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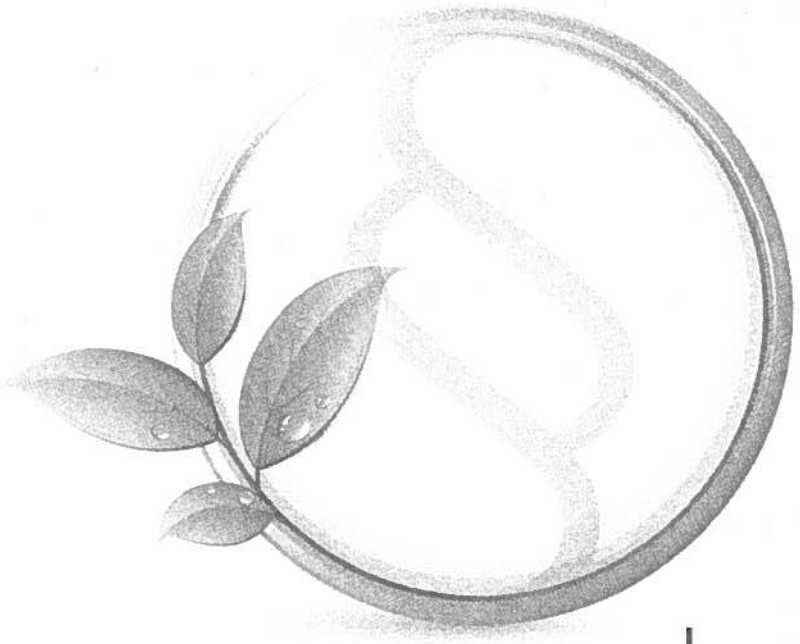
The Protection of Fundamental Rights Post-Lisbon:

The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions

Volume 1



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Bulgaria

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I. Nature and scope of the rights protected

Q1. Are there any remaining (potential or actual) *gaps* in the substantive scope and level of protection of fundamental rights? And can (potential) gaps in one fundamental rights source be filled by reference to other fundamental rights sources?

It is possible to identify two groups of fundamental rights whose scope and/or level of protection varies according to their source. The rights classified in the first group have a wider scope under the Bulgarian Constitution than under the Charter or the ECHR (Part A). The rights classified in the second group enjoy a wider scope or level of protection under the Charter or the ECHR than under the Constitution (Part B). After identifying the resulting gaps, the analysis then draws a number of conclusions (Part C), with regards, first, to the fundamental rights which should be considered as part of Bulgaria's constitutional identity (Part C, point 1); second, to the problems which may potentially arise from the resulting gaps (Part C, points 2 and 3); and third, to the possible ways of filling in the gaps (Part C, points 4 and 5).

A. Fundamental rights whose scope is wider under the Bulgarian Constitution

1. A number of social rights guaranteed by the Bulgarian Constitution generally have a wider scope than those under the Charter. Thus, for example:
   - by virtue of article 48, paragraph 5 of the Constitution, workers and employees shall be entitled, in particular, to a *guaranteed minimum pay*. The right to a guaranteed minimum pay is not enshrined in the Charter (see article 31);

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- under article 52, paragraph 1 of the Constitution the right to health care is defined as the right to "*affordable* medical care", and even to "*free* medical care in accordance with conditions and procedures established by law". The substantive scope of this right is therefore wider than the right to health care recognized by article 35 of the Charter;
- similarly, according to Article 47, paragraph 2 of the Constitution mothers have the right to "prenatal and postnatal leave, *free* obstetric care, alleviated working conditions and other social assistance";
- the right to education has a wider scope under article 53 of the Bulgarian Constitution. It guarantees not only free primary and secondary education in state and municipal schools (similarly to article 14 of the Charter), but also *free higher* education according to the conditions laid down by law. In addition, the establishments of higher education have the constitutional right to *academic autonomy*.

2. The right to a fair trial has one specific dimension under Bulgarian constitutional law. According to article 31, paragraph 2 of the Constitution, no one shall be convicted *solely* by virtue of his or her confession.

B. Fundamental rights whose scope is wider under the Charter/ECHR

1. The scope of the prohibition of discrimination under the Bulgarian Constitution seems narrower in comparison with the Charter and the ECHR. In particular, *language, age and sexual orientation* are not listed among the grounds on which discrimination is prohibited (Article 6, paragraph 2 of the Constitution). The Bulgarian Constitutional Court has held that the aforementioned article contains an *exhaustive* list of all the grounds on which discrimination is prohibited.[1] By contrast, Article 21 of the Charter refers expressly to the abovementioned three grounds of discrimination. Article 14 ECHR does not mention age and sexual orientation but prohibits "discrimination on *any* ground such as ...". In addition, age and sexual orientation are mentioned in Article 1 of Protocol No 12 of the ECHR.[2]

[1] Judgment No. 1 from 1 February 1993, case No. 23/92; judgment No. 1 from 16 January 1997, case No. 27/96; judgment No. 1 from 27 January 2005, case No. 8/2004.

[2] Bulgaria is not a signatory to Protocol No 12 ECHR.

It is not clear whether the drafters of the Constitution intentionally excluded the aforementioned three grounds of discrimination. The law on protection against discrimination, which was adopted several years after that, contains a longer list of prohibited grounds of discrimination, which contains, in particular, age and sexual orientation as well as all other grounds recognized by international treaties to which Bulgaria is signatory.[3] In a recent judgment however the Constitutional Court refered to the general principle of equality in order to fill in the resulting gap.[4]

2. The freedom of assembly and association may be seen, at least in one case, as more restricted under the Constitution than under the ECHR. The former stipulates, in Article 11, paragraph 4, that "there shall be no political parties on ethnic, racial or religious lines...".[5] This prohibition may or may not withstand the judicial control exercised by the ECHR in relation to Article 11 ECHR, in particular with regard to the test of proportionality. The same applies in relation to Articles 12 and 52, paragraph 1 of the Charter.
3. The right of free movement also has a different substantive scope. Under article 35, paragraph 1, of the Constitution everyone shall be free to choose a place of residence and shall have the right to freedom of movement in the territory of the country, as well as the right to leave the country. However, this right can be restricted by law "in the name of national security, public health, *and the rights and freedoms of other citizens*". In comparison, under EU law the free movement of European citizens can only be restricted on grounds of public security, public policy or public health.[6] It could therefore be argued that the scope of this right is wider under EU law than under the national Constitution, in so far as under the latter the rights and freedoms of other citizens can be a sufficient ground for denying the right of free movement.

[3] Article 4, paragraph 1 of the law.

[4] Judgment No 11 from 5 October 2010, case 13/2010.

[5] The Constitutional Court has already declared anticonstitutional one political party ("OMO-Ilinden"-PIRIN, judgment No 1 from 29 February 2000, case No 3/99) and has rejected another motion to apply Article 11, paragraph 4 of the Constitution (this case concerned the Movement for Rights and Freedoms, see judgment No 4 from 21 April 1992, case No 1/91).

[6] It remains to be seen whether this traditional approach to the possible restriction of the freedom of movement under EU law would remain valid in the light of Article 52, paragraph 1 of the Charter.

4. The right to marriage is limited, under article 46, paragraph 1, of the Constitution, to the voluntary union between *a man and a woman*. Article 12 ECHR is worded in a similar way. By contrast, the right to marriage conferred by article 9 of the Charter is not limited to marriages between individuals of the opposite sex and also encompasses, unlike the Constitution, other forms of founding a family.[7]
5. There are a number of fundamental rights that have been consecrated in the Charter and/or the ECHR but which are not part of the Bulgarian Constitution. These are, for example:
   - *protection of personal data*. It can be argued that this right is to some extent covered by the right to private and family life under article 32 of the Constitution; however these two rights do not necessarily and always coincide;
   - *the workers' right to information and consultation within the undertaking* (Article 27 of the Charter). No similar right can be found in the Constitution;
   - *the right to sound administration* (article 41 of the Charter);
   - *the right of access to documents* (article 42 of the Charter). This is only to a certain extent covered by article 41, paragraph 2 of the Constitution which entitles citizens to "obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or official secret and does not affect the rights of others".[8]
   - *the right to legal aid* (Article 47 of the Charter, article 6, paragraph 3, letter c) ECHR), *the principle of proportionality of criminal offences and penalties* (Article 49 of the Charter), as well as the *right not to be tried or punished twice in criminal proceedings for the same criminal offence* (Article 50 of the Charter and Article 4 of Protocol No 7 to the ECHR).

C. Conclusions

1. The question of which constitutional rights shall be considered to be part of a Member State's **constitutional identity** has no clear answer in the academic writings or in the case law. It could be argued that Chapter I ("Fundamental principles") and Chapter II ("Fundamental Rights and Obligations of Citizens") of the Constitution should be regarded as being part of Bulgarian constitutional identity.[9] This is a rather large approach to the notion of "constitutional identity" since, if it were to be accepted, it would cover virtually all principles and fundamental rights enshrined in the Constitution. One possible consequence of such an interpretation would be that certain contentious constitutional provisions, such as the prohibition of same sex marriages, may be considered as part of the country's constitutional identity. The same may apply to the various social rights enshrined therein.

It could also be argued that Bulgaria's legal order has a certain number of unwritten principles which underline its constitutional identity. One such example is the obligatory use of the Cyrillic alphabet in official documents and in public places. This may give rise to certain problems related to the (obligatory) transcription in Cyrillic of names of individuals from other Member States who enjoy certain rights as European citizens, namely the right of free movement. The full and effective exercise of this right may be hindered, in certain circumstances, if under national law his or her name cannot be transcribed in the same way as it appears in his or her Member State of origin. The Court's case law has already addressed similar issues, for example in the recent *Runević* case[10].

2. The comparative analysis carried out above shows that there are no truly "unique" fundamental rights under the Bulgarian Constitution – both the Charter and the ECHR recognize the same or very similar fundamental rights. Still, it could be argued that **the substantive scope of a limited category of fundamental rights guaranteed under the Constitution is wider** (Part A above). In this regard, it should be kept in mind that according to article 53 of the Charter the latter shall not be interpreted in a way that would limit or restrict the rights guaranteed under the national constitutions of the Member States. However, **a potential conflict cannot be excluded**, in particular as far as the constitutionally recognized social rights are concerned whose scope is perceived as potentially wider. Such a conflict could result in cases where these rights have to be balanced against other fundamental rights of particular importance under EU law, such as the right to free movement. Such conflicts remain however, for the time being, hypothetical, given that the country has not so far experienced an influx of migrant workers.

3. As far as the second group of fundamental rights are concerned (Part B), it is generally considered that their potentially larger scope under EU law

[7] See Part C, point 5 below.

[8] See for example judgment of the Constitutional Court No 1 from 1996, case No. 7/96.

[9] This view is supported, although in different terms, in the case law of the Constitutional Court – see, for example, judgment No 4 from 21 April 1992, case No 1/91, Section I, point 3).

[10] Case C-391/09.

would not, as a whole, lead to problems of a large scale. Still, certain **objections against widening the level of protection resulting from EU law** may arise in some specific cases where the possibility for public authorities to act in the public interest is, as a result, restricted. One such example stems from the prohibition of discrimination on grounds of ethnic origin. While this type of discrimination is also prohibited under the Constitution and the relevant legislative acts, it is generally perceived that the level of protection under EU law may be higher than under national law. By applying EU law, in particular the Charter and Directive 2000/43/EC, this specific ground of discrimination could for example prevent public authorities and private companies from taking the necessary measures against the abusive use of the national electrical grid or of other utilities by the residents of some deprived neighbourhoods where the majority of the population belongs to a certain ethnic group by limiting the access to the respective measurement devices.[11]

4. The comparative analysis of the fundamental rights protected under the Bulgarian Constitution, on the one hand, and the Charter and the ECHR, on the other hand, shows that certain gaps cannot be excluded outright. **These gaps can however be filled in several ways.** Firstly, the fundamental rights which are part of the Charter/ECHR but not part of the Constitution (Part B, point 5), are recognized, in one way or another, in various national *legislative acts*, which, although not constitutional in nature, provide for similar protection. The fact that these rights are not part of the catalogue of constitutional rights may affect the judicial control exercised by the Constitutional Court. Arguably, the latter may not be able to examine whether a national law violates these rights since they are not in the Constitution.

Secondly, some gaps can be filled by reference to *other fundamental rights* guaranteed by the Constitution (e.g. the right of access to documents can be, to some extent, covered by the constitutional right to obtain information; the right to protection of personal data can be partially covered by the constitutional right of private and family life).

Thirdly, the resulting gaps may also be filled by reference to the relevant instruments of international law. The Constitutional court is competent to review the compatibility of a national law with an international agreement to which Bulgaria is signatory.[12] The Constitutional court has been asked, on this basis, to rule on various occasions on the compatibility of a national law with the ECHR. Therefore, as long as a given fundamental right is

[11] Such a case is presently pending before the ECJ – case C-394/11, *Belov*.

[12] Article 149, paragraph 1, point 4 of the Constitution.

enshrined in the ECHR, the Constitutional court will enforce it, no matter whether this right has been recognized by the Constitution or not. Since most of the resulting gaps, however, stem from the Charter, and not the ECHR, this recourse can be of little or no particular use. It would therefore be important to see whether the Constitutional court is prepared to review the compatibility of a national law with EU law and declare the former anti-constitutional, if it breaches EU law. The Constitutional court has not yet taken a clear stand on this matter.

This problem can however, in certain cases, be sidestepped. One such example is the right to integrity of the person in the field of medicine and biology. This right has a wider reach under article 3, paragraph 2 of the Charter in comparison with article 29, paragraph 2 of the Constitution. Yet, given that Bulgaria is signatory to the Convention of Human Rights and Biomedicine, adopted by the Council of Europe which provides for very similar protection to that of the Charter, the substantive scope of this fundamental right should be deemed to be protected in an identical manner. The same applies to the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights which can be seen as means of interpretation of the relevant internationally recognized fundamental rights.[13]

5. It cannot be ruled out that some of the resulting gaps may be intentionally sought. If that is the case, the gaps should be respected. Such appears to be the case with the right to marriage. While the national Constitution, as well as the ECHR have restricted the right to marriage to individuals of the opposite sex, Article 9 of the Charter is more widely and neutrally worded. However, the latter does not seek to fill in this particular gap, given that it explicitly refers back to the national laws which regulate the matter. This should be interpreted as meaning that the limitations of the right to marriage by virtue of the Bulgarian Constitution remain valid even if they come within the scope of EU law.

In other areas, the same fundamental right may have a different scope, depending on whether it comes under EU law or not. One possible example could be the right to free movement. If it is exercised within the EU, the Charter and the relevant provisions of EU law will apply. If it is exercised outside of the EU, it can, in general, be subjected to stricter rules under national law.

[13] See, for example, Judgment No 7 from 4 April 1996 of the Constitutional Court, case No 1/1996.

Q2. What is the role of general legal principles: can they function as sources of fundamental rights protection?

It may not always be possible to draw a clear line between general legal principles and fundamental rights The Bulgarian Constitution may be thought to draw such a line: Chapter I is about "Fundamental principles", while Chapter II is about "Fundamental rights and obligations of the citizens". To a certain extent this distnction is consistent with the substantive content of these two chapters. A closer look however shows that some typical fundamental rights, such as the right to property and inheritence (Article 17), as well as the right to consumer protection (Article 19, paragraph 2) are included in Chapter I and may therefore be viewed not as rights, but also as principles. It may be argued that the EU Charter of fundamental rights does not make a clear-cut distinction between rights and principles either.[14]

The case law of the Constitutional court shows that some fundamental constitutional principles, such as the principles of legality (Article 4), equality (Article 6), a public hearing and audiatur et altera pars, as well as the principle of truth (Article 121) are often used as means of interpretation to define the actual scope and level of protection of a given fundamental right. One example is the principle of non-discrimination whose scope is relatively narrow under the Constitution given the limited number of grounds listed in Article 6, paragraph 2. In one case, the Constitutional Court referred to the general principle of equality in order to fill in the resulting gap.[15]

There are also a number of important principles, mostly of procedural nature, which are enshrined in various legislative acts. Examples of these are the principles of fairness[16], of sound administration[17], of proportionality[18], of deciding a case within a reasonable time[19], of transaprency and accessibility[20]. These principles, although not constitutional in rank, may also be used as a tool of interpretation of the scope and the required level of protection of certain fundamental rights.

[14] See the reply to Question 8.
[15] Judgment No 11 from 5 October 2010, case 13/2010.
[16] Article 6(1) of the Code of administrative procedure.
[17] Article 6(1) of the Code of administrative procedure.
[18] Articles 6(2)(5) and 10 of the Code of administrative procedure.
[19] Article 13 of the Code of civil procedure and Article 11 of the Code of administrative procedure.
[20] Articles12 and 13 of the Code of administrative procedure.

II. Horizontal Effect and Collision of Rights

Q3. To what extent is 'horizontal effect' of fundamental rights accepted in the Member States? How is the case law of the ECJ in this respect received?

The horizontal effect of fundamental rights has been generally well received in Bulgaria both by the legislature and the case law. In particular, there are no signs of national courts being reluctant to accept the case law of the ECJ in this respect.

Q4. How do Member States within their respective jurisdictions and EU institutions deal with cases of the collision of rights, both as regards?

a. collisions between classic rights (e.g. non-discrimination and freedom of expression or religion, etc.)

Bulgarian constitutional law makes the traditional distinction between absolute and relative human rights. Whilst the former cannot be subject to restrictions, the latter can. Examples of relative human rights are the freedom of conscience, of thought and religion (Article 37), the freedom of expression (Articles 39), the right to obtain and disseminate information (Article 41). The Constitutional court has explicitly refused to establish a hierarchy between the various constitutional rights and has confirmed that collisions should be resolved on a case by case basis by balancing the rights in question[21]. For the purposes of balancing the various concurrent fundamental rights, national jurisdictions, and in particular the Constitutional Court, without giving priority to a given category of rights over another, would resolve the resulting collision by applying the principle of proportionality.[22]

In some cases the collision may be resolved by referring to the respective constitutional provisions, some of which explicitly provide for a number of exhaustively enumerated grounds on which some of the relative human rights can be restricted – for example the freedom of conscience, of thought and religion (Article 37), the freedom of expression (Articles 39), the right to obtain and disseminate information (Article 41), which can be restricted, inter alia, if exercised to the detriment of the "rights and obligations of other

[21] Judgment No 7 from 4 April 1996, case No 1/1996.
[22] For an example, see Judgment No 2 from 31 March 2011, case No 2/2011.

citizens". This construction is sufficiently vague to allow a large degree of flexibility and a case by case approach. In cases where the Constitution itself does not contain an exhaustive list of possible grounds for restriction, national jurisdictions also refer to the general prohibition of abuse of rights (Article 57, paragraph 2 of the Constitution) as a tool for resolving the resulting collision.

The case law contains various examples where the freedom of religion had to be weighed against the principle of equal treatment (e.g. religious clothing incompatible with school uniforms[23]). Since the principle of equal treatment implies the prohibition of privileges for certain groups of the society (in this case, the privilege not to wear a school uniform), it is generally considered that its weight against the freedom of religion is bigger. Balancing the freedom of expression against the right to privacy or to human dignity, it is normally the latter which will prevail, unless the person in question is public and the revealed circumstances have a link with his public stature.[24] The case law also shows some recurrent criteria which are often taken into consideration for the purposes of the balancing act – for example the *voluntary* nature of an individual's action (he or she have voluntarily chosen to sign up for a certain educational curriculum which includes religious training); the *general* nature of a discriminatory behaviour (it is aimed at a specific group of people as such, irrespective of the person's individual behaviour) – in such cases the prohibition of discrimination will prevail over the freedom of expression, etc.[25]

b. collisions between on the one hand classic rights and socio-economic and cultural rights on the other (e.g. free movement rights and freedom of expression, religion)

This type of horizontal collision will also be resolved along the lines explained above. It should be added that national jurisdictions have not yet, at this stage, had to deal with balancing the right of free movement of citizens from other EU Member States against other fundamental rights for the reasons explained under Question 1. The case law however contains an interesting example with regard to the possibility to restrict the free

[23] See, for example, Decision No 37 from 27 July 2007, case No 65/2006, Commission for protection from discrimination.

[24] Judgment No 7 from 4 April 1996 of the Constitutional Court, case No 1/1996.

[25] Decision No 141 from 20 June 2008, case No 40/2007, Commission for protection from discrimination; Decision No 211 from 8 October 2008, case No 8/2008, Commission for protection from discrimination.

movement of Bulgarian citizens, i.e. their right to leave the country, in cases where the exercise of this right may affect the rights of other citizens. Under national law Bulgarian citizens may be prohibited from leaving the country if they have unpaid substantial public or private debts.[26] This rule was challenged both before the Constitutional Court and the competent administrative courts. It was argued before the Constitutional Court that this rule aimed at protecting the creditor's rights. Article 35 of the Constitution allows the restriction of the freedom of movement if it is exercised to the detriment of the rights and freedoms of other citizens. The Constitutional Court had thus to balance the debtor's right to free movement against the creditor's right to recover his money. It held that in the case of non payment of public debts, the citizens' constitutional rights to social security benefits, education, medical insurance, etc. are at stake. In the case of non payment of private debt, at stake is the creditor's right to property. It concluded, in both cases, that these constitutional rights are worthy of protection and accepted that the freedom of movement may be restricted in order to protect them. At the end, the challenged legal provision was held to be incompatible with the Constitution not because the above mentioned rights were incapable of restricting the freedom of movement but because the resulting restriction was disproportionate.[27]

In parallel, the question was brought to the ECJ for a preliminary ruling by an administrative court. The key question is whether under EU law free movement rights can at all be restricted on the ground that they affect adversely other people's rights and freedoms. It should be reminded that the free movement rights can be restricted under EU law only on grounds of public order, public security and public health. In addition, purely economic reasons cannot justify such a restriction.[28] While AG Mengozzi has suggested that the notion of "public order" may *in exceptional circumstances* be construed as covering the payment of a public debt (since the taxes collected by the State may serve not only a purely economic goal), this may not be the case of a private debt.[29] The case is still pending before the ECJ.

There is an important conceptual difference between the way the Constitutional Court resolved the collision and the way the ECJ

[26] Articles 75, paragraphs 5 and 6 of the Law on the Bulgarian personal identification documents. The amount of the public debt is determined at BGN 5000 (approx. EUR 2500), while the amount of the private debt is defined simply as "substantial".

[27] Judgment No 2 from 31 March 2011, case No 2/2011.

[28] See, for example, Article 27 of Directive 2004/38.

[29] Opinion of AG Mengozzi of 6 September 2011, C-434/10.

traditionally does. While the latter is rather reluctant to admit restrictions to the free movement rights at all and, if it does, it constructs them as exceptions to the rule which it then interprets in a particularly strict manner, the Constitutional Court had no conceptual problems to admit a wide array of possible restrictions. While the former is prepared to allow only restrictions intimately linked to public order, public security and public health, the latter allows practically any sort of fundamental right as a possible counterbalance to the free movement rights. This means, in the particular case in question, that the Constitutional Court is prepared to balance the free movement rights, on the one hand, and the affected concurrent rights, such as the right to property, the right to social security, medical care, etc. (irrespective of whether they are of purely economic nature or not), on the other hand, relying, for the purposes of the balancing act, on the principle of proportionality. On the contrary, according to AG Mengozzi, the abovementioned concurrent rights would qualify as possible justifications for the resulting restriction of the right to free movement only in exceptional circumstances and only if they can be associated with "public order".

c. collisions between socio-economic and cultural rights *inter se* (e.g. right to strike and free movement)?

National courts have yet to elaborate on the possible solutions of collisions between socio-economic and cultural rights *inter se*. It can however be assumed that they will rely on the traditional way courts have dealt with collision issues, namely by balancing the concurrent rights and by applying the principle of proportionality, as well as the prohibition of abuse of rights.

It is interesting to note that the right to strike is enshrined in Article 50 of the Constitution. Unlike other constitutionally recognized rights, the Constitution does not explicitly provide for restrictions to the right to strike – the constitutional text simply states that "workers and employees shall have the right to strike in defence of their collective economic and social interests" and that this right "shall be exercised in accordance with conditions and procedures established by law". The Constitutional Court has however held this does not mean that the right to strike cannot be subject to restrictions. In particular, it has referred to the prohibition of abuse of right in order to justify the compatibility with the Constitution of a national law *denying* the right to strike of a number of professions, such as, among others, those related to the distribution and supply of energy, the sector of communications, of medical care, etc.[30] It did not however

[30] Judgment No 14 from 24 September 1996, case No 15/96.

examine whether the resulting prohibition to strike in the abovementioned economic sectors was proportionate to the pursued objective.[31] This could mean that the level of protection under the Constitution may be lower than that guaranteed by Article 28 of the Charter and Article 11 ECHR.[32]

Q5. How does, or should, the balancing take place in the context of the multiplicity of EU, ECHR and national legal orders ('multilevel' legal order)?

It is submitted that the fundamental rights enshrined in the ECHR should be perceived as a minimum standard of protection. This is confirmed, in particular, by Article 52, paragraph 3 of the Charter according to which the meaning and scope of the rights enshrined in the Charter which correspond to rights guaranteed by the ECHR shall be the same as those laid down by the said Convention. This article goes on to say that Union law may however provide more extensive protection.

The next level of protection (in substantive terms) is the Charter, subject to its field of application (Article 51). It contains rights which are not protected under the ECHR. The substantive scope of certain corresponding rights is also wider under the Charter than the ECHR.

The last level of protection (in substantive terms) may in certain cases be the national Constitutions or bills of rights of the Member States, in so far as the Charter shall not be interpreted as restricting or adversely affecting the rights recognized by national Constitutions (Article 53). Therefore, in principle, it should be possible for national Constitutions to provide a longer list of rights worthy of protection or a higher level of protection of the corresponding rights than that of the Charter.

[31] See the dissenting opinion of judge T. Todorov who argues that while the Constitution may be interpreted as permitting certain restrictions to the right to strike, it does not permit the *denial* of this right. He further submits that the right to strike can take various forms and that not all of them imply the effective interruption of all of the respective services. In other terms, he implicitly suggests that if the principle of proportionality had been applied, the prohibition to strike at issue would not have passed the test.

[32] Under Article 11, paragraph 2 ECHR, States may impose lawful "restrictions" on the exercise of the rights conferred by this article "by members of the armed forces, of the police or of the administration of the State". The Explanations relating to the Charter of Fundamental Rights (2007/C 303/02) also mention that "the modalities and limits" for the exercise of collective action, including strike action, come under national laws and practices.

The above structure may however prove to be difficult to implement in practice, especially in cases of a horizontal collision of fundamental rights where the levels of protection of the concurring rights is different at one of the abovementioned levels. Such a difference may seriously affect the balance between these rights and may thus change the outcome of the collision. It is submitted that in such cases it may be more appropriate to leave the final balancing act to the national judge rather than the ECJ. Finding the balance between colliding rights often comes down to applying, in one form or another, the principle of proportionality. The ECJ has a long standing practice of leaving the actual application of this principle to the national judge. Such an approach in the area of horizontally colliding fundamental rights is particularly justified by Article 6, paragraph 3 TEU and Article 53 of the Charter both of which bestow particular importance to the constitutional traditions of Member States in the area of fundamental rights. Leaving the final balancing act to the national judge would thus allow the aforementioned constitutional traditions to be duly taken into consideration.

Q6. What role does the legislature have in granting horizontal effect to fundamental rights? What is its role in ordering and prioritizing rights which might collide? In particular, what is the influence of the non-discrimination Directives on the exercise of other fundamental rights in the Member States?

As mentioned above, the horizontal effect of fundamental rights has not raised specific conceptual problems neither in the case law nor in the legislative process. The legislature has so far abstained from ordering or prioritizing rights which may collide. Nonetheless, the influence of the non-discrimination directives has been far-reaching. In particular, the Parliament passed a special law on non-discrimination which provides, *inter alia*, for a specific quasi-jurisdictional procedure to deal with discrimination complaints. A special body was created to that end, the Commission for protection from discrimination. As a result, the control over the practical application of the non-discrimination rules, including the horizontal application thereof, has intensified over the last several years, as illustrated by the ever-increasing case law of the Commission. It may be argued that in practical terms, as a consequence of the non-discrimination directives, the protection of the rights based on the principle of non-discrimination has been prioritized in comparison with other fundamental rights.

III. Consequences of the entry into force of the EU Charter of Fundamental Rights

Q7. Is the Charter perceived as being a mere continuation and consolidation of the previous (i.e. pre-Lisbon) sources of EU fundamental rights protection; or does the Charter provide added protection (or rights) as compared to the pre-Lisbon situation, if one looks at the case law in various jurisdictions since its entry into force?

The Charter should be perceived, in the first place, as a continuation and consolidation of the pre-Lisbon sources of EU fundamental rights protection. Since these sources – including the ECHR, the constitutional traditions and the international obligations of Member States, the Social Charters of the Union and the Council of Europe and the jurisprudence of the ECJ and the ECHR – already cover a substantial part of the fundamental rights enshrined in the Charter, the latter seems indeed as a token of continuation and consolidation.

It is of course possible to argue that certain rights enshrined in the Charter are "new". These are mostly some of the so-called second and third generation rights (e.g. the workers' right to information and consultation within the undertaking, the right to protection in case of unjustified dismissal, the right to social security, social assistance and health care, the right to the protection of personal data, the right to a high level of environmental protection, the right to consumer protection, the right to asylum, etc.). Yet, the fact is that these rights already enjoy protection under various EU legal instruments, but had hitherto not been considered as fundamental rights in the context of EU law.

The pre-Lisbon case law of Bulgarian courts contains only sporadic references to the protection of fundamental rights under EU law. This is explained, on the one hand, by the difficulty to identify the exact EU source of such rights and, on the other hand, by the well established practice to refer to other international instruments, such as the ECHR. A pre- and post-Lisbon comparison of the level and scope of protection of fundamental rights under EU law in the case law of Bulgarian courts cannot therefore be conclusive. The case law post-Lisbon however indicates that the Charter has quickly taken place as a primary source of fundamental right protection for matters coming within the scope of EU law. Litigants would now often refer in their claims to the Charter and national jurisdictions have already made several

references for to the ECJ on this matter.[33] The apparent change in the case law can be explained by the increased visibility of fundamental rights protection under EU law as a result of the entry into force of the Lisbon Treaty.

Q8. Has the distinction made in the Charter, especially in its official Explanations Relating to the Charter of Fundamental Rights (OJ 2007/C 303/02), between 'rights and freedoms' and 'principles' been reflected in the practice of courts and legislatures in the respective jurisdictions, as well as in the doctrine?

The distinction made in the Charter between "principles" and "rights and freedoms" has not so far been reflected in the case law of Bulgarian courts or in the doctrine. It is however submitted that it may, in some cases, be difficult to draw a clear-cut distinction between the two. If we look closer at some of the so-called socio-economic rights, such a distinction may prove uneasy. Some of these rights are already labelled as "hybrid", i.e. containing both "rights" and "principles" – such is the case of the right to social security and social assistance, which, according to the Explanations, contains both elements. Others, which are normally labelled as "rights", such as the right to work, come actually very close to a "principle", especially when it comes down to their justiciability. Indeed, without proper implementation through legislative or executive acts, some of the socio-economic rights cannot give rise to direct claims for positive action by the Union's institutions or Member States' authorities. In other terms, individuals cannot directly rely on them as part of a lawsuit to assert a right of access or request the creation of benefits or services. If these socio-economic rights are not enforceable per se, the courts should nonetheless take them into account as "principles", particularly when they have to interpret or review the legality of legislative or executive acts. The opposite is also true. Some "principles" actually come very close to a "right". For instance, the integration of persons with disabilities (Article 26 of the Charter) is labelled in the Explanations as a "principle", which means that it cannot give rise to direct claims for positive action. This however may not always hold true, at least under national law, where such a claim (for instance, ensuring some form of access to a public building as a prerequisite for the exercise of the person's other fundamental rights) may not be inadmissible.

[33] C-394/11, Belov; C-249/11, Byankov; C-27/11, Vinkov; C-434/10, Aladzhov; C-430/10, Gaydarov; C-339/10, Estov.

IV. Consequences of the accession of the EU to the ECHR

Q9. Does EU accession to the ECHR overall add to the protection of fundamental rights of citizens; does it outweigh the procedural complications to which it may give rise, for instance when the EU is co-respondent, and more especially when a prior involvement of the ECJ in a case pending at the ECtHR would become possible?

It is submitted that EU accession to the ECHR is, before all, a symbolic gesture of political will. It would add very little, if anything, to the substantive scope of the fundamental rights which are subject to protection under EU law, especially now after the entry into force of the Lisbon Treaty. On the one hand, the EU Charter of Fundamental Rights contains a much longer list of rights worthy of protection than the ECHR. As far as the rights which come under both instruments are concerned, it is clear that the substantive scope of some of them is wider under the Charter than under the ECHR. The ECHR can therefore be seen as a minimum standard which is already ensured by the Charter which has become binding law. On the other hand, long before the Lisbon Treaty, the ECJ has consistently taken into account and observed both the ECHR and the case law of the Strasbourg court.

It cannot however be excluded that in certain areas of EU law the accession to the ECHR may eventually bring about significant changes. One such area is EU competition law where it has been argued that various basic principles and notions, as well as the system itself, are incompatible with the ECHR. Without being necessary to embark on this endless debate, it should be noted, for the purposes of this paper, that this view is not shared by the author.

The accession to the ECHR would however entail a number of procedural complications. Obviously, one of them is the fear that the Strasbourg court will eventually have to rule upon (indirectly) the separation of competences between the Union and its Member States which is a delicate issue reserved exclusively – and it should remain so – for the ECJ. It is difficult to envisage a satisfactory solution to this problem. The automatic add-up of the EU as co-respondent in cases where the respondent Member State has supposedly implemented or applied EU law as a possible solution has its drawbacks. In the event the Strasbourg court finds a violation of the ECHR and condemns both the EU and the Member State, it would supposedly do so without saying – since it has no competence in that regard – whether the illegality resulted from the autonomous action of the Member State, from EU law alone or from a mixture of both. In case of disagreement between the EU and the Member State – which may affect the execution

of the Strasbourg judgement – how should this be resolved? By creating yet another specific procedure before the ECJ?

Another complication stems from the envisaged "preliminary reference" from Strasbourg to Luxembourg in cases where the ECJ had not had the opportunity to rule upon the validity of an act of the EU with regard to fundamental rights. This would undoubtedly place another procedural burden on both courts, would cause further delays and would raise concerns about the effective nature of the available remedies with regard, in particular, to their time span.

A further complication may arise from the possibility of Member States to sue the EU in Strasbourg (Article 33 ECHR). If this is allowed, Member States may decide to take up their case in Strasbourg, once they have lost in Luxembourg. This may apply to both actions for annulment and the infringement actions. Such a possibility may create unwanted tensions inside the Union and jeopardize its institutional equilibrium.

It is therefore submitted that the procedural complications which EU accession to the ECHR may entail outweigh the resulting hypothetical – and marginal, if at all – strengthening of the protection of fundamental rights in the EU.

Q10. The ECtHR *Bosphorus* ruling exempts Member State action covered by EU law from scrutiny on the rebuttable assumption of an overall conformity of EU measures with the ECHR?

- Is this 'double standard' of review of Member State action, depending on whether it is determined autonomously or on the basis of EU law, justified and acceptable to all Member States?
- Have national courts followed the *Bosphorus* ruling in their case law when parties invoked the ECHR?
- Does the *Bosphorus* presumption have the overall effect of shifting the ultimate authority concerning the question whether ECHR rights have been infringed from Strasbourg to Luxembourg?
- Will the *Bosphorus* presumption be tenable, also in light of the purposes of accession to the ECHR?

The Bosphorus jurisprudence has secured a particularly important privilege for EU law in that it creates a presumption of its overall conformity with the ECHR. Despite its many critics, one should not light-heartedly discard the Bosphorus jurisprudence as creating double standards or as discriminatory against the signatories to the Convention. The judgment in Bosphorus is deeply rooted in the idea that the rule of law and the protection of fundamental rights are inherent to the EU, an idea which is hardly debatable in itself. It is however also true that the Bosphorus presumption was created to a large extent due to the fact that at that time the EU was not a signatory to the ECHR. Upon EU accession, the Bosphorus jurisprudence would become less tenable, unless it is incorporated, in one way or another, in the accession agreement itself.

We have no information of Bulgarian courts having relied upon the Bosphorus presumption in cases where parties have invoked the ECHR.

V. The future of fundamental rights protection, national and European, in the EU as an "area of fundamental rights"

Q11. Is the interpretation which the ECJ has so far given of the general provisions on the scope of the Charter, its relation to national constitutional rights and human rights treaties, and on restricting the exercise of rights (Title VII of the Charter) looked upon favourably?

It is obvious that the authors of the Charter have sought to put into place special precautions in order to define the boundaries of its application amidst fears of a possible extension of EU competences. The resulting text of Article 51 seems, at first sight, to set clear limits to the application of the Charter. Those limits should, in a lot of cases, be easy to comply with. A further look into the issue however reveals a number of potential problems, a certain *"grey area"* which may or may not fall within the scope of the Charter. According to Article 51, paragraph 1, Member States should comply with the Charter "only when they are implementing Union law". The exact meaning of this proviso may cause uncertainties when it comes to its application in practice. One example is the classical scenario of adopting national measures implementing a Union directive. These measures would sometimes contain not only the prescriptions following from the directive but also complementary provisions which the Member State has taken autonomously, albeit in the context of its obligation to implement the EU directive. Should these complementary provisions be considered as "implementing" EU law? Another example is the situation where EU law allows for derogations and a Member State adopts a measure which falls within the scope of the derogation. Should such a measure be considered

as "implementing EU law"? Yet another example may be drawn from the principle of effectiveness which requires that Member States take all necessary measures to ensure the effective application of EU law. When Member States impose, for instance, criminal sanctions for breaches of EU law, without EU law expressly imposing such an obligation upon Member States, are they "implementing Union law"? These queries exemplify the possible uncertainties surrounding the autonomous character of the national measure in question. These uncertainties could make elusive the contours of the area otherwise exclusively reserved for the national bills of rights.

The matters which remain clearly outside of the scope of EU law, and therefore outside of the scope of the Charter, in other words, outside of the "grey area", are not spared from possible controversies either. An easy answer may be that the Member States' bills of rights remain unaffected and therefore fully applicable, as long as the matter falls outside EU law. This conclusion, although it is in principle correct, is however tempered by at least one further interrogation. Would it be tenable at all to maintain two parallel systems of humans rights protection, one based on the national constitution for the matters remaining outside of the scope of EU law, and the other based on the EU Charter for the matters coming within the scope of EU law? While such a distinction is in theory possible and could in many cases be applied in order to find concrete solutions, it is highly questionable whether it is reasonable and justifiable to proceed that way since this would raise questions about the very "fundamental" nature of the respective right. Such an approach may result into securing a different level of protection for the same right depending on whether it comes under EU law or not. A more appropriate solution may consist in trying to avoid conflicts between the two, whenever this is possible. However, in cases where there are material differences between the two, the problems may prove difficult to resolve.

Q12. Is there a general EU human rights competence, or should there be such competence? What are the implications for the future of the ECHR system of protection of rights?

There is no general EU human rights competence. Article 51 of the Charter confirms that national authorities, when they act outside the scope of EU law, are not bound by its provisions. One example where the ECJ drew that line and declined to give a preliminary ruling precisely on the basis of the limitations placed upon the field of application of the Charter, is the case Estov[34].

[34] C-339/10, order of the Court from 12 November 2010.

The future accession of the EU to the ECHR will increase the importance of the latter due to the judicial mechanism that will be put into place. One consequence is that the provisions and the case law of the ECtHR will now appear even more often in the case law of the ECJ which will have to make sure, under the threat of an ever possible sanction by Strasbourg, that the fundamental rights protection that it offers is at least equivalent to that of the Strasbourg court. Another consequence is that the European court in Strasbourg will become the ultimate judge in the area of fundamental rights protection in the EU.

The reverse process is also possible. Given that the Charter provides a wider protection of fundamental rights than the ECHR, the latter may be influenced thereby. The case law of the ECtHR already contains examples where it referred to the Charter in order to justify a broader conception of the protection of a fundamental right under the Convention.[35] In addition, the ECtHR has declared the Charter a "source of inspiration".[36] This process should retain our attention since it exemplifies the influence the Charter has and will exert upon the ECHR. Given that the Charter is undoubtedly more advanced, more complete and more thorough that the Convention, this process can only be beneficial for the overall protection of human rights in Europe.

Q13. What role should be envisaged for EU institutions as to fundamental rights protection within a more polycentric constitutional system of Europe? Would you conclude on the basis of the development of the ever-widening scope of EU law and fundamental rights activity, as well as your discussion of the previous questions in your report, that a gradual but definite transfer of human rights

[35] In its judgment from July 11, 2002, Christine Goodwin v. United Kingdom (No. 28957/95) the ECtHR recognized the right of transsexuals to marry a partner whose sex is the same as the transsexual's previous sex. In so doing, the Court had to move away from the strict sense of Article 12 ECHR ("men and women have the right to marry") by invoking the broader wording of Article 9 of the Charter, which generally recognizes the "right to marry." In the following years the ECtHR started to refer to the Charter more often (see, for example, judgment of April 19, 2007, Vilho Eskelinen and others v. Finland, No. 63235/00, where the ECtHR referred to Article 47 of the Charter and the Explanation Relating to it; judgment of November 12, 2008, Demir and Baykara v. Turkey, No. 34503/97, where the ECtHR referred to Articles 12 et 28 of the Charter; judgment of 17 September 2009, Scoppola v. Italy (No. 2), No. 10249/03, where the ECtHR referred to Article 49 of the Charter and the case law of the ECJ).

[36] See, for example, judgment of November 12, 2008, Demir and Baykara v. Turkey, No. 34503/97.

protection has taken place from Member States to the EU and from the Council of Europe and ECHR to the EU?

EU institution should, in the first place, review their administrative practices in the light of the Charter and the ECHR. This holds particularly true for a number of areas of EU law where the European Commission has investigative powers – competition law, state aids, anti-dumping and countervailing measures, fraud investigations, etc. In these areas the Commission should undertake to review with meticulous care certain aspects of its administrative practices. In particular, the role of the hearing officer should be reinforced. The European Ombudsman can make significant contribution to the review process. The European Parliament should also put into place a mechanism which would allow scrutiny of every legislative proposal in the light of the Charter and the ECHR.

It can certainly be concluded that a gradual but definite transfer of human rights protection from Member States to the EU has and is taking place. This process had already begun before the Lisbon Treaty as a result of the case law of the ECJ which had recognized some of the fundamental rights as general principles of EU law on the basis of which it reviewed the compatibility of national or private (horizontal) measures falling within the scope of EU law. With the entry into force of the Lisbon Treaty this process has become definite and irrevocable. Where in the past human rights protection was entrusted to national constitutional law, even when a national measure came within the scope of EU law, since the EU had at the time no binding bill of rights, EU law has now officially taken over this area of fundamental rights protection.

It seems however more difficult to assert that a transfer of human rights protection from the Council of Europe and the ECHR to the EU has or is taking place. While such a view could find comfort in the Bosphorus presumption, the future accession of the EU to the ECHR and the possible abandon of that presumption, has put the issue under a different light. It is true that the EU has gradually started to deal in an ever expanding manner with human rights issues. It is also true that the ECtHR itself is taking into account the Charter as a source of inspiration.[37] This does not however necessarily mean that human rights protection has been "transferred" from the Council of Europe to the EU. The future accession of the EU to the

[37] See the reply to the previous question.

ECHR will have as a consequence, among other things, that the final word on human rights protection will be reserved for Strasbourg.

Q14. Although fundamental rights protection in the EU has been triggered by Member State courts, the common constitutional traditions of Member States on fundamental rights protection have not functioned as an important direct source of protection in the case law of the ECJ. This gives rise to the general question what the role of the common and individual constitutional traditions can be at present and in future.

It is clear that national constitutional fundamental rights protection will eventually undergo some sort of metamorphosis. At this stage, we can only speculate as to what the outcome of this metamorphosis may be.

It is certainly possible to argue that the importance of the national bills of rights will be weakened over time as large chunks of national law have now to comply with EU, and not national standards of fundamental rights protection. Yet, certain areas of law remain exclusively reserved for the national law (on condition that it complies with the ECHR), although, as we saw in our reply to Question 11, this may also prove to be elusive.

The Charter itself pays tribute to national constitutional traditions. If a given matter comes within the scope of EU law, it is obvious that it should first and foremost be consistent with the Charter. Nonetheless, Article 52, paragraph 4 thereof makes a praiseworthy attempt to strike a difficult balance as it provides that insofar as the Charter recognises fundamental rights as they result from the "constitutional traditions common to the Member States", those rights shall be interpreted in harmony with those traditions. It remains to be seen what the actual reach of this provision would be in practice, the input from the ECJ being of particular importance in this regard. Overall, it shouldn't be unjustifiably difficult to take due account of this provision in the case law. It should however be noted that there are at least two preliminary questions which await an answer. First, what sort of rights and/or principles qualify as "constitutional traditions". It is highly unlikely that Member States have a ready answer to that query. It is possible that they try to argue that all fundamental rights and principles which are enshrined in national constitutions, are part of their constitutional traditions. The approach of the ECJ may however be more restrictive. Second, Article 52 refers only to the constitutional traditions *common* to the Member States. The Charter does not say much about *individual* constitutional traditions.

It is submitted that even though the Charter has failed to take due account of the constitutional traditions which cannot be considered as "common", it would not be wise to completely disregard them. Very often they are the expression of local sensitivities which a society may deem to be essential or inherent to its very structure. A possible way of getting around that problem, while taking into consideration the individual constitutional traditions of a Member State in a particular case, is to leave the final appraisal of the proportionality of a given measure to the national court, thus allowing it, as the case may be, to account for the specific constitutional traditions of that Member State.

The possible divergences between the scope and level of protection of fundamental rights on EU level and on national level should not however be exaggerated. In most cases a "peaceful" and a perfectly compatible co-existence should be perfectly possible. In the rare cases of intolerable differences, solutions should be sought on a case by case basis, possibly along the lines indicated in the present submission.