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Op-Ed

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www.eulawlive.com

Suggested citation: Melanie Fink, "Non-Compliance with EU Law as a violation of the ECHR? The broader implications of *Spasov v Romania*", *EU Law Live*, 6 February 2023

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Melanie Fink

The relationship between the European Convention on Human Rights (ECHR) and EU law has occupied a central place in the debate on human rights protection in Europe for decades. Even in the absence of EU accession to the ECHR, questions involving the EU or EU law often end up before the European Court of Human Rights (ECtHR), especially because EU law has permeated many areas of national law. Lacking the competence to rule on the compatibility of EU conduct with the ECHR directly, the ECtHR has developed a web of principles that determine the degree to which it will consider cases with an EU law angle.

On 6 December 2022, the ECtHR delivered its ruling in *Spasov v Romania*. The case concerned Mr Spasov, the owner and captain of a vessel registered in Bulgaria, who was convicted by a Romanian court for illegal fishing. According to the ECtHR, the Romanian court had thereby so gravely misinterpreted and misapplied EU law that it amounted to arbitrariness. This constituted a 'denial of justice' in violation of Article 6 ECHR.

The case adds another piece to the puzzle that is the relationship between the EU and the ECHR. It is particularly timely given the negotiations for a new agreement on the accession of the EU to the ECHR are steadily gaining pace. The following explores the broader implications of this ruling for the relationship between the EU and the ECHR.

Enhancing the Effectiveness of EU law

While substantive obligations under EU law have played a role in establishing violations of the ECHR in earlier cases, *Spasov v Romania* is remarkable because the ECtHR found the failure of Romania to correctly apply EU law to be the immediate basis for a violation of the ECHR. The underlying reason is simple: EU law forms part of the law to be applied to a case by the national courts of the EU Member States. Manifest errors in applying EU law that amount to arbitrariness thus constitute violations of Article 6 ECHR under the same circumstances as manifest errors in applying national law do. While straightforward, ultimately this means that EU

Member States are obliged to comply with EU law not just by virtue of EU law, but to some degree also by virtue of the ECHR. The ECHR thereby enhances the effectiveness of EU law.

From this perspective, this ruling also goes beyond established lines of case law concerning the relationship between the ECHR and EU law. With the well-known '*Bosphorus*-presumption', named after the case *Bosphorus Airways v Ireland*, the ECtHR developed a 'scrutiny waiver' according to which it would refrain from detailed scrutiny of Member State conduct that is taken in strict compliance with obligations flowing from EU law. The reasoning behind it is that the EU protects human rights in a manner equivalent to the ECHR and Member States can – subject to a number of conditions and fail-safes – be presumed to have complied with their Convention rights when they strictly implement EU law. Put simply, this allows Member States to fulfil their obligations under EU law without worrying too much whether these conflict with their ECHR obligations. In doing so, the ECHR helps to create the conditions for the effective implementation of EU law. As opposed to Spasov, however, it does not require Member States to implement EU law substantively correctly or, for that matter, implement it at all.

In another related line of case law, the ECtHR requires national courts of last instance to give reasons when they choose not to refer question to the Court of Justice of the EU ('the Court')for a preliminary ruling. Depending on the circumstances of the case, these reasons have to engage with the '*Cilfit* criteria' developed by the Court to flesh out the conditions under which an obligation to refer a case for a preliminary ruling arise under EU law (see *Sanofi Pasteur v France*). With this approach, the ECtHR creates an additional incentive for Member States to comply with their obligation under EU law to make use of the preliminary ruling procedure. However, reasoning obligations are procedural in nature. As long as consistent reasons are provided, it is not essential whether these reasons are substantially correct. Along these lines, the ECtHR requires that national courts have to explicitly and reasonably engage with the Court's *Cilfit* criteria, not that they apply them substantially correctly. As opposed to *Spasov*, whether or not EU law is correctly applied is therefore only a question of EU law, not the ECHR.

The CJEU's Prerogative to Interpret EU Law

If errors in the application of EU law by national authorities are the basis for a violation of the ECHR, the ECtHR cannot escape establishing the content of EU law. As the ECtHR itself recalled in *Spasov*, it does not have the competence to interpret EU law. This presented no particular difficulty in the particular case. The European Commission had actually gotten involved at national level, pointing out to the Romanian authorities that Mr Spasov was perfectly within his rights when fishing in Romanian waters and that prosecuting him represented a serious error in the interpretation and application of the EU's Common Fisheries Policy. In order to establish that the Romanian authorities had gravely misapplied EU law, the ECtHR relied heavily on this interpretation of EU law by the Commission.

However, establishing the content of relevant EU law may not always be as clear-cut. As discussed in more detail by Krommendijk and Timmerman here, the necessary engagement by the ECtHR with EU law in a less obvious case may be at odds with the autonomy of EU law vis-à-vis the ECHR. In addition, it also raises questions from the perspective of the division of competences among EU institutions under EU constitutional law.

The competence to interpret EU law lies exclusively with the Court of Justice. The preliminary ruling procedure, which would have given the Court the opportunity to establish the correct interpretation of the rules of EU law relevant to the case, was not triggered by the Romanian national courts. Infringement proceedings, which would have allowed the Court to establish the breach of EU law by Romania, were actually commenced by the Commission. However, they were abandoned after the Romanian Ministry of Agriculture and Fisheries had remedied the situation by expressly authorising access to Romanian waters for fishing vessels of other Member States. Thus, in the concrete case, the Court of Justice never got a chance to have its say and exercise its prerogative to interpret EU law.

Establishing the content of EU law may involve intricate legal questions, even when the case appears relatively straightforward. In *Spasov*, where the relevant rules were particularly clear, the ECtHR nonetheless touched upon the relationship between the doctrines of direct effect and primacy, a question that had been the subject of debate among academics and was only resolved by the Court of Justice in with *Popławski* in 2019. While the ECtHR cannot modify or pre-empt a CJEU ruling on questions of EU law, getting it wrong might nonetheless place Member States in an awkward position when it creates an unintentional conflict between the ECHR and EU law.

Conclusion

The ECtHR is faced with the difficult task of maintaining human rights protection in areas affected or even dominated by EU law, without being competent to rule on the compatibility of EU conduct with the ECHR directly. The ECtHR has developed complex lines of case law with a view to facilitating Member State cooperation within the context of EU law, incidentally – as *Spasov* shows – even increasing the effectiveness of EU law.

At the same time, *Spasov* also illustrates that the ECtHR's engagement with EU law has broader implications for the autonomy of the EU legal order and the division of competences among institutions. Ultimately, only accession of the EU to the ECHR really solves this dilemma, also by enabling the Court of Justice to examine provisions of EU law relevant to a case before the ECtHR within the framework of a prior involvement procedure. As Krommendijk and Timmerman rightly point out here, this clearly shows the (continued) added value of the EU's accession to the ECHR, not only for individuals affected by the EU's activities, but also for the EU itself.

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EU Law Live is an online publication, focused on European Union law and legal developments related to the process of European integration. It publishes News on a daily basis, along with Analyses, Op-Eds, and Weekend Long Reads.

ISSN

EU Law Live	2695-9585
EU Law Live Weekend Edition	2695-9593

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