The Slippery Slope of a Snooping Strasbourg

The erroneous application of EU law as an ECHR breach

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Last week, the ECtHR ruled in *Spasov*, for the first time, that there was a 'denial of justice' and thus a violation of Article 6(1) ECHR due to a manifest error of law by a national court regarding the interpretation and application of EU law. A Romanian court had convicted Mr Spasov, the owner and captain of a Bulgarian-flagged vessel, of illegal fishing inside Romania's exclusive economic zone. The court considered that EU law was not applicable despite clear indications that Common Fishery Policy rules did apply to the benefit of the convicted individual permitting his fishing activities. *Spasov* is an important principled judgment that further intertwines the EU and ECHR legal systems. The ECtHR also strengthens the enforcement and, hence, effectiveness of EU law.

In this blog, we contextualise this judgment in the ECtHR case law, namely the *Dhahbi* case law on national courts' duty to state reasons for a decision not to refer preliminary questions to the CJEU and the *Bosphorus* case law. We will especially point out the risks for a "snooping Strasbourg", namely the danger of unclear or incorrect interpretation and application of EU law by the ECtHR of EU law and its interpretation and application in national legal orders in the light of the concerns of the CJEU expressed in *Opinion 2/13*.

The context: Related Strasbourg cases: Dhahbi, Bivolaru and Moldovan, and Dangeville

To our knowledge, this is the first judgment in which the ECtHR concluded that Article 6 ECHR was breached by a national court's manifest error of law with regard to the interpretation and application of EU law. This does not, however, mean that there are no related relevant Strasbourg rulings. We distinguish two types of cases. First, there is an abundant body of ECtHR case law on the duty to state reasons for decisions of national courts not to refer a case for a preliminary ruling to the CJEU (e.g. *Dhahbi*). On several occasions, the ECtHR has found a violation of Article 6 ECHR in cases where the highest national court - despite a sufficiently clear and substantiated request by one of the parties in the proceedings- failed to make a preliminary reference (see most recently *Sanofi Pasteur*, analysed here). In these cases, the violation consists of a failure to comply with the duty to state reasons under Article 6(1) ECHR. This failure concerns in essence a more formal or procedural violation of the right to effective judicial protection, while the present judgment discerns a substantive violation of the same right approached from the perspective of access to a court within the meaning of Article 6(1) ECHR, i.e. 'denial of justice' (see for this distinction Lacchi). In *Spasov,* the ECtHR also expressly contrasts the present judgment with this case law (para 87). The ECtHR does, however, acknowledge towards the end of its analysis that in case of doubt about the interpretation of EU law, the Romanian court could have put questions to the CJEU (para 97). In that regard, the fact that it was possible, and perhaps appropriate, for the national court to refer to the CJEU still appears to have played a role in the establishment of a violation of Article 6 ECHR.

A second line of related cases in which the application of EU law in national legal orders play a role concerns the *Bosphorus* case law. This case law is not specifically aimed at national judicial authorities but concerns the broader implementation of EU law by Member States. Under the *Bosphorus* presumption, the ECtHR assumes that ECHR obligations have not been violated by Member States in the implementation of EU law unless there is a manifest deficiency in situa-

tions where (i) the state has no margin of appreciation and (ii) when the full EU system of legal protection has been deployed. Only relatively recently, in 2021, the ECtHR first (and last) refuted the Bosphorus presumption and found a violation of Article 3 ECHR. This happened in the case of *Bivolaru and Moldovan v. France* in which a suspect had been surrendered to France from Romania on the basis of a European arrest warrant (see for an analysis here). That surrender was particularly problematic because several ECtHR rulings showed that prisons were overcrowded and there was a real risk that the complainant would be detained in a cell where he would have less than 3m2 of personal space. According to the ECtHR, the executive French judicial authorities should have better assessed the additional information obtained from the Romanian authorities on the detention conditions in Moldovan. The French court had relied too easily on Romanian statements and commitments. The ECtHR thus ruled that the national courts' application of EU law was problematic in light of the ECHR. The ECtHR thus does not so much give a substantive judgment on EU law, but only on how it was applied by the national court. Nor does the ECtHR prescribe how EU law is to be interpreted. *Bivolaru* thus differs from *Spasov*.

In addition to the two types of related cases distinguished above, the earlier ECtHR judgment in *Dangeville* deserves a mention here. As in *Spasov*, the Strasbourg Court was not reluctant to make clear statements on the application and interpretation of EU law in a Member State. In *Dangeville*, the ECtHR found a violation of the right to property enshrined in Article 1 of Protocol No.1 because the applicant company was denied a claim for reimbursement of the VAT that was paid at a time when an EC Directive stipulated that no VAT was due. The denial of the company's reimbursement claim by a French court constituted a disproportionate interference with the right to the peaceful enjoyment of property (para 61). By examining EU law, the ECtHR found that the requirements laid down in French law were contrary to a provision of a EC Directive that was 'directly applicable' from a certain point in time (para 46). The Court did so with a general reference to 'the relevant case law' of the CJEU, to the text of the applicable Directive, and to a notification to the French State in a subsequent Directive that France was given additional time to adapt its legislation to the applicable Directive. While the Court acknowledged that difficulties existed in France in implementing and interpreting the applicable Directive (para. 57), and the Court did not characterize those difficulties as manifestly unreasonable, the sources of EC law cited by the ECtHR apparently provided sufficient grounds for the Strasbourg Court's clear-cut judgment as to what rights the applicant company could derive from EC law as of what point in time. The engagement with EU substantive law by the ECtHR in *Spasov* is thus not wholly unprecedented, as it bears some resemblance to the use of EU law in the earlier *Dangeville* case.

EU law concerns with a snooping Strasbourg

Remarkable about *Spasov* is that the ECtHR does arrive at an appreciation of EU law, albeit perhaps in a rather implicit way. In doing so, the ECtHR risks transcending the distinction between the application of EU law and its interpretation that the CJEU guarded so carefully in *Opinion 2/13*. The CJEU clearly indicated that the autonomy of EU law means that it is purely for the CJEU to interpret EU law (para 186). The ECtHR is aware of this stance of Luxembourg as well as its own subsidiary role on the basis of the ECHR. In *Sanofi Pasteur,* it held: 'it is not for the Court to examine any errors that might have been committed by the domestic courts in interpreting or applying the relevant law … On that latter point, it has also pointed out that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, if necessary, in conformity with Community law, the Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention' (para 68). In *Spasov*, the ECtHR seems somewhat less adamant on this point, however, mentioning that it is primarily up to national (judicial) authorities to interpret domestic law in the light of EU law. The ECtHR's role is limited to checking whether the consequences of that interpretation are compatible with the ECHR (para 83). Interestingly, the Court avoids a reference to the first sentence in the quote from *Sanofi*

Pasteur and thus does not mention that the ECtHR does not pass judgment on errors by national courts in the interpretation and application of EU law. The latter is indeed precisely what the ECtHR seems to be doing in *Spasov*. This is perhaps not surprising or problematic from an ECHR perspective, especially considering the exceptional facts of the case. The Romanian court came to an interpretation contrary to EU law while there were several clear signals about its likely conflict with EU law, without consulting the CJEU about that (intended) interpretation. From the perspective of EU law and the CJEU, a similar approach by the ECtHR is more problematic in a less exceptional case than *Spasov* in which several reasonable interpretations of national law in the light of EU law would be possible. It is reasonable and expected that the ECtHR will take a (much) more cautious approach in finding a violation of Article 6 ECHR, as in such a case this would require the ECtHR to rule in more detail on the correct interpretation of EU law.

Be that as it may, in *Spasov* the ECtHR does engage with EU law, especially when the ECtHR contrasts its interpretation with the Romanian court. The Strasbourg Court bases its finding of a manifest error of law and thus a 'denial of justice' on two elements. First, an appraisal of Articles 8 and 17 of Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (para 94). Article 17 provides that Community fishing vessels enjoy equal access to waters, subject to emergency measures taken by Member States under Article 8 in the event of 'a serious and unforeseen threat to the conservation of living aquatic resources or to the marine ecosystem'. Interestingly, the ECtHR comes up with its own interpretation of these provisions and contrasts it with the Romanian court's interpretation. It determines that Romania had not applied Article 8 of the Regulation, while the convicting Romanian court found that it did (paras 41-43). The ECtHR's own appraisal is given before the reference to the clear position of the European Commission ('l'opinion très claire'; para 97). This second element in the ECtHR's reasoning entails the initiation by the Commission of an infringement proceeding in respect of Romanian regulations that were found to be contrary to EU law (para 96). The Commission had even made it clear that the applicant's specific case was contrary to EU law (para 95). Romania eventually changed its regulations as a result of this procedure. Important to highlight is that the case never reached the CJEU. No *de jure* violation of EU law was ever established in court. Although the CJEU usually determines a violation in the vast majority of infringement cases brought, it does not do so in all cases. Therefore, there does lurk a danger in the Strasbourg Court's reference to the Commission's views as an important element in its engagement with (or interpretation of?) EU law.

The danger of the unclear or incorrect interpretation and application of EU law could also easily materialise in relation to core principles and doctrines of EU law. In *Spasov*, the ECtHR seems to suggest that direct effect is a condition for primacy: 'En vertu du principe de la primauté du droit de l'Union, un tel règlement, doté d'un effet direct, l'emporte sur le droit interne contraire' (para 93). However, such conditionality is not correct: primacy does not depend on the direct effect of a provision (see De Witte and Dougan). Questions can also be raised about the English-language press release accompanying the judgment. It states, after mentioning EU Regulations adopted under the common fisheries policy: 'According to the principle of the primacy of EU law, a Regulation with direct effect took precedence over any conflicting domestic law'. This sentence raises the question whether the ECtHR determines that the relevant provisions of the Fishing Regulation in question have direct effect. From an EU law perspective, that would be remarkable, since a judgment on the direct effect of EU provisions is for the CJEU to make.

Spasov after EU accession to the ECHR

The EU's accession to the ECHR will largely remedy the abovementioned dangers. Interestingly, negotiations about accession are seemingly running smoothly, especially after Russia's expulsion from the Council of Europe. The draft accession agreement includes a prior involvement procedure in Article 3(6) in cases in which

the EU is a co-respondent. This enables the CJEU to make an assessment of EU law with the ECHR rights at issue when it has not yet done so because, for example, no preliminary reference had been made (as happened in this case). *Spasov* thus clearly shows the added value of the EU's accession, also and especially from the perspective of *Opinion 2/13* and the autonomy of EU law.

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