called for a harmonised interpretation. Looking at relevant and comparative international texts the Court deduced that the approach used should be based strictly on the identity of the material acts and not on specific legal classification. Thus the term 'same offence' of Art. 50 of the EU Charter was used to validate a new interpretation of Art. 4 of Protocol No. 7 ECHR which now prohibits the prosecution or trial for a second offence in so far as it arose from identical facts or facts that were 'substantially' the same as those underlying the first offence.[35] This decision was confirmed already in the same year by *Maresti v. Croatia.* This case was likewise concerned with an application alleging a violation of the *ne bis in idem* principle as the applicant was tried and finally convicted twice for the same conduct. In the merits of the case concerning the *idem* element the Strasbourg Court set out the relevant passages of *Zolotukhin v. Russia* and with that also indirectly referred to the Art. 50 CFREU, following higher standard of protection established by the EU Charter.[36]

The above mentioned judgments were directed against Turkey, Russia and Croatia (before the accession to the European Union), which demonstrates the ECtHR's willingness to consider the EU Charter a valid indicator of newly

[33] *Pishchalnikov v Russia* (no. 32), paras. 91-92.

[34] *Zolotukhin v Russia,* The European Court of Human Rights (2009, App. no. 14939/036), para. 33.

[35] *Sergey Zolotukhin v Russia* (no. 34), paras. 79, 120-122.

[36] *Maresti v. Croatia,* The European Court of Human Rights (2009, App. no. 55759/07), para. 62.

shaped common values and emerging 'consensus in international law', even in cases involving the ECHR parties that are not the participants of the European Union. Due to the exceptional CFREU value as a modern Human Rights law instrument,[37] as well as the European Court of Human Rights' objective to interpret the Convention provisions in a dynamic manner to provide the maximum protection of Human Rights,[38] the provisions of Art. 52(3) CFREU has therefore led to the so-called *'spill-over' effects*[39] within the Strasbourg Court practice on Arts. 6 ('right to a fair trial'), 7 ('no punishment without law') and Art. 4 of Protocol No. 7 to the European Convention ('right not to be tried or punished twice'), i.e. the judgments in cases involving non-EU Convention signatories, where an evolutive interpretation of the Convention was mainly based on a consensus between EU Member States.

The approach chosen, however, raised concerns because of the risk of the 'EU majority' hegemony and undermining the principle of the Convention subsidiarity in relation to the national legal systems.[40] Although none of the ECtHR judgments issued before the Treaty of Lisbon entry into force invoked the EU Charter as the sole evidence of a consensus justifying a departure from previous Strasbourg case-law, Arts. 47-50 provisions seemed to have played a primordial role in some cases. This may already be considered an evidence of increasing significance of the Charter of Fundamental Rights of the European Union as a factor affecting the 'European consensus' notion, or even of the EU Charter's increasing role of the *'standard-setter'* within the Council of Europe legal order in the area of 'due process' rights.

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37 JAASKINEN, Niilo. The Place of the EU Charter within the Tradition of Fundamental and Human Rights, in MORANO-FOADI, Sonia, VICKERS, Lucy (eds). Fundamental Rights in the EU*: A Matter for Two Courts*. London: Bloomsbury Publishing, 2015, p. 12.

38 *European Ministerial Conference on Human Rights and Commemorative Ceremony of the 50th Anniversary of the European Convention on Human Rights (Rome, 3-4 November 2000)*. Strasbourg: Council of Europe – 2002, p. 83.

39 LOCK (no. 28), p. 26.

40 In that sense, see for example ARDEN, Mary. Human Rights and European Law*: Building New Legal Orders*. Oxford: Oxford University Press, 2015, pp. 77-80; MURRAY, John. Consensus, Concordance of Hegemony of the Majority? in *Dialogue between judges, European Court of Human Rights.* Strasbourg: Council of Europe – 2008, p. 22; DAUTRICOURT, Camille. A Strasbourg Perspective on the Autonomous Development of Fundamental Rights in EU Law: Trends and Implications. [online]. Available at: <http://www.jeanmonnetprogram.org/wp-content/uploads/2014/12/101001.pdf>, accessed 6 February 2018, pp. 53-56.

3. The Strasbourg Court after the Treaty of Lisbon: a move towards 'consistent' interpretation?

The Treaty of Lisbon appeared to herald a new, promising era for the protection of fundamental rights within the European Union legal order.[41] The number of cases in which the EU Court of Justice mentioned the EU Charter in its reasoning has significantly increased, and the CJEU has engaged substantively with and given prominence to the EU Charter arguments[42] since, as underlined by Allan Rosas, its application has become a matter of daily business due to the CFREU legally binding status.[43] However the way the EU Charter provisions were interpreted and applied by the EU Court of Justice added more complexity to the Luxembourg and Strasbourg Courts' relationship. The author contends that the CJEU post-Lisbon practice in the field of *'due process'* rights is characterised by such trends as, *firstly*, the CJEU's preference to apply the EU Charter rights rather than the European Convention or the Strasbourg case-law as a source of fundamental rights (the so-called 'Charter centrism')[44] and, *secondly*, defining the EU-specific level of protection of *'due process'* rights, which is not necessarily equivalent to one proposed by the Strasbourg Court (*Kadi, DEB, Fransson* lines of reasoning).[45]

Although the majority of the CJEU post-Lisbon judgments propose to follow the ECHR standards or to increase the level of guarantees provided by European

41 SHARPSTON, *Eleanor*. *Reconciling Mutual Trust* and Individual Fundamental Rights. [online]. Available at: <http://www.ecba.org/extdocserv/conferences/lux2015/Sharpston.pdf >, accessed 6 February 2018, p. 1.

42 *DE BÚRCA* (no. 8), p. 169.

43 ROSAS, Allan and KAILA, Heidi. L'application de la charte des droits fondamentaux de l'Union européenne par la Cour de justice: un premier bilan. *Il diritto dell'unione europea,* 2011, no. 1, pp. 5-8.

44 KORENICA, Fisnik. The EU Accession to the ECHR*: Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection*. Heidelberg: Springer, 2015, p. 63.

45 In this sense, see for example, ANDERSON, David and MURPHY, Cian. The Charter of Fundamental Rights, Chapter 7 in BIONDI, Andrea, EECKHOUT, Piet (eds). EU Law after Lisbon. Oxford: Oxford University Press, 2012, p. 179; AROLD LORENZ, Nina-Louisa, GROUSSOT Xavier, PETURSSON (no. 19), pp. 64-65; WEIS, Wolfgang. The EU Human Rights Regime Post Lisbon: Turning the CJEU into a Human Rights court? Chapter 5 in MORANO-FOADI, Sonia, VICKERS, Lucy (no. 37), p. 70; HAMULAK, Ondrej and MAZÁK, Ján. The Charter of Fundamental Rights of the European Union *vis-á-vis* the Member States – scope of its application in the view of the CJEU. *Czech Yearbook of International Law*, 2017, vol. 8, pp. 161, 163.

Law (*DEB,*[46] *Jaramillo,*[47] *E.ON*[48]), the diverging line of reasoning appeared, focussing on the possibility of the EU-specific derogations from the European Convention standards on the basis of Art. 52(1) CFREU. Despite the tendency towards unification between two European systems of Human Rights protection, Art. 52(1) CFREU allows for a divergent interpretation exceptionally where the EU Law provides less favourable regime of Human Rights protection. In accordance with Art. 52(1) of the EU Charter, particularly in respect of the European Union's legal autonomy, it must be permissible for the CJEU to impose the limitations on the exercise of the CFREU rights. Since Art. 53 of the EU Charter guarantees the level of protection *equivalent* to one proposed by the Convention – this also means a derogation from a specific interpretation by the Strasbourg Court. These derogations are admitted if 'provided by law' (i.e. contained in EU secondary law) and 'meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others', while respecting the 'essence of the right' and the principle of proportionality.[49] The issue of actual derogations from the ECHR standards on the basis of Art. 52(1) CFREU has already been discussed by the CJEU after the Lisbon Treaty entry into force in more than 30 cases, including several groundbreaking judgments in the area of the '*due process* rights'.[50]

Giving consideration to these developments, it comes as no surprise that in 2010 the European Court of Human Rights first mentioned the EU Charter's *legally binding nature*,[51] and later referred to on several occasions as to the integral part of the European Union's *primary law*.[52] Since 2012, the ECtHR predictably

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[46] *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland,* The Court of Justice of the European Union (2010, Case C-279/09), paras. 36-36, 39-42.

[47] Oscar Orlando Arango Jaramillo and Others v European Investment Bank, The Court of Justice of the European Union (2013, Case C-334/12 RX-II), paras. 41-44.

[48] *E.ON Földgáz Trade Zrt v. Magyar Energetikai és Közmű-szabályozási Hivatal,* The Court of Justice of the European Union (2015, Case C510/13), paras. 50-51.

[49] DE HERT, Paul. EU criminal law and fundamental rights, in MITSILEGAS, Valsamis, BERGSTRÖM, Maria, KONSTADINIDES, Theodore (eds). *Research Handbook on EU Criminal law.* Cheltenham*:* Edward Elgar Publishing, 2016, p. 111.

[50] For instance, the judgments concerning interpretation of the right to a *fair trial and an effective remedy* (*Kadi II,* 2013*,* C-584/10; *Alassini,* 2010*,* C-317/08*), presumption of innocence and right of defence (WebMindLicenses,* 2015*,* C-419/14*)* and *ne bis in idem* principle in European law (*Spasic,* 2014*,* C-129/14) allow to limit the rights in question, pursuing such EU-specific interests as guaranteeing (inter) national security, quicker settlement of disputes to guarantee the effectiveness of EU Law, prevention of fraud falling within the scope of European law or an effective functioning of Area of Freedom, Security and Justice.

[51] *Neulinger and Shuruk v. Switzerland*, The European Court of Human Rights (2010, App. no. 41615/07), para. 56.

[52] See, *inter alia*, *K.M.C. v. Hungary*, The European Court of Human Rights (2012, App. no. 19554/11), para. 18; *M.M. v. the United Kingdom*, The European Court of Human Rights (2012, App. no. 33394/96), para. 144; *Gáll v. Hungary,* The European Court of Human Rights

initiated to rely on the Charter-based Luxembourg jurisprudence as an indicator of the pan-European political consensus[53] to further develop an interpretation of Art. 6 ('right to a fair trial'), Art. 13 ('right to an effective remedy') and Art. 4 of Protocol No. 7 to the European Convention ('right not to be tried or punished twice'). It will be stated that the post-Lisbon jurisprudence of the Strasbourg Court demonstrates the willingness to apply the CFREU provisions and pertinent CJEU case-law not only to raise the level of Human Rights protection in accordance with Art. 52(3) CFREU, but also to transpose the EU-specific derogations from the ECHR standards on the basis of Art. 52(1) of the EU Charter, to give an interpretation of the Convention which is *consistent* with the EU Court of Justice interpretation of corresponding provisions of the Charter of Fundamental Rights of the European Union.

The 'technical' factors which arguably led to abovementioned changes in the Strasbourg Court's practice following the Treaty of Lisbon entry into force were, at first, the perspective of the EU accession to the European Convention on Human Rights[54] and, after the CJEU *Opinion 2/13,* the Strasbourg Court's aspiration to avoid possible collisions with developing body of the CJEU case-law with autonomous substance. One shall note, however, the Strasbourg Court's willingness to continue application of the EU Charter and the CJEU case-law based on Arts. 47-50 CFREU in cases involving the non-EU signatories to the European Convention. As the EU Charter or the EU Court of Justice case-law do not yet have any 'official' status in that regard within the Strasbourg Court practice, these legal sources are still being treated by the ECtHR *as on a par* with other sources of International Law.

3.1. The EU Charter, 'European consensus' and the EU Member States

For instance, inspired by Art. 30 of the Charter of Fundamental Rights of the European Union (*'protection in the event of unjustified dismissal'*) and Art. 24 of the European Social Charter (*'the right to protection in cases of termination of employment'*), the Strasbourg Court gradually extended protection against unfair

(2013, App. no. 49570/11), paras. 19 and 69; *M.S.S. v. Belgium and Greece*, The European Court of Human Rights (2011, App. no. 30696/09), para. 61.

53 LENAERTS, Koen and GUTIÉRREZ-FONS, José. The Place of the Charter in the EU Constitutional Edifice, in PEERS, Steve, HERVEY, Tamara, KENNER, Jeff and WARD, Angela (eds). *The EU Charter of Fundamental Rights: A Commentary*. Oxford: Hart Publishing, 2014, p. 1560.

54 FABBRINI, Federico and LARIK, Joris. Dialoguing for Due Process: Kadi, Nada and the EU Accession to the ECHR. [online]. Available at: <http://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp121-130/wp125-larik-fabbrini.pdf>, accessed 6 February 2018, p. 2.

dismissal in the KMC *v. Hungary* case. The European Court of Human Rights held that the dismissal of a civil servant without giving reasons, permitted under Hungarian law at the time of the case consideration, meant that the dismissal could not be practically and effectively challenged independently in a hearing before an impartial tribunal, contrary to Art. 6 of the European Convention (*'right to a fair trial'*).[55]

In subsequent case of *Urbšienė and Urbšys v. Lithuania*, the European Court of Human Rights was asked to interpret the provisions of Art. 6(1) ECHR, in relation to the refusal of legal aid which prevented the applicants from the effective realisation of their right of access to the court. One can state that the *Urbšienė and Urbšys* judgment was a long-awaited response to the *CJEU DEB* case, proposing the wider protection of the right to legal aid provided by EU Law in comparison with the ECtHR's jurisprudence, primarily on the basis of Arts. 47 and 52(3) of the EU Charter.[56] To determine the existence of the majority consensus on this issue, the Strasbourg Court conducted a thoughtful analysis of the pertinent CFREU provisions and the EU Court of Justice practice in the 'Relevant European Union law and practice' section.

The ECtHR demonstrated an awareness of the legal reasoning in *DEB*, where the CJEU recognised that the right to an effective remedy before a court enshrined in Art. 47 of the EU Charter applies to both natural and *legal persons*, and the assessment of the need to grant that aid must be made *on the basis of the right of the actual legal person* whose rights and freedoms as guaranteed by European Law have been violated, rather than on the basis of the public interest of society, even if that interest may be one of the criteria for assessing the need for the aid.[57] To justify the raising of the Strasbourg standard of Human Rights protection primarily on the basis of Art. 47 CFREU and its interpretation by the CJEU, as well as (arguably) for the greater legitimacy of the approach chosen, relevant *DEB* passages referring to the earlier ECtHR jurisprudence have been cited to demonstrate the coherence and consistency of the practice of two European Courts on the matter.[58] On the basis of the legal assessment conducted, the European Court of Human Rights found Lithuania in breach of Art. 6(1) of the Convention and stated that the failure to provide legal aid for the applicants in a bankruptcy proceeding of unlimited company deprived them of the opportunity to present their case effectively to the domestic courts.[59]

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55 *K.M.C. v. Hungary (no. 52)*, paras. 18-19.

56 *DEB* (no. 46), paras. 35-39.

57 *Urbsiene And Urbsys v Lithuania,* The European Court of Human Rights (2016, App. no. 16580/09), para. 32.

58 *Urbsiene And Urbsys v Lithuania* (no. 57), para. 33.

59 *Urbsiene And Urbsys v Lithuania* (no. 57), paras. 47-54.

The Strasbourg Court's jurisprudence concerning the *right not to be tried or punished twice* (Art. 4 of Protocol No. 7 ECHR) also presents an interest for the purposes of present contribution. One of the first post-Lisbon applications on *ne bis in idem principle* lodged against the EU Member State was one made in *Grande Stevens v. Italy*[60] case. In this case, the ECtHR had to deal with the prevention of double jeopardy and the right to a public hearing of the persons responsible for market manipulation, and the CFREU and pertinent CJEU case-law seemed to have a significant impact on the case outcome. The Strasbourg Court scrutinised the Italian regulation on market abuse in light of Art. 4 of Protocol No. 7 and Art. 6 of the Convention. Under Italian Legislative Decree no. 58 of 1998, the same *corpus legis*[61] provides for both criminal and administrative sanctions for market manipulation: where the former is issued by the judiciary, the latter by the Authority (CONSOB) 'which in the Italian legal system, has the task, *inter alia*, of protecting investors and ensuring the transparency and development of the stock markets'.[62] Importantly, the criminal proceedings which had followed the imposition of the financial penalty provided for by Art. 187 of the Decree were authorised by Art. 14 of Directive 2003/6/EC (the so-called 'Market Abuse Directive').[63]

The sensitivity of the issue arguably instigated the Strasbourg Court to follow the proposal of the applicants (Mr. Grande Stevens and Mr. Gabetti) to use Art. 50 of the EU Charter and pertinent CJEU jurisprudence as a criterion of the 'European consensus' in this case. The ECtHR turned to the analysis of the CJEU *Spector Photo Group* case to reaffirm the *possibility* for EU Member States to set both criminal and administrative sanctions to combat market abuses, but not an obligation to establish the 'double track procedure' system in accordance with Directive 2003/642, in order to establish an effective mechanism to fight market manipulation and abuses[64]. The references were made to the *Åklagaren v. Hans Åkerberg Fransson* judgment, on the subject of value-added tax, where the CJEU stated that, under the ne bis in idem principle, a State could only impose a double penalty (fiscal and criminal) in respect of the same facts if the first penalty was *not* criminal in nature.[65] Therefore, the Directive 2003/6 did

[60] *Grande Stevens and Others v. Italy,* The European Court of Human Rights (2014, App. no. 18640/10).

[61] Legislative Decree of Italian Parliament no. 58 of 24 February 1998 (Decreto Legislativo 24 febbraio 1998, n. 58, 'Testo unico delle disposizioni in materia di intermediazione finanziaria, ai sensi degli articoli 8 e 21 della legge 6 febbraio 1996, n. 52', pubblicato nella *Gazzetta Ufficiale* n. 71 del 26 marzo 1998 – Supplemento Ordinario n. 52).

[62] *Grande Stevens* and Others *v. Italy* (no. 60), para. 9.

[63] *Grande Stevens* and Others *v. Italy* (no. 60), *paras.* 34, 43, 46, 91.

[64] *Grande Stevens and Others v. Italy* (no. 60), para. 229.

[65] *Grande Stevens and Others v. Italy* (no. 60), para. 229.

not provide a duty to establish criminal sanctions to combat market abuses, nor banned it. In light of these considerations, the European Court of Human Rights concluded that there had been a violation of Art. 6 (1) ECHR (*'right to a fair hearing within a reasonable time'*), a violation of Art. 4 of Protocol No. 7 (*'right not to be tried or punished twice'*) and that the respondent State was to ensure that the new criminal proceedings brought against the applicants, in violation of Art. 4 of Protocol No. 7, which were still pending in respect of Mr. Gabetti and Mr. Grande Stevens, were closed as rapidly as possible.[66]

Similar approach was chosen by the European Court of Human Rights in subsequent case of *Kapetanios and Others v. Greece*, where the criminal proceedings were brought against each of the three applicants on contraband (*criminal*) charges, combined with the obligation to pay the *administrative* fines for illegal imports, or fiscal fines for contraband.[67] In this connection, the ECtHR noted the convergence between the Strasbourg interpretation of Art. 4 of Protocol No. 7 and that of the CJEU with regard to the criminal nature of a penalty: 'Lastly, the Court observes that in the judgment in the *Åkerberg Fransson* case, referred to by the Greek Government in its observations, the Court of Justice of the European Union stated that under the *ne bis in idem principle,* the State may impose a double penalty (both tax and penal) for the same offence only on condition that the first sanction is *not* of a criminal nature. The Court notes on this point that in assessing the criminal nature of a tax penalty the CJEU relies on the three criteria used by the [Strasbourg] Court in *Engel and Others* case… The [Strasbourg] Court therefore finds that the two courts have reached a *consensus* in the assessment of the criminal nature of a tax procedure and, *a fortiori*, on the application of the *ne bis in idem* principle in tax and penal matters (see, to that effect, *Grande Stevens and Others)*'.[68]

In light of the *Fransson* judgment, the European Court of Human Rights commented, however, that the principle *non bis in idem* would not have been breached had the two possible forms of penalty (i.e. imprisonment and pecuniary) been envisaged as part of *a single set of judicial proceedings*, or if the criminal court had *suspended the trial* following the opening of the administrative proceedings and subsequently brought the criminal proceedings to a close once the Supreme Administrative Court had confirmed the fine. As that had not been the case, the Strasbourg Court concluded that there had been a *violation* of Art. 4 of Protocol No. 7 in respect of the three applicants.[69]

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66 *Grande Stevens and Others v. Italy* (no. 60), paras. 235-237.

67 *Kapetanios and Others v. Greece,* The European Court of Human Rights (2015, nos. 3453/12, 42941/12 and 9028/13).

68 *Kapetanios and Others v. Greece* (no. 67), para. 73.

69 *Kapetanios and Others v. Greece* (no. 67), paras. 71-75.

3.2. The EU Charter, 'European Consensus' and the Non-EU ECHR Signatories

Interestingly, one of the first Strasbourg references to the EU Court of Justice CFREU-based jurisprudence (*Kadi I*) was made in case of *Nada v. Switzerland*, concerning the possibility to impose limitations on the right to an effective remedy of persons suspected of association with terrorism (Art. 13 of the European Convention).[70] It will be stated that the application of the famous *Kadi* litigation's outcomes within the Strasbourg *Nada* shall be seen as a very specific case of the consensual application of the Charter of Fundamental Rights of the European Union. The judgment in *Kadi I* clarified certain procedural rights of persons suspected of association with terrorism, including the right to an effective remedy and the right to a fair trial (Art. 47 of the EU Charter).[71] However, this line of reasoning was often criticised for allowing to limit the rights in question, pursuing such EU-specific interests as guaranteeing (inter) national security and *primacy* of European Law within the European Union legal order.[72]

One can contend that the *Kadi I* impact on the Strasbourg Court's reasoning in *Nada* had extremely far-reaching consequences on the European Convention relationship with the UN legal order because the ECtHR elaborated on how to deal with acts attributed to a Contracting Party in cases involving the UNSC Resolutions' implementation, in light of the Convention 'margin of appreciation' doctrine. This example of consensual usage of the CJEU case-law by the Strasbourg Court is also of special significance as Mr. Nada's complaint was lodged against Switzerland, which is the non-EU signatory to the European Convention.

In 2012, the Grand Chamber of the European Court of Human Rights issued its judgment, where the Court was to clarify whether a ban which had been imposed on the applicant as a result of the addition of his name to a list annexed to the Swiss Federal Ordinance, in the context of the implementation of United Nations Security Council counter-terrorism resolutions, breached his rights under Arts. 8 and 13 of the European Convention on Human Rights. Importantly, the Strasbourg Court *accepted* the possibility to limit the Convention rights in question on the basis of relevant UNSC Resolutions as a matter of principle.[73] At

[70] *Nada v Switzerland,* The European Court of Human Rights (2012, App. no. 10593/08).

[71] Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, The Court of Justice of the European Union (2008, Case C-402/05 P).

[72] TZANAKOPOULOS, Antonios. Legal acts, Chapter 4 in RYNGAERT, Cedric, DEKKER, Ige, WESSEL, Ramses (eds). *Judicial Decisions on the Law of International Organizations.* Oxford: Oxford University Press, 2016, pp. 229-232.

[73] *Nada v Switzerland* (no. 70), para. 172. The relevant resolution is Security Council is Resolution 1390 of 28 January 2002, UN Doc. S/RES/1390 (2002).

the same time, the Grand Chamber evoked the special situation of the applicant, who had been prohibited from leaving an Italian enclave of approximately 1,6 square kilometres despite his medical needs. The ECtHR considered that the relevant SC Resolution did not specifically require such restrictive measures, a circumstance that enabled the Grand Chamber to assess the legality of Switzerland's conduct.[74]

According to the Strasbourg Court, Switzerland should have provided Mr. Nada with access to the effective judicial review by Swiss courts, by which means he could have challenged the measures implementing UNSC Resolutions' sanctions regime. Swiss tribunals did look at his case, but only to conclude that they could go no further than to state the primacy of UNSC resolutions within the national legal order, on the basis of Art. 103 of the United Nations Charter.[75] Consequently, at the Swiss level, review options were open, but not efficient, since no institution found itself competent to challenge the sanctions. As the Court considered that Switzerland had failed to harmonise the international obligations that appeared contradictory, the Court found that there had been a violation of Art. 8, and also Art. 13 of the European Convention.[76]

In reaching this conclusion, the ECtHR was evidently inspired by the EU Court of Justice reasoning in the *Kadi I* case, which evidenced the CJEU's role in the governance of global anti-terrorism law.[77] The Strasbourg Court referred to the finding of the CJEU that *'it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations'.* The ECtHR was of the opinion that the same reasoning was applicable to *Nada* case, more specifically to the review by the Swiss authorities of the conformity of the Taliban Ordinance with the Convention. It further found that there was nothing in the Security Council resolutions to prevent the Swiss authorities from *introducing mechanisms to verify the measures taken at national level* pursuant to those resolutions.[78] The *Nada* judgement thus echoed the approach

[74] *Nada v Switzerland* (no. 70), para. 195.

[75] *Nada v Switzerland* (no. 70), paras. 45-48. Art. 103 of the Charter of the United Nations is worded as follows: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

[76] *Nada v Switzerland* (no. 70), para. 214.

[77] MURPHY, Cian. The legal response to terrorism of the European Union and Council of Europe, Chapter 39 in SAUL, Ben (ed). *Research Handbook on International Law and Terrorism.* Cheltenham: Edward Elgar Publishing, 2014, p. 691.

[78] *Nada v. Switzerland* (n. 70), para. 212.

of the EU Court of Justice and the General Court in the *Kadi I* judgment, holding that regional implementing measures taken by the European Commission were to be judged against human rights standards binding on the Union institutions. However, the *Nada* case outcome has wider geographical ramifications than *Kadi* since it applies to all 47 Member States of the Council of Europe, including three permanent members of the UN Security Council.

The CJEU reasoning in *Kadi* litigation, however, had further implications on the notion of 'European consensus' within the ECtHR's jurisprudence. Less than two months after the decision of the CJEU in *Kadi II*, similar reasoning was adopted by the European Court of Human Rights in subsequent *Al-Dulimi* case, where the Court found a violation of Art. 6(1) ECHR ('right to a fair trial'), because Swiss courts did not provide meaningful judicial review of the applicants' listing by the Sanctions Committee of the Security Council.[79] The case was transferred for the consideration of the Grand Chamber; it upheld the previous decision of the Strasbourg Court with the similar reasoning supported by the references to the *Kadi II* judgment. The Grand Chamber stated that no UNSC resolution 'explicitly prevented' the Swiss courts from reviewing the measures taken to implement the international sanctions and concluded that no real conflict of obligations had arisen.[80] The Court added that because the relevant UNSC resolutions did not exclude domestic judicial review *expressis verbis*, the resolutions, when properly interpreted, left the door open for such review, which was required by Art. 6 of the Convention. However, that review would be relatively minimal, ensuring that the listing of the person in question was not *arbitrary*.[81]

In so doing, the Strasbourg Court avoided (similarly to *Nada*) ruling on whether Art. 103 of the United Nations Charter – establishing the principle of the UN Charter primacy over other international agreements concluded by the UN Member States – was capable of displacing the European Convention in the first place, in case there was a genuine norm conflict.[82] The ECtHR, again, referred to the relevant passages of *Kadi II: 'it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under*

[79] *Al-Dulimi and Montana Management Inc. v. Switzerland*, The European Court of Human Rights (2013, App. no. *5809/08*).

[80] *Al-Dulimi and Montana Management Inc. v. Switzerland*, The European Court of Human Rights (2016, App. no. 5809/08), para. 143.

[81] *Al-Dulimi and Montana Management Inc. v. Switzerland* (no. 80), paras. 147.

[82] *Al-Dulimi and Montana Management Inc. v. Switzerland* (no. 80), para. 149.

Chapter VII of the Charter of the United Nations'.[83] As the ECtHR has already observed, the Security Council was required to perform its tasks while fully respecting and promoting human rights. To sum up, the Court took the view that paragraph 23 of Resolution 1483 (2003) could not be understood as precluding any judicial scrutiny of the measures taken to implement it, therefore developing a presumption in favour of the UN not to impose obligations on its Member States requiring a violation of fundamental rights.[84]

Considering that the above passages of *Kadi I* and *Kadi II* were extensively quoted in *Nada* and *Al-Dulimi*, there are good reasons for assuming that, over the peculiarities of the different cases, the Strasbourg Court *de facto* transposed the standard of judicial review proposed by the EU Court of Justice. In order to solve the conflict of obligation to carry out Security Council decisions under Art. 25 of the UN Charter and to implement the ECHR norms effectively, the ECtHR seemed to have endorsed the more stringent version of 'equivalent protection' (*Solange I*) doctrine.[85] It is evidenced in the paragraph of *Al-Dulimi* where it is stated that, given the serious consequences that the denial of the Swiss courts to fully examine the claims before them has from the perspective of the European Convention, the absence of an explicit prohibition by the UNSC to permit judicial review of the conduct implementing the measures it has adopted, should be understood as an authorisation for *national courts* to exercise scrutiny.[86] In view of these strong statements, the point at issue is whether the standards of judicial review applied to the UN blacklisting system in both *Nada* and *Al-Dulimi* are fully consistent with those requirements of flexibility that are necessary for ensuring the balance of interests at stake.[87] In other words, whether an equivalent protection argument shaped on such high standards of judicial review can be

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[83] *Al-Dulimi and Montana Management Inc. v. Switzerland* (no. 80), para. 148.

[84] RAVASI, Elisa. Human Rights Protection by the ECtHR and the ECJ*: A Comparative Analysis in Light of the Equivalency Doctrine.* Leiden: BRILL, 2017, p. 127.

[85] In the *Solange I* case, the German Federal Constitutional Court ruled in 1974 that European law had not yet reached a level of protection of fundamental rights equivalent to that provided by national constitutional law, as well as a similar level of democratic legitimacy for its law-making powers. In the light of these factors, in the hypothetical case of a conflict between EU Law and the guarantee of fundamental rights under the German Constitution, German constitutional rights prevailed over any conflicting norm of the EU law. According to *Solange I* the German Courts therefore shall determine whether Union law infringed German constitutional law and reserve the right to apply national constitutional law ahead of Union Law.

[86] *Al-Dulimi and Montana Management Inc. v. Switzerland* (no. 80), para. 146.

[87] ARCARI, Maurizio. UN Security Council Resolutions before the European Court of Human Rights: Exploring Alternative Approaches for the Solution of Normative Conflicts, Chapter 2 in ACCONCI, Pia, DONAT CATTIN, David, MARCHESI, Antonio (eds*).* International Law and the Protection of Humanity*: Essays in Honor of Flavia Lattanzi*. Leiden: Martinus Nijhoff Publishers, 2016, p. 35.

considered as the best way to attain a 'fair balance' between the goals of peace maintenance and protection of the ECHR *'due process'* rights.

Similarly, in the case of *Tomasović v. Croatia*,[88] the EU Charter was cited by the Strasbourg Court to identify an emerging consensus while interpreting the *ne bis in idem* principle. The applicant's constitutional complaint, alleging a violation of the right not to be tried or punished twice, was dismissed by the Constitutional Court of the Republic of Croatia on 7 May 2009 (before the previously mentioned *Maresti* judgment was delivered). It was dismissed on the ground that the Croatian legal system did not exclude the possibility of punishing the same person twice for the same offence when the same act is prescribed both as a minor offence and a criminal offence. In the *Tomasović* judgment, the ECtHR found a violation of Art. 4 of Protocol no. 7, having referred to the relevant passages of the *Zolotukhin* case citing the relevant provisions of the EU Charter (Art. 50 'Right not to be tried or punished twice in criminal proceedings for the same criminal offence').[89] It pointed out that the applicant was prosecuted and tried for a second time for an offence of which she had already been convicted. Moreover, in the *Tomasović* judgment, the ECtHR concluded for the first time that it is irrelevant if the first penalty has been discounted from the second in order to mitigate the double punishment.[90]

The same line of reasoning was continued by the Strasbourg Court in *Milenković v. Serbia*, which concerned a violation of the applicant's right not to be tried twice because the domestic criminal courts tried him in 2011 and 2012 for the second time for a criminal offence for which he had already been convicted in misdemeanor proceedings in 2007.[91] Like in *Tomasović,* the ECtHR made a reference to the relevant passages of the *Zolotukhin* case mentioning pertinent provisions of the EU Charter to indicate an 'international consensus' on the issue of double punishment for the same offence. The Court said that at the time the misdemeanor conviction acquired the force of *res judicata*, the criminal proceedings were pending before the first instance court (the Municipal Court in Leskovac).[92] In these circumstances, the ECtHR considered that the Municipal Court in Leskovac should have terminated the criminal proceedings following the delivery of a 'final' decision in the first proceedings. It furthermore noted that in his appeal against his conviction by the Municipal Court the applicant complained of a violation of *non bis in idem* principle. However, the appellate court upheld the applicant's conviction in respect of the same offence for which

[88] *Tomasovic v Croatia*, The European Court of Human Rights (2011, App. no. 53785/09), para. 26.
[89] *Tomasovic v Croatia* (no. 88), para. 26.
[90] *Tomasovic v Croatia* (no. 88), para. 27-32.
[91] *Milenkovic v Serbia,* The European Court of Human Rights (2016, App. no. 50124/13).
[92] *Milenkovic v Serbia* (no. 91), para. 38.

he had already been punished in the misdemeanor proceedings.[93] Lastly, when deciding the applicant's appeal, the Constitutional Court failed to bring its case-law in line with this Court's approach taken in the *Zolotukhin* case.[94] In light of these considerations, the ECtHR unanimously held that there has been a violation of Art. 4 of Protocol No. 7 to the Convention.[95]

In sum, the evolution of the Strasbourg case-law (*Zolotukhin, Maresti, Tomasović, Milenković, Grande Stevens, Kapetanios*) tended to show that Art. 4 of Protocol no. 7 to the ECHR precluded measures for the imposition of both administrative and criminal penalties in respect of the same acts, thereby preventing the commencement of a second set of proceedings, whether administrative or criminal. On the other hand, the abovementioned CJEU *Åkerberg Fransson* judgement interpreted the principle of *ne bis in idem* as not directly prohibiting an imposition of both administrative and criminal sanctions for tax evasion in light of Art. 50 of the EU Charter. It could be said that the noted differences in the interpretation of Art. 4 of Protocol no. 7 by the ECtHR and Art. 50 CFREU by the CJEU placed the Strasbourg Court in a very difficult position, considering that this kind of legal collisions often arose within the context of the Strasbourg litigation against the non-EU Convention signatories.

However, the European Court of Human Rights partially solved this legal puzzle in the *A. B. v. Norway* Grand Chamber judgement on the application of the non bis in idem principle.[96] Unlike previous case of Grande Stevens which concerned the 'double track procedure' in the EU-specific context of market manipulation, or the case of *Kapetanios* regarding two separate sets of proceedings, *A. and B. v. Norway* concerned two taxpayers who submitted that they had been prosecuted and punished twice – in the national procedure combining the elements of both administrative and criminal sanctions – for the same offence. Tax surcharges were imposed on the applicants following administrative proceedings because they had omitted to declare certain income in tax returns; in parallel criminal proceedings they were also subsequently convicted and sentenced for tax fraud for the same omissions. The *A.* and *B.* complained under Art. 4 of Protocol No. 7 to the European Convention that they had been prosecuted and punished twice in respect of the same tax offence. The ECtHR explicitly referred to the interpretation of Art. 50 CFREU proposed by the EU Court of Justice in *Åkerberg Fransson*, which seemed to have a decisive impact on the case outcome. The long-awaited judgment was supported by some Council of Europe Member States (for instance France, as third party

[93] *Milenkovic v Serbia* (no. 91), paras. 40-42.
[94] *Milenkovic v Serbia* (no. 91), paras. 46-48.
[95] *Milenkovic v Serbia* (no. 91), para. 48-49.
[96] A. B. v. Norway, The European Court of Human Rights (2016, nos. 24130/11 and 29758/11).

intervener in the case),[97] however may also be seen as quite controversial due to the development of the principle of subsidiarity to the (possible) detriment of the Convention rights' effectiveness.

The Strasbourg Court's cautionary reasoning indicated the complexity of the problem: the ECtHR concluded that it had no cause to cast doubt on the reasons why the Norwegian legislature had opted to regulate the socially harmful conduct of non-payment of taxes by means of an integrated dual (administrative/criminal) process. Nor did it call into question the reasons why the Norwegian authorities had chosen to deal separately with the more serious and socially reprehensible aspect of fraud in the context of criminal proceedings rather than an ordinary administrative procedure. The Court then continued the discussion with the reference to the AG Opinion in the *Fransson* case, which clarified that many European jurisdictions accepted the 'two-track' system of criminal proceedings and administrative penalties, in line with their constitutional traditions.[98] This easily explains, in the eyes of the Court, that as many as six states intervened in support of the Norwegian government.[99] Moreover, the Strasbourg Court evidently followed the CJEU judgment in the above mentioned case, which interpreted the *ne bis in idem* principle laid down in Art. 50 of the EU Charter as *not* precluding a (EU) Member State from imposing *successively*, *for the same acts* of non-compliance with declaration obligations in the field of value added tax, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.[100]

On the basis of these premises, the ECtHR pointed out that, in principle, Art. 4 of Protocol 7 ECHR does not exclude that the Convention signatory can legitimately provide a *system* of punitive measures for the socially offensive conduct (such as the tax evasion). However, these coordinated legal responses brought against a subject shall be *'sufficiently closely connected in substance and in time'* to form *'a coherent whole'*, and *'do not represent an excessive burden for the individual concerned'*.[101] In particular, the Strasbourg Court emphasised that Art. 4 of Protocol No. 7 ECHR does not pose an absolute ban on States to impose an administrative sanction (even though it can be qualified as 'substantially criminal') for those tax evasion in cases, where it is also possible to prosecute and punish for an element other than the mere non-payment of the tax, such as a fraudulent conduct, to which the mere 'administrative' procedure

[97] A. B. v. Norway (no. 96), paras. 90-92.
[98] A. B. v. Norway (no. 96), para. 118.
[99] A. B. v. Norway (no. 96), para. 119.
[100] A. B. v. Norway (no. 96), para. 52.
[101] A. B. v. Norway (no. 96), para. 130.

could not be adequately applied.[102] Considering these premises, the ECtHR found no violation of Art. 4 of Protocol No. 7 to the Convention in respect of either of the applicants and said that, while different penalties had been imposed by two different authorities in the context of different procedures, there had nevertheless been a sufficiently close connection between them, both in substance and in time, for them to be regarded as forming part of an *overall* scheme of sanctions under Norwegian law.[103]

4. Conclusion

In this paper an attempt was made to shed some light on the influence of the group of the so-called EU Charter *'due process'* rights on the notion of 'European consensus' within the practice of the European Court of Human Rights. The author analysed the usage of the EU Charter as a criterion of 'European consensus' within the practice of the Strasbourg Court, with a special focus on the *'due process'* rights (i.e. Arts. 6, 7, 13 and Art. 4 of Protocol 7 to the European Convention) and discussed possible influence of the EU Court of Justice jurisprudence on Arts. 47-50 CFREU on 'European consensus' notion in the future. The main argument presented was that the Charter's influence on the notion of 'European consensus' in the area of *'due process'* rights in years to come, is likely to remain significant. However, the application of the EU Charter provisions capturing the *'due process'* rights as an indicator of 'European consensus' remains a very sensitive issue, due to the different legal contexts where the CFREU and the Convention are applied, as well as different *raisons d'être* of the Strasbourg and Luxembourg regimes of Human Rights protection. There are several crucial points which are worthy of being mentioned.

Firstly, the analysis of the Strasbourg Court's judgments released before the Treaty of Lisbon entry into force demonstrated the ECtHR's willingness to use Arts. 47-50 of the EU Charter to raise the level of the Human Rights guarantees in comparison with the standard previously existed in the European Court of Human Rights's practice. For example, such lines of reasoning as *Micallef* and *Salduz* (right to a fair trial, Art. 6 ECHR), *Scoppola No.2 (*no punishment without law, Art. 7 ECHR), *Zolotukhin* (right not to be tried or punished twice, Art. 4 of Protocol No. 7 ECHR) demonstrated the potential of Art. 52(3) CFREU as a factor affecting 'European consensus' notion and could be quite telling on this point. Importantly, the ECtHR has employed the EU Charter provisions as an

[102] A. B. v. Norway (no. 96), para. 123.
[103] A. B. v. Norway (no. 96), para. 147, 153, 154.

indicator of 'emerging consensus' not only in cases involving the EU Member States, but also in cases directed against non-EU Convention signatories (such as Russia,[104] Turkey[105] and Croatia before its accession to the European Union).[106]

Secondly, one could claim that the binding legal force of the Charter of Fundamental Rights of the European Union brought significant changes to the Strasbourg Court's practice in the area of '*due process*' rights. Despite the views expressed in academia earlier on the 'consensual' value of the EU Charter *only* in cases when it provides a more extensive protection on the basis of Art. 52(3),[107] the post-Lisbon practice of the European Court of Human Rights demonstrated that this statement is not necessarily correct. Rather, it can be concluded that the ECtHR demonstrates the aspiration to use pertinent CFREU-based jurisprudence of the EU Court of Justice to propose the *consistent* interpretation of the European Convention, even in cases where a possible derogation from the ECHR standards of protection might take place and/ or the application concerns the non-EU Convention signatory (*Nada/ Al-Dulimi, Kapetanios/ A and B v. Norway* lines of reasoning). Considering the *res interpretata* effects of the ECtHR's decisions, it will be stated that the Strasbourg Court demonstrates an endeavour to choose wherever possible an interpretation of the European Convention that is not only compatible with, but even conducive to a proper application of the EU Charter *'due process'* provisions by national authorities of the EU Member States,[108] acting within the scope of European Law. This tactic of 'conflict avoidance' is understandable as, in light of the CJEU *Opinion 2/13*, the time-frame and likelihood of success of any future negotiations to achieve EU accession to the European Convention remain unclear, while the need in coherent application of two main European legal instruments for the Human Rights protection is beyond doubt. Therefore, the influence of the EU Charter provisions on the 'European consensus' method usage is likely to increase further with the CJEU becoming more and more active in framing for the derogations from the ECHR standards on the basis of Art. 52(1) of the EU Charter, given that they are provided for by European Law, respect the essence of the rights and do not violate the principle of proportionality.

Thirdly, the higher degree of specificity achieved by the EU fundamental rights' standards in the area of *'due process'* rights may result in subjecting

[104] *Pishchalnikov v. Russia* (no. 32*), Zolotukhin v. Russia* (no. 34).

[105] *Salduz v. Turkey* (no. 31).

[106] *Maresti v. Croatia* (no. 36).

[107] NICOLAOU (no. 15), p. 7.

[108] POLAKIEWICZ, Jörg. Europe's multi-layered human rights protection system: challenges, opportunities and risks. [online]. Available at: < http://eulawanalysis.blogspot.ru/2016/03/europes-multi-layered-human-rights.html>, accessed 6 February 2018.

non-EU Member States to additional layers of obligations stemming from the EU Charter autonomous interpretation and given in the specific context of the EU legal order. This point may be well illustrated by the Strasbourg *Nada* or *Al-Dulimi* judgments which *de facto* obliged Switzerland to raise the standard of national judicial review, in order to make the application of national legislation consistent with the requirements of Arts. 6 and 13 of the European Convention. One could state that under these circumstances the ECtHR should provide a deeper scrutiny of the EU Charter interpretation to define the rationale of the CJEU approach – the EU-specific purpose of the market integration or the protection of the EU individual. Under these circumstances, the Strasbourg Court should also remain open to *not* following a 'European consensus' if there are good reasons for doing so. In connection with the previous discussion, one of these good reasons – though not actually employed by the European Court of Human Rights so far – could be that in a case brought against a non-EU ECHR signatory a consensus is mainly based on developments in European Law.