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THE RELATIONSHIP BETWEEN THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND EUROPEAN UNION LAW

Lecture at the Riga Graduate School of Law
Riga, 14 April 2009

The topic of my lecture this morning is the relationship between the European Convention on Human Rights and European Union Law. The European Convention on Human Rights is undoubtedly the benchmark for human rights protection in Europe; however, it does not exist in a vacuum. The Strasbourg Court influences and is influenced by other relevant Courts. The European Union has played an important role in this respect and its impact on human rights protection is likely to grow if the Charter of Fundamental Rights becomes binding, which, as you all know, will depend on the entry into force of the Lisbon Treaty. The spheres of activity of the Luxembourg and Strasbourg Courts, which started out rather far apart, have been progressively converging on each other, particularly with the expansion of the Union's areas of competence, so that there is now an important overlap. Having this in mind, I consider that there is a clear need for a coherent and effective system of human rights protection in Europe. This requires that the Courts in Strasbourg and Luxembourg cooperate closely with a view to achieving that goal.

I. Fundamental rights and the European Court of Justice

I will begin by looking at the development of fundamental rights protection under Community law and the application of the Convention by the European Court of Justice. Secondly, I will discuss the scope of review of European Union acts by the European Court of Human Rights. Thirdly, I will consider how the Strasbourg Court has relied on the case-law of the Court of Justice in interpreting the Convention. Finally, I will reflect on the case for accession of the European Union to the Convention.

Fundamental rights in Community law have undergone a remarkable evolution. The founding Community treaties made no mention of fundamental rights. At first, the European Court of Justice was mostly preoccupied with ensuring the supremacy of Community law with a view to guaranteeing the common market. It was not favourable to pleas of protecting fundamental rights.
However, it was forced to adjust this approach under pressure from constitutional courts of some member States, who actually themselves threatened the supremacy of Community law if it failed to accommodate fundamental rights. As early as 1969 the Court of Justice declared that fundamental rights were enshrined in the general principles of Community law. In 1970, in its important judgment *Internationale Handelsgesellschaft*, it removed any doubts in that respect holding that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice".

In *Nold* (1974) the Court of Justice found that it could not uphold measures which were incompatible with fundamental rights recognised and protected by national constitutions. It also identified as a source of fundamental rights international human rights treaties on which member States had collaborated or of which they were signatories.

In 1974 France ratified the Convention on Human Rights as the last of the six founding member States of the Community to do so. It was only after that date that the Court of Justice in *Rutili* (1975) was able to refer for the first time specifically to the European Convention on Human Rights, which was a binding instrument for all member States (nine at that time, twenty-seven now).

After 1975 it did not take the Court of Justice long to move towards a much more positive stance. Thus it accorded special significance to the Convention, amongst international human rights treaties, in a case decided in 1979 (*Hauer*). This has been its consistent position since then. Subsequently, the Court of Justice began to refer extensively to Convention provisions and also to the Strasbourg case-law. In the case of *ERT* (1991) it formulated a clear statement of principle that measures which were incompatible with the observance of human rights as recognised in the Convention and national constitutions were not acceptable in Community law.

It is of course true that formally speaking the Convention is not binding under European Union law. However, the case-law of the Court of Justice amply demonstrates that it applies the Convention "for practical purposes" as if the Convention formed an integral part of European Union law. Advocate General Jacobs expressed a similar view in his opinion in 1996 submitted to the Court of Justice in the case of *Bosphorus* (both his opinion and the ruling by the Court of Justice have been referred to and analyzed in the European Court of Human Rights' judgment, *Bosphorus v. Ireland* (2005)).

It is remarkable that the European Court of Justice has not just followed the Convention case-law, but is ready to reconsider its own case-law in view of subsequent developments in Strasbourg. That was the case concerning the applicability of Article 8 of the Convention to searches of business premises by public authorities. Initially, in *Hoechst* the Court of Justice was against such a proposition. However, the European Court of Human Rights held in a series of rulings, in particular *Chappell v. United Kingdom* (1989) and *Niemietz v. Germany* (1992), finally in *Société Colas Est* v.
France (2002), that the notion of "home" in Article 8 could be extended to professional premises. The Court of Justice subsequently accepted that development in Roquette Frères (2002), finding that it had to take into account the Strasbourg case-law subsequent to Hoechst.

In Schmidberger (2003) the Court of Justice had been asked to settle an open conflict between the classic economic freedoms of the Treaty and fundamental rights. The case arose from a decision by the Austrian authorities to close a motorway in order to allow a demonstration by environmental protesters. Schmidberger claimed damages from the authorities related to the closure of the motorway, arguing that the principle of free movement of goods had been breached. The Court of Justice considered that as a matter of principle the protection of fundamental rights could justify restrictions on the obligations imposed by Community law, even in the sphere of fundamental freedoms. It then engaged in a balancing exercise, similar to that which is carried out by the Strasbourg Court, in order to determine which of the competing interests should prevail. It eventually found that the demonstrators' freedom of expression and assembly prevailed over freedom of movement within the Community.

The case of Pupino (2005) illustrates that the Court of Justice continues to adhere closely to Strasbourg case-law even in the new areas of European Union law covered by the "Third Pillar" (Justice and Home Affairs). In that case the reference for a preliminary ruling had been made in the context of criminal proceedings against a nursery school teacher charged with inflicting injuries on small children. The Court of Justice was requested to interpret the "Framework Decision" (Decision cadre) of 2001 on the standing of victims in criminal proceedings. It held that the Framework Decision had to be interpreted in accordance with the fair trial guarantees set out in Article 6 of the Convention and the relevant Strasbourg case-law. As a result, it was incumbent on the Italian court to hear evidence of young children in conditions offering them an appropriate level of protection, while at the same time respecting the fairness of the criminal proceedings against Mrs Pupino.

I will conclude this short survey with the landmark judgment given by the European Court of Justice one month ago in the case of Kadi and in the case of Yussuf and Al Barakaat (3 September 2008). In Kadi the Court of Justice reviewed the Council's regulation ordering the freezing of funds of persons and entities associated with known terrorist organisations. That regulation had been adopted in accordance with resolution of the United Nations Security Council. The Court of Justice reviewed the lawfulness of the regulation in the light of fundamental rights. It held that freezing of funds without respecting basic procedural guarantees amounted to a breach of the claimants' right to be heard and the right to effective judicial review as enshrined in Articles 6 and 13 of the Convention. Referring to Chahal v. United Kingdom (ECHR, 1996), it declared that individuals must be accorded sufficient procedural guarantees in the context of the fight against terrorism. Interestingly, the Court of Justice further found that the freezing of funds constituted an unjustified
restriction of the right to property, referring to procedural requirements inherent in Article 1 of Protocol 1 to the European Convention on Human Rights.

Even more recently, in *Elgafaji* (2009), the Luxembourg Court has given a ruling which applies the level of protection provided for by Article 3 of the Convention.

The Court of Justice has become increasingly at home with the Convention and the Strasbourg case-law and now plays a major role in ensuring the observance of fundamental rights in European Union law. Respect for human rights is now a condition of the lawfulness of European Union acts. As the President of the European Court of Human Rights let me say that I very much welcome this approach which is entirely consistent with the necessary complementarity of the two systems.

The development of the protection of fundamental rights by the European Court of Justice has been acknowledged in various declarations of the Community institutions and eventually found expression in the treaties. Article 6 (2) of the Treaty on European Union provided that the Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and national constitutional traditions, as general principles of Community law. Article 6 names as the sole reference text the European Convention on Human Rights. The Lisbon Treaty, when it enters into force, will maintain that arrangement in place.

The further important legislative step towards ensuring the observance of fundamental rights by the European Union came with the Charter of Fundamental Rights proclaimed in Nice in December 2000. The Charter will be incorporated in the treaties and, as I said, become binding if the Lisbon Treaty comes into force. It is addressed to the institutions and bodies of the European Union and to the member States, only when they are implementing Union law. The European Charter is already a basis for the activity of the European Union Agency for Fundamental Rights. The Agency, based in Vienna, was established in 2007 by a Council Regulation. It is a successor, with a broader scope, of the European Monitoring Center on Racism and Xenophobia.

From the Strasbourg perspective, it is important to note that the Charter of Fundamental Rights provides for a satisfactory solution to the problem of the relationship between the Charter and the European Convention on Human Rights. This was not a forgone conclusion, with some voices calling for a completely separate catalogue. Fortunately for the coherence of human rights protection in Europe they were not successful. The Charter takes the Convention as setting out the minimum level of protection, while making it clear that the Charter itself may, and does indeed in certain areas, provide for a more extensive level of protection. That solution, which in reality gives effect to the practice of the Court of Justice, is wholly compatible with the Convention and reflects the principle of subsidiarity governing the relationship between the Convention and the national legal systems. It is furthermore intended to promote harmony between the two instruments and to avoid competition between them. The Charter expressly states that the meaning and scope of the Charter
rights corresponding to the rights guaranteed by the Convention should be interpreted consistently with Convention rights and in its Preamble, the Charter refers to the case-law of the Strasbourg Court. In that respect the Charter also clarifies the situation for the Union member States, all of them being at the same time parties to the European Convention on Human Rights.

The significance of the Charter cannot be underestimated and I should stress that in Strasbourg we welcome it and look forward to the day when it will become fully binding. In terms of the relationship between the Convention and European Union law it goes considerably further than Article 6 (2) of the Treaty on European Union. Through Article 52 § 3 the Charter refers explicitly to the substantive provisions of the Convention. The European Convention on Human Rights will determine the minimum level of protection required under the Charter. Thus, the Convention will indirectly become part of European Union law and not just one of the elements of the general principles of that law.

II. The European Court of Human Rights and Community law

The other side of the story is the evolution of the approach of the European Court of Human Rights as regards its jurisdiction to review Community law. This is the second topic I wish to discuss this morning. The basic question is if and to what extent, the European Court of Human Rights has jurisdiction to review European Union acts.

It is clear that as long as the European Union is not a contracting Party to the Convention, the Strasbourg Court has no jurisdiction to examine applications directed specifically against it or its institutions. That approach, followed by the former European Commission of Human Rights, confirmed by the Court in Matthews (1999), does not, however, resolve the issue of responsibility of member States for decisions made in the exercise of competences conferred on the European Union.

The Strasbourg case-law demonstrates that there are two ways in which European Union acts may be challenged. The first situation concerns cases lodged against member States which implement European Union law in their domestic legal order. The second concerns cases in which an attempt is made to challenge European Union acts indirectly through an application brought against all the member States.

Let me give you some examples of the first type of scenario. In the well-known case of the former Commission, M. and Co. v. Germany (1990) the authorities issued a writ for the execution of a judgment of the European Court of Justice. That court had ordered the applicant company to pay a heavy fine for breach of Community competition law. The applicant alleged that the proceedings before the Luxembourg Court had offended against Article 6 of the Convention and that, accordingly, the authorities should have refused to execute the judgment. The European Commission
of Human Rights declared the case inadmissible, having found that fundamental rights received "equivalent protection" within the European Communities.

The essence of the "equivalent protection" doctrine was later confirmed by the European Court of Human Rights, admittedly outside the background of European Union, in Waite and Kennedy and Beer and Regan v. Germany (1999). In both cases the Court examined the question of whether States could exclude access to their national jurisdictions by granting immunity to international organisations. It held that the Convention does not prohibit the transfer of State competences to international organisations. However, any such transfer would not automatically absolve the States from their responsibility under the Convention with regard to the exercise of the transferred competences. In these cases the bar on access to national courts was nonetheless justified since the alternative means of legal protection within the international organisation, namely the European Space Agency, had been available to the applicants.

In Matthews v. United Kingdom (1999) the Court confirmed its jurisdiction ratione materiae and found a breach of Article 3 of Protocol 1 to the Convention on account of exclusion of Gibraltar residents from elections to the European Parliament. The issue originated from treaty obligations voluntarily undertaken by the respondent State. The United Kingdom was held responsible as the State was considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention. In that case, owing to the nature of the legal instrument at issue, the Court of Justice's jurisdiction was excluded and thus no alternative means of protection of voting rights was provided within the Community system. It is interesting to note that Matthews gave rise to subsequent proceedings before the European Court of Justice in which Spain challenged measures taken by United Kingdom in implementation of that judgment. In Kingdom of Spain v. the United Kingdom (2006), the Luxembourg Court confirmed the Strasbourg Court's approach. These developments well illustrate the potential for interaction between the two Courts.

The Strasbourg Court's developed position on the relationship between the Convention and European Union law was recently stated in the landmark Bosphorus v. Ireland (2005) judgment. The case arose from the impounding by the Irish authorities of an aircraft leased by the applicant company from Yugoslav Airlines. The authorities were acting in pursuance of an EC Council Regulation which, in turn, had implemented the UN sanctions regime against the Federal Republic of Yugoslavia. In the domestic proceedings, the applicant company unsuccessfully argued that the aircraft was not covered by the Regulation. The result of those proceedings was determined by a preliminary ruling from the Court of Justice which had found that the Regulation had been applicable to the Bosphorus Company and that the impoundment compatible with Community law. In Strasbourg the applicant company alleged a breach of Article 1 of Protocol 1 to the Convention. In a sense, it was a kind of "appeal" against the ruling given by the European Court of Justice.
In *Bosphorus* the Strasbourg Court firstly ruled that the application was compatible *ratione personae* and *materiae* with the Convention, finding that the impounding took place within the jurisdiction of Ireland. It clearly confirmed its jurisdiction in cases where a State is implementing its obligations flowing from the membership of an international or supranational organisation. Thus, even if no discretion is left to a State, the implementation of a Community act may engage its responsibility under the Convention. I should recall here that under the established Strasbourg case-law a State remains responsible under the Convention for the exercise of its discretion in applying Community law (*Procola v. Luxembourg*, 1995, *Cantoni v. France*, 1996, and many others).

I believe that the most important contribution of *Bosphorus* is the development of the doctrine of "equivalent protection". When examining the merits of the applicant company's claim, the Strasbourg Court applied that doctrine and found that no breach of the applicant company's property rights had occurred. If equivalent protection is considered to be provided by the organisation, there is a presumption, admittedly rebuttable, that a State complies with its obligations under the Convention when it does no more than implement legal obligations resulting from its membership in the organisation. In *Bosphorus* that presumption remained valid since the preliminary ruling given at the request of the Supreme Court of Ireland had analysed at length the protection of the company's property rights. The concrete effect of the presumption was that the Strasbourg Court refrained from a detailed examination of the question of whether a fair balance had been struck between the competing interests.

"Equivalent protection" for the Strasbourg Court means protection comparable to that which the Convention provides, but not necessarily identical protection. The sufficiency of the protection is assessed in the light of both the substantive and procedural guarantees offered by European Union. The *Bosphorus* conclusion is susceptible to review should the level of protection within the organisation change. If, on the facts of a particular case, the Court established that the protection of the Convention rights within the Community was manifestly deficient, then it would exercise its full jurisdiction.

Some commentators called the *Bosphorus* judgment a compromise, and it is true that, whilst the judgment was decided unanimously by a Grand Chamber of seventeen judges, a judge expressed a concurring opinion and six other judges a joint concurring opinion. The judgment reflects a conciliatory approach of the Strasbourg Court vis-a-vis European Union law. In my view, it can be seen as an important expression of our Court's plea for harmonious coexistence of both legal orders. I should mention that *Bosphorus* firmly emphasised the growing importance of international cooperation and of the consequent need to secure the proper functioning of international organisations, including international Courts. The European Court of Human Rights paid great attention to the developments of fundamental rights under European Union law and recognised that the Court of Justice acting jointly with national courts could ensure an equivalent level of protection.
of fundamental rights. At the same time, the Strasbourg Court left an emergency exit open for its intervention if the circumstances considerably change.

The *Bosphorus* case dealt with implementation of a Community act. However, sometimes a case may concern decisions directly taken by the European Union institutions themselves. This is the second way in which European Union acts may be challenged. The Strasbourg Court has been confronted with such indirect challenges in the past. In these cases the applicants sought to establish that all member States of the Union were collectively responsible for the impugned acts. However, the question of whether such a challenge would be possible has never been clearly resolved.

The *Bosphorus* case was a significant development in clarifying the relationship between the two Courts. However, it may be premature to say that all potential areas of conflict have been completely eliminated. One issue which has already been raised in Strasbourg in the case of *Emesa Sugar v. the Netherlands* (2005) is compatibility of the position of the Advocate General at the Court of Justice with Article 6 of the Convention as interpreted in cases involving similar national institutions. However, in that case the Court did not examine the substantive point because the underlying dispute concerned customs law, which fell outside the scope of applicability of Article 6, and consequently it declared the case inadmissible on that ground. The other possible issue concerns a refusal of a domestic court to seek a preliminary ruling by the European Court of Justice. It is true that the Convention does not guarantee as such, any right to have a case referred to the Court of Justice for a preliminary ruling under Article 234 of the EC Treaty. In a recent *John v. Germany* decision (2007) the Court stated that such refusal might infringe the fairness of proceedings within the meaning of Article 6 of the Convention if it appeared to be arbitrary. In this particular case, however, there was no appearance of arbitrariness since the applicant had failed to demonstrate the alleged necessity of a preliminary ruling. The issue is now once more before the Court in a pending case against Belgium and has been very recently communicated to the Belgian Government. I know that the European Court of Justice has expressed concerns about the possible developments of the jurisprudence in this field.

I have discussed earlier how the European Court of Justice has followed the case-law of the Strasbourg Court in its fundamental rights case-law. By doing so the Court of Justice appears to have recognised that it should seek to ensure that European Union Member States' obligations under European Union law are consistent with their Convention obligations.

I subscribe to that view. It is equally significant that the Strasbourg Court is also seeking a convergence of approach. In its practice, the Court has had regard to the specific features of European Union law in order to avoid divergent interpretation in similar matters. Interestingly, in certain cases, the Strasbourg Court goes further and assists - in a sense - in implementation of Community law. In the case of *Hornsby v. Greece* (1997) the Court held that an unreasonable delay in the execution of a domestic judgment given subsequently to a ruling by the Court of Justice...
constituted a breach of Article 6 § 1 of the Convention. In that case a refusal of the Greek authorities to open a language school was considered incompatible with Community law by the Court of Justice. In the case of *Dangeville v. France* (2002) the applicant company was required to pay VAT in violation of a Community directive, which France had failed to implement. The company's action for damages was dismissed by French courts, including my own former Court, the Conseil d'Etat, although they agreed that the VAT had been paid contrary to the directive. In Strasbourg the Court held that the applicant company's claim for the VAT paid in error was protected by Article 1 of Protocol 1 to the Convention and found a breach of that provision. The company, as just satisfaction, had to receive the correspondent sum from the State. These cases demonstrate potential for the Strasbourg Court's complementary role in ensuring observance of European Union law by the Member States.

III. The influence of the European Court of Justice case-law on the European Court of Human Rights case-law

There is no doubt that the European Court of Human Rights has been ready to take into account the jurisprudence of the Court of Justice and European Union legislation. By doing so the risk of conflict between those jurisdictions has been considerably reduced. Let me demonstrate that by way of a few examples from the Strasbourg case-law. This is the third topic of my address.

The case of *Christine Goodwin v. United Kingdom* (2002) is illustrative in this respect. It concerned, as you are well aware, the practical difficulties faced by post-operative transsexuals on account of the lack of legal recognition of their change of sex. In *Christine Goodwin*, the Strasbourg Court reconsidered its interpretation of Articles 8 and 12 of the Convention, referring, *inter alia*, to an earlier judgment of the Court of Justice in which the discrimination of a postoperative transsexual had been equated with discrimination based on sex (*P. v. S. and Cornwell City Council*, 1996). In addition, the Court sought guidance in the European Charter of Fundamental Rights, even if it is not yet a binding instrument. However, that was not the end of the jurisprudential dialogue between the two Courts. Subsequently, the Luxembourg Court relied on *Goodwin* when holding that the denial of a widow's pension to a transsexual violated the EC Treaty.

The case of *Stec and Others* (2006) is an even more striking example of interaction between the two European jurisdictions. The case arose from sex-based differences in eligibility for certain social security benefits. The issue was related to the difference in the statutory pensionable ages in the UK for men and women. The applicants' case was first decided by the Court of Justice. That court accepted the difference in treatment, pending the equalisation of pensionable ages, as compatible with the relevant Council Directive. In Strasbourg the applicants alleged discrimination in the enjoyment of their rights to property. However, the Court found no violation in that case. It paid, indeed, considerable attention to the stand taken in Luxembourg, holding that "particular regard
should be had to the strong, persuasive value of the European Court of Justice's finding on this point".

I would also like to mention two cases in which the Court dealt with the applicability of Article 6 § 1 of the Convention to disputes involving civil servants. In *Pellegrin v. France* (1999) the Strasbourg Court sought assistance from the categories of activities and posts listed by the European Commission in connection with the exception to the freedom of movement in attempting to define more clearly the civil servants who fell outside the protection of Article 6. Interestingly, in the subsequent *Eskelinen and Others* judgment (2007) the Court extended the applicability of Article 6 § 1 in that field and emphasised that such an approach was consistent with the landmark judgment of the Court of Justice in *Marguerite Johnston* (1986). It further stated in more general terms that Community law provided useful guidance in interpreting the Convention.

By contrast, it may also happen that the European Court of Human Rights acts in order to remedy certain shortcomings existing in Community law. The case in issue is *Koua Poirrez v. France* (2003). The applicant in that case was a national of the Ivory Coast who had been adopted by a French citizen when he was already an adult, which means that he did not get the French nationality through his adoption. He was refused a disability allowance on the ground of his Ivory Coast nationality. The European Court of Justice gave a preliminary ruling in the case, but found that Community law did not apply. All French courts dealing with the case subsequently dismissed it. Later, the applicant turned to Strasbourg. The Court of Human Rights upheld the applicant's claim that he had been the victim of discrimination based on nationality in the enjoyment of his property rights. I should mention that it took 13 years for the applicant to finally win his case. The French law contained an element of discrimination which Community law was powerless to remedy, because it did not apply in the particular case. Consequently, it was only in Strasbourg that the problem could finally be remedied.

IV. The European Union's accession to the Convention

It seems natural to me to turn finally to some remarks on the issue of European Union's accession to the Convention.

The *Bosphorus* case indicates, in my view, the importance of the European Union accession to the Convention with a view to making the control mechanism of the Convention complete. It is only through accession that individuals will be provided with the same degree of protection vis-a-vis acts of the European Union as they presently enjoy vis-a-vis all the member States. Accession seems even more essential, given that member States have transferred a substantial part of their competences to the Union.
I place great hopes on the European Union's accession to the Convention. This has been delayed by the changes of fortune that you know about; the Lisbon Treaty has made it possible once more, even though the necessary technical adjustments may take some time. The accession will strengthen the indispensable convergence between the rulings of the two European Courts. These Courts are by no means rivals but strongly complementary and are already cooperating in the best spirit. Above and beyond that rather technical benefit, the accession can be expected to bring a synergy and a tightening of bonds between the two Europes, and strengthen our Court's cooperation in the construction of a single European judicial space of fundamental rights. That will be in the interest of all Europeans. I must even say that, politically, the weight of the European Union would be most welcome, at a time when our Court faces many difficulties, mainly due to its huge workload.

Accession would further enable the European Union to participate in the proceedings before the Strasbourg Court as a respondent in cases in which its acts are being challenged.

I should mention that the incorporation of the Charter of Fundamental Rights into the Treaties and the Union's accession to the Convention are not two alternative solutions. They should be regarded as complementary steps aimed at ensuring full respect of fundamental rights by the Union. Such a view has been consistently advocated by the Council of Europe and by the drafters of the Charter, among whom I would like to pay tribute to my very close friend, Guy Braibant, who died a few months ago.

I would like to end this lecture by noting that coherence between the European Convention on Human Rights and European Union law has been gradually emerging. The case-law of both European Courts discussed previously shows that they are ready to cooperate in order to ensure consistency of fundamental rights protection in their respective domains. In fact, they do more than co-operate. The examples of cross-fertilisation in the jurisprudence of both Courts indicate that a convergence between the two legal orders begins to develop.

There are no formal rules regarding the relationship between the Court of Justice and the European Court of Human Rights. If there were conflicts between them, there would be no obvious way of resolving them. Therefore, the two European Courts have a particular responsibility in that regard. On a practical level - both Courts meet regularly, either in Strasbourg or in Luxembourg, and discuss issues of common interest. These meetings are not merely courtesy visits; they constitute working seminars, in a friendly, frank atmosphere. The last such meeting took place in Luxembourg on 24 November 2008.

Thank you for your attention.