



# Advanced EU law

Prof. dr. Pieter Van Cleynenbreugel

# Advanced EU law

- EU law = law of the European Union
- Advanced?
  - Different focus, yet familiar subjects
    - Fundamental rights in the European Union – different view on EU internal market law
    - New themes: transparency and data protection
  - Use of terminology in English
  - In addition to knowledge, also skills
    - how to read a judgment of the Court of Justice (see later this class)?
    - how to write a case comment in English?

# Advanced EU law

- Course setup
  - 10 lectures (20h), focused on specific themes and seminal Court cases
    - 2 general lectures on fundamental rights in the EU legal order
    - 3 lectures on the fundamental rights and the EU internal market
    - 5 lectures zooming in on specific EU-tailored fundamental rights
      - Transparency
      - Data protection
  - 2 written assignments – case notes – replace 2 classes and preparation
    - One individual feedback moment in week starting 22 November

# Advanced EU law

- Course materials
  - eCampus: additional documents to read
  - Cases & Materials reader: to be taken with you on the exam => for sale at Presses Universitaires (B8)
  - Court of Justice of the European Union website:  
[www.curia.europa.eu](http://www.curia.europa.eu)

# Advanced EU law

- Written work requirement
  - Two case notes
    - Choose a case discussed in class or choose another case (please ask for my approval in that situation)
      - Case note 1: cases relating to lectures 1-4 (or 5, but limited time)
      - Case note 2: cases relating to lectures 6-10
  - What is a case note?
    - Summary of a case – distinguishing relevant from irrelevant facts and identification of key legal question(s) + answer given by the Court
    - Commentary on the case at hand: how does it relate to earlier or later case law, to legislative initiatives?
      - Some independent research required
      - Make your own argument, what is your position regarding the case at hand?
      - Link it to the course theme on fundamental rights

# Advanced EU law

- Written work requirement
  - Times New Roman, font 12,
  - Spacing 1.15
  - No longer than 8 pages, standard margins
- Submission via eCampus + hard copy at EU law secretariat (Mme Caroline Langevin, B33, 2<sup>nd</sup> floor)
- Compulsory individual feedback on first case note, starting 22 November – possibility to register via eCampus

# Advanced EU law

- Course evaluation
  - 40% of final grade (8/20): two case notes
    - Instructions see eCampus
    - Case of your choice, may be one treated in class
      - If other case, ask for approval!
    - Demonstrate you can summarise and comment upon a specific court case
    - First case note due 5/11 on subject related to classes 1-4 (or 5), feedback in week of 22 November
    - Second case note due 17/12 on subject related to classes 6-10, evaluation as to whether feedback on case note 1 has been taken into account
  - 60% of final grade (12/20): oral exam in January
    - 30 minutes of preparation time, 20 minute exam
    - 2 general questions, basis for discussion on course materials

# Advanced EU law

- Deadlines
  - **Friday 5/11** at 16h00 at the latest – submission of first case note assignment via eCampus
    - hand in a written version by 17h00 at the latest
  - **Friday 17/12** at 16h00 at the latest – submission of second case note assignment via eCampus
    - hand in a written version by 17h00 at the latest



# Advanced EU law

- Calendar – Trifac 4, except 15 Oct
  - 24/9: introduction + fundamental rights in the EU: generalities
  - 1/10: fundamental rights beyond the EU
  - **8/10: no class**
  - 15/10: fundamental rights and internal market law (DUYCKAERTS)
  - 22/10: fundamental rights and internal market law
  - 29/10: fundamental rights and internal market law
  - **5/11: no class**
  - 12/11: openness and transparency as EU fundamental rights
  - 19/11: openness and transparency as EU fundamental rights
  - *22, 23 or 26/11: individual feedback on first case note*
  - 26/11: data protection as EU fundamental right
  - **3/12: no class**
  - 10/12: data protection as EU fundamental right
  - 17/12: data protection as EU fundamental right – last class

# Advanced EU law

QUESTIONS?

# Lecture 1: the emergence of fundamental rights in the EU

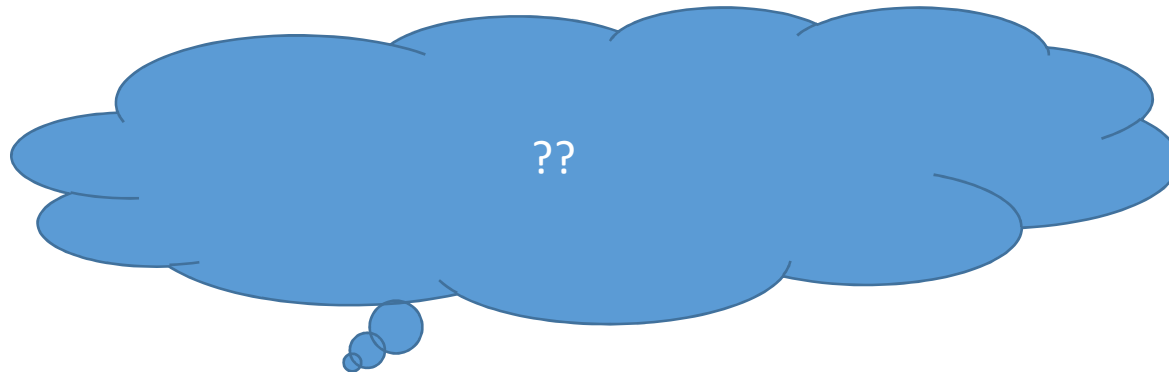
- Then-Commission Vice-President Frans Timmermans, 8 June 2018
  - *"This year we celebrate the 70th anniversary of the UN Universal Declaration on Human Rights. This is a good opportunity to recall that **fundamental rights, democracy and the rule of law are the three pillars that are the bedrock of the European Union.** Our Charter of fundamental rights is not optional. The EU institutions are bound by it and so are the Member States when implementing EU law. The Court of Justice of the EU and the national courts play an important role to uphold fundamental rights and the rule of law across the Union."*



# Lecture 1: The emergence of fundamental rights in the EU

- In legal English relating to the European Union:

fundamental rights  $\neq$  human rights



# Lecture 1: The emergence of fundamental rights in the EU

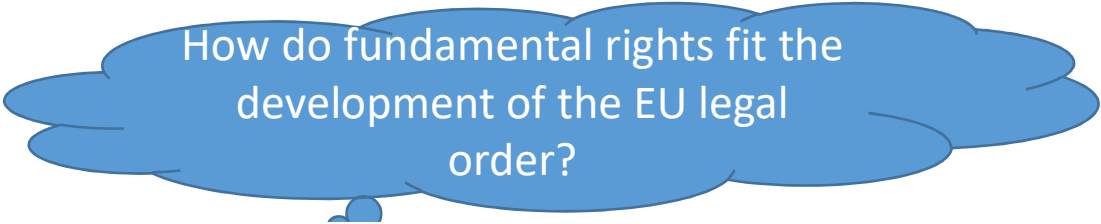
- In legal English relating to the European Union:

fundamental rights  $\neq$  human rights

Human rights are generally considered to be fundamental rights, but category of fundamental rights is much broader than what we classically understand as human rights

# Lecture 1: The emergence of fundamental rights in the EU

- Fundamental rights =
  - Rights or claims that are particularly important for a given legal order
    - often subjective rights; rights that can be invoked against someone else to claim protection
  - Given their importance, they are given a 'higher' status in the hierarchy of norms → special types of legal protection
    - often found in constitutional texts
    - protection by Courts
    - to be taken into account in legislative process



How do fundamental rights fit the development of the EU legal order?

# Lecture 1: The emergence of fundamental rights in the EU

- The EU as an order based on the rule of law
- Rule of law and fundamental rights: two parallel developments
- Fundamental rights as source of EU law: status quo

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- The EU as an order based on the rule of law
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# The EU legal order and the rule of law

- Law has always played an essential part in the European integration project
  - Law serves as an *instrument* to make European integration happen
    - In the beginning: public international law – the law of Treaties between equal States
  - From there, gradual development towards supranational law, an autonomous legal order, under impetus of CJEU:
    - Specific subjective rights given to individuals
    - Rights that can set aside rules of national law
    - Rights that are fundamental in nature – to be respected by EU secondary legislation and Member States when implementing EU law

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# The EU legal order and the rule of law

- Specific rights given to individuals: *Van Gend & Loos*



# Intermezzo: how to read a judgment of the Court of Justice?

- Identify the key legal question asked
- Read backwards, start with the holding
- Clarify the facts of the case
- Then read the findings of the Court to understand the legal reasoning
- If issues are unclear, read the facts again as well as the summary of arguments made
- If there is a Opinion by an Advocate General, read that Opinion first to have a more narrative version of the facts and issues of the case

# The EU legal order and the rule of law



- Specific rights given to individuals: *Van Gend & Loos* (Case 26/62)
  - *THE OBJECTIVE OF THE EEC TREATY, WHICH IS TO ESTABLISH A COMMON MARKET, THE FUNCTIONING OF WHICH IS OF DIRECT CONCERN TO INTERESTED PARTIES IN THE COMMUNITY, IMPLIES THAT THIS TREATY IS MORE THAN AN AGREEMENT WHICH MERELY CREATES MUTUAL OBLIGATIONS BETWEEN THE CONTRACTING STATES . THIS VIEW IS CONFIRMED BY THE PREAMBLE TO THE TREATY WHICH REFERS NOT ONLY TO GOVERNMENTS BUT TO PEOPLES . IT IS ALSO CONFIRMED MORE SPECIFICALLY BY THE ESTABLISHMENT OF INSTITUTIONS ENDOWED WITH SOVEREIGN RIGHTS, THE EXERCISE OF WHICH AFFECTS MEMBER STATES AND ALSO THEIR CITIZENS .*

# The EU legal order and the rule of law



- Specific rights given to individuals: *Van Gend & Loos*
  - *IN ADDITION THE TASK ASSIGNED TO THE COURT OF JUSTICE UNDER ARTICLE [267], THE OBJECT OF WHICH IS TO SECURE UNIFORM INTERPRETATION OF THE TREATY BY NATIONAL COURTS AND TRIBUNALS, CONFIRMS THAT THE STATES HAVE ACKNOWLEDGED THAT COMMUNITY LAW HAS AN AUTHORITY WHICH CAN BE INVOKED BY THEIR NATIONALS BEFORE THOSE COURTS AND TRIBUNALS . THE CONCLUSION TO BE DRAWN FROM THIS IS THAT THE COMMUNITY CONSTITUTES A NEW LEGAL ORDER OF INTERNATIONAL LAW FOR THE BENEFIT OF WHICH THE STATES HAVE LIMITED THEIR SOVEREIGN RIGHTS, ALBEIT WITHIN LIMITED FIELDS, AND THE SUBJECTS OF WHICH COMPRISE NOT ONLY MEMBER STATES BUT ALSO THEIR NATIONALS.*
  - *INDEPENDENTLY OF THE LEGISLATION OF MEMBER STATES, COMMUNITY LAW THEREFORE NOT ONLY IMPOSES OBLIGATIONS ON INDIVIDUALS BUT IS ALSO INTENDED TO CONFER UPON THEM RIGHTS WHICH BECOME PART OF THEIR LEGAL HERITAGE .*

# The EU legal order and the rule of law



- Specific rights given to individuals: *Van Gend & Loos*
  - *THESE RIGHTS ARISE NOT ONLY WHERE THEY ARE EXPRESSLY GRANTED BY THE TREATY, BUT ALSO BY REASON OF OBLIGATIONS WHICH THE TREATY IMPOSES IN A CLEARLY DEFINED WAY UPON INDIVIDUALS AS WELL AS UPON THE MEMBER STATES AND UPON THE INSTITUTIONS OF THE COMMUNITY .*

# The EU legal order and the rule of law

- Law has always played an essential part in the European integration project
  - Law serves as an *instrument* to make European integration happen
    - In the beginning: public international law – the law of Treaties between equal States
  - From there, gradual development towards supranational law, an autonomous legal order, under impetus of CJEU:
    - Specific subjective rights given to individuals
    - Rights that can set aside rules of national law
    - Rights that are fundamental in nature – to be respected by EU secondary legislation and Member States when implementing EU law



# The EU legal order and the rule of law

- Rights that can set aside rules of national law:  
*Costa v Enel* (Case 6/64)



# The EU legal order and the rule of law



- Rights that can set aside rules of national law: *Costa v Enel*
  - *BY CONTRAST WITH ORDINARY INTERNATIONAL TREATIES, THE EEC TREATY HAS CREATED ITS OWN LEGAL SYSTEM WHICH, ON THE ENTRY INTO FORCE OF THE TREATY, BECAME AN INTEGRAL PART OF THE LEGAL SYSTEMS OF THE MEMBER STATES AND WHICH THEIR COURTS ARE BOUND TO APPLY .*
  - *BY CREATING A COMMUNITY OF UNLIMITED DURATION, HAVING ITS OWN INSTITUTIONS, ITS OWN PERSONALITY, ITS OWN LEGAL CAPACITY AND CAPACITY OF REPRESENTATION ON THE INTERNATIONAL PLANE AND, MORE PARTICULARLY, REAL POWERS STEMMING FROM A LIMITATION OF SOVEREIGNTY OR A TRANSFER OF POWERS FROM THE STATES TO THE COMMUNITY, THE MEMBER STATES HAVE LIMITED THEIR SOVEREIGN RIGHTS, ALBEIT WITHIN LIMITED FIELDS, AND HAVE THUS CREATED A BODY OF LAW WHICH BINDS BOTH THEIR NATIONALS AND THEMSELVES .*

# The EU legal order and the rule of law



- Rights that can set aside rules of national law: *Costa v Enel*
  - *THE LAW STEMMING FROM THE TREATY, AN INDEPENDENT SOURCE OF LAW, COULD NOT, BECAUSE OF ITS SPECIAL AND ORIGINAL NATURE, BE OVERRIDDEN BY DOMESTIC LEGAL PROVISIONS, HOWEVER FRAMED, WITHOUT BEING DEPRIVED OF ITS CHARACTER AS COMMUNITY LAW AND WITHOUT THE LEGAL BASIS OF THE COMMUNITY ITSELF BEING CALLED INTO QUESTION .*
  - *THE TRANSFER BY THE STATES FROM THEIR DOMESTIC LEGAL SYSTEM TO THE COMMUNITY LEGAL SYSTEM OF THE RIGHTS AND OBLIGATIONS ARISING UNDER THE TREATY CARRIES WITH IT A PERMANENT LIMITATION OF THEIR SOVEREIGN RIGHTS, AGAINST WHICH A SUBSEQUENT UNILATERAL ACT INCOMPATIBLE WITH THE CONCEPT OF THE COMMUNITY CANNOT PREVAIL . CONSEQUENTLY ARTICLE 177 IS TO BE APPLIED REGARDLESS OF ANY DOMESTIC LAW, WHENEVER QUESTIONS RELATING TO THE INTERPRETATION OF THE TREATY ARISE .*

# The EU legal order and the rule of law

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# The EU legal order and the rule of law

- Rights that can set aside rules of national law:  
*Internationale Handelsgesellschaft* (Case 11-70)



# The EU legal order and the rule of law



- 11/70, *Internationale Handelsgesellschaft*
  - Para 3: RECOURSE TO THE LEGAL RULES OR CONCEPTS OF NATIONAL LAW IN ORDER TO JUDGE THE VALIDITY OF MEASURES ADOPTED BY THE INSTITUTIONS OF THE COMMUNITY WOULD HAVE AN ADVERSE EFFECT ON THE UNIFORMITY AND EFFICACY OF COMMUNITY LAW . THE VALIDITY OF SUCH MEASURES CAN ONLY BE JUDGED IN THE LIGHT OF COMMUNITY LAW . IN FACT, THE LAW STEMMING FROM THE TREATY, AN INDEPENDENT SOURCE OF LAW, CANNOT BECAUSE OF ITS VERY NATURE BE OVERRIDDEN BY RULES OF NATIONAL LAW, HOWEVER FRAMED, WITHOUT BEING DEPRIVED OF ITS CHARACTER AS COMMUNITY LAW AND WITHOUT THE LEGAL BASIS OF THE COMMUNITY ITSELF BEING CALLED IN QUESTION . THEREFORE THE VALIDITY OF A COMMUNITY MEASURE OR ITS EFFECT WITHIN A MEMBER STATE CANNOT BE AFFECTED BY ALLEGATIONS THAT IT RUNS COUNTER TO EITHER FUNDAMENTAL RIGHTS AS FORMULATED BY THE CONSTITUTION OF THAT STATE OR THE PRINCIPLES OF A NATIONAL CONSTITUTIONAL STRUCTURE .
  - Para 4: [...] IN FACT, RESPECT FOR FUNDAMENTAL RIGHTS FORMS AN INTEGRAL PART OF THE GENERAL PRINCIPLES OF LAW PROTECTED BY THE COURT OF JUSTICE [...]

# The EU legal order and the rule of law

- Interim conclusion:
  - EU law recognises rights individuals can invoke before national courts
  - EU-recognised rights prevail over rights recognised at national level, even when those rights are enshrined in Member State constitutions
  - Ability to invoke rights against decision taken to someone's detriment or disadvantage is to be a key element of the EU's rule of law
- Open questions:
  - What fundamental rights – however defined – do belong to the EU legal order?
  - Does there exist a hierarchy of rights?
  - When exactly can those rights be invoked?

# Lecture 1: The emergence of fundamental rights in the EU

- The EU as an order based on the rule of law
- Rule of law and fundamental rights: two parallel developments
- Fundamental rights as source of EU law: status quo



# Two parallel developments

- Starting point:
  - EU founded on rule of law needs rights that can be invoked – different rights of different nature
    - Right to ask for a subsidy
    - Right to free movement
    - Right to protection of one's personal life
    - ...
  - Some rights are considered more fundamental than others
    - Deserve protection – legislator cannot go against them
    - Individuals can invoke their violation by either government or private parties

# Two parallel developments

- Starting point: PROBLEM
  - At the outset of the EU integration project, it was unclear whether a catalogue of fundamental rights was present
    - ECSC and – later – EEC and Euratom Treaties did not mention a list of rights deemed more fundamental than others
    - Interpretation of fundamental nature of rights left to the Court of Justice (parallel development A) and to the EU legislator (parallel development B)
      - Case-by-case basis
      - Level of protection depends on type of right

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# Two parallel developments

- Parallel development A: judge-steered developments
  - On the one hand, recognition of EU as legal order based on the rule of law
    - *Van Gend & Loos, Costa/ENEL, Internationale Handelsgesellschaft*
  - On the other hand, recognition as general principles of law of rights protected by constitutions of Member States and ECHR (human rights being considered as fundamental rights)
    - economic rights – fundamental freedoms and right to property (*Internationale Handelsgesellschaft*; *Nold*; *Hauer*)
    - social rights
    - human rights – privacy, right to life, inspired by ECHR/national constitutions

# Two parallel developments

- Why? Above all pressure from national (German) constitutional court
  - Article 24 Grundgesetz: The Federation may by a law transfer sovereign powers to international organisations.
  - Case *Internationale Handelsgesellschaft* - 29 May 1974, BVerfGE 37, 271, English translation at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588>

# Two parallel developments

- Why? Above all pressure from national (German) constitutional court
  - The part of the Basic Law dealing with fundamental rights is an inalienable, essential feature of the valid Basic Law of the Federal Republic of Germany and one which forms part of the constitutional structure of the Basic Law. Article 24 of the Basic Law does not without reservation allow it to be subjected to qualifications. In this, the present state of integration of the Community is of crucial importance. The Community still lacks
    - a democratically legitimate parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level;
    - in particular, a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Basic Law and therefore allows a comparison and a decision as to whether, at the time in question, the Community law standard with regard to fundamental rights generally binding in the Community is adequate in the long term measured by the standard of the Basic Law with regard to fundamental rights (without prejudice to possible amendments) in such a way that there is no exceeding the limitation indicated, set by Article 24 of the Basic Law.

# Two parallel developments

- Case is often referred to as Solange I
  - **As long as** this legal certainty, which is not guaranteed merely by the decisions of the European Court of Justice, favourable though these have been to fundamental rights, is not achieved in the course of the further integration of the Community, the reservation derived from Article 24 of the Basic Law applies. What is involved is, therefore, a legal difficulty arising exclusively from the Community's continuing integration process, which is still in flux and which will end with the pre-sent transitional phase.
  - Provisionally, therefore, in the hypothetical case of a conflict between Community law and a part of national constitutional law or, more precisely, of the guarantees of fundamental rights in the Basic Law, there arises the question of which system of law takes precedence, that is, ousts the other. In this conflict of norms, the guarantee of fundamental rights in the Basic Law prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism.
  - Pressure remains even today – see Judgment of 5 May 2020, [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505\\_2bvr085915en.html;jsessionid=2394F2002D6C648EAE4656098F987CB3.2\\_cid383](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html;jsessionid=2394F2002D6C648EAE4656098F987CB3.2_cid383), but also Order of 29 April 2021

# Two parallel developments



- *Internationale Handelsgesellschaft*
  - *Para 4: HOWEVER, AN EXAMINATION SHOULD BE MADE AS TO WHETHER OR NOT ANY ANALOGOUS GUARANTEE INHERENT IN COMMUNITY LAW HAS BEEN DISREGARDED . IN FACT, RESPECT FOR FUNDAMENTAL RIGHTS FORMS AN INTEGRAL PART OF THE GENERAL PRINCIPLES OF LAW PROTECTED BY THE COURT OF JUSTICE . THE PROTECTION OF SUCH RIGHTS, WHILST INSPIRED BY THE CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES, MUST BE ENSURED WITHIN THE FRAMEWORK OF THE STRUCTURE AND OBJECTIVES OF THE COMMUNITY .*



# Two parallel developments

- Nold (Case 4/73) :
  - *Para 13: FUNDAMENTAL RIGHTS FORM AN INTEGRAL PART OF THE GENERAL PRINCIPLES OF THE LAW, THE OBSERVANCE OF WHICH IT ENSURES ; THAT IN SAFEGUARDING THOSE RIGHTS, THE COURT IS BOUND TO DRAW INSPIRATION FROM CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES , SO THAT MEASURES WHICH ARE INCOMPATIBLE WITH THE FUNDAMENTAL RIGHTS RECOGNIZED BY THE CONSTITUTIONS OF THOSE STATES ARE UNACCEPTABLE IN THE COMMUNITY ; AND THAT , SIMILARLY , INTERNATIONAL TREATIES FOR THE PROTECTION OF HUMAN RIGHTS ON WHICH THE MEMBER STATES HAVE COLLABORATED OR OF WHICH THEY ARE SIGNATORIES , CAN SUPPLY GUIDELINES WHICH SHOULD BE FOLLOWED WITHIN THE FRAMEWORK OF COMMUNITY LAW .*

# Two parallel developments

- Example of case: *Hauer* (Case 44/79)



# Two parallel developments

- *Hauer* (Case 44/79):
  - Para 14: respect for EU fundamental rights only to be evaluated by the Court of Justice, at the EU level itself
  - Para 15: *THE COURT IS BOUND TO DRAW INSPIRATION FROM CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES , SO THAT MEASURES WHICH ARE INCOMPATIBLE WITH THE FUNDAMENTAL RIGHTS RECOGNIZED BY THE CONSTITUTIONS OF THOSE STATES ARE UNACCEPTABLE IN THE COMMUNITY*

# Two parallel developments

- Example of case: *Hauer* (Case 44/79)
  - Para 17: *THE RIGHT TO PROPERTY IS GUARANTEED IN THE COMMUNITY LEGAL ORDER IN ACCORDANCE WITH THE IDEAS COMMON TO THE CONSTITUTIONS OF THE MEMBER STATES , WHICH ARE ALSO REFLECTED IN THE FIRST PROTOCOL TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS .*

# Two parallel developments

- Example of case: *Hauer* (Case 44/79)
  - *Para 20: IT IS NECESSARY TO CONSIDER ALSO THE INDICATIONS PROVIDED BY THE CONSTITUTIONAL RULES AND PRACTICES OF THE NINE MEMBER STATES . ONE OF THE FIRST POINTS TO EMERGE IN THIS REGARD IS THAT THOSE RULES AND PRACTICES PERMIT THE LEGISLATURE TO CONTROL THE USE OF PRIVATE PROPERTY IN ACCORDANCE WITH THE GENERAL INTEREST . THUS SOME CONSTITUTIONS REFER TO THE OBLIGATIONS ARISING OUT OF THE OWNERSHIP OF PROPERTY ( GERMAN GRUNDGESETZ , ARTICLE 14 ( 2 ), FIRST SENTENCE ), TO ITS SOCIAL FUNCTION ( ITALIAN CONSTITUTION , ARTICLE 42 ( 2 ) ), TO THE SUBORDINATION OF ITS USE TO THE REQUIREMENTS OF THE COMMON GOOD ( GERMAN GRUNDGESETZ , ARTICLE 14 ( 2 ), SECOND SENTENCE , AND THE IRISH CONSTITUTION , ARTICLE 43.2.2\* ), OR OF SOCIAL JUSTICE ( IRISH CONSTITUTION , ARTICLE 43.2.1\* ). IN ALL THE MEMBER STATES , NUMEROUS LEGISLATIVE MEASURES HAVE GIVEN CONCRETE EXPRESSION TO THAT SOCIAL FUNCTION OF THE RIGHT TO PROPERTY . THUS IN ALL THE MEMBER STATES THERE IS LEGISLATION ON AGRICULTURE AND FORESTRY , THE WATER SUPPLY , THE PROTECTION OF THE ENVIRONMENT AND TOWN AND COUNTRY PLANNING , WHICH IMPOSES RESTRICTIONS , SOMETIMES APPRECIABLE , ON THE USE OF REAL PROPERTY .*

# Two parallel developments

- Interim conclusion:
  - Fundamental rights need to be respected
  - Scope and existence of fundamental rights is determined on a case-by-case basis

# Two parallel developments

- Starting point: PROBLEM
  - At the outset of the EU integration project, it was unclear whether a catalogue of fundamental rights was present
    - ECSC and – later – EEC and Euratom Treaties did not mention a list of rights deemed more fundamental than others
    - Interpretation of fundamental nature of rights left to the Court of Justice (parallel development A) and to the EU legislator (parallel development B)
      - Case-by-case basis
      - Level of protection depends on type of right

# Two parallel developments

- No references to fundamental rights in the EEC Treaty
  - Messina Strategy after failure of European Political Community in the 1950s
    - Important part of discussions devoted to fundamental rights and need for fundamental rights' catalogue, comparable to ECHR
      - Contribution of Fernand Dehousse (Uliège)





# Two parallel developments

- Following entry into force of EEC
  - Fundamental rights considered a side-issue of overall integration project despite calls for a fundamental rights policy
  - Only with the Maastricht and Amsterdam Treaties in the 1990s became fundamental rights yet again an issue → attention for human rights notably in that respect
  - 1999: European Council grants mandate to draft a charter of fundamental rights
  - 2000: Charter is proclaimed, yet is considered non-binding
  - 2007: creation of a European Fundamental Rights Agency (Vienna)
  - 2009: Entry into force Lisbon Treaty: Charter becomes binding by virtue of Article 6 TEU
  - 2009: Lisbon Treaty: fundamental rights become very explicit core values protected by the European Union

# Lecture 1: The emergence of fundamental rights in the EU

- The EU as an order based on the rule of law
- Rule of law and fundamental rights: two parallel developments
- Fundamental rights as source of EU law: status quo

# Fundamental rights in the EU: status quo

- Article 2 TEU: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.
- Charter of Fundamental Rights of the EU (see next lecture)

# Fundamental rights in the EU: status quo



- Article 6 TEU
  - 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
  - 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Union law.

# Fundamental rights in the EU: status quo

- Article 7 TEU: emergency break procedure – or nuclear option – for Member State that does not respect the values of the European Union
  - Current cases:
    - Hungary (European Parliament Report vote 12 September 2018), initiated by European Parliament – ‘rule by decree’ discussions 2020
    - See also Poland:
      - Case C-619/18, *Commission v Poland*, 24 June 2019 => reliance on Article 19(1) TEU
      - Case C-791/19, *Commission v Poland*, 15 July 2021 => idem

Next week: focus on the EU  
Charter

Questions?

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Prof. dr. Pieter Van Cleynenbreugel

# Two parallel developments

- European Union as a legal order based on rule of law
  - Room and need for fundamental rights protection to be used by individuals
- Starting point: PROBLEM
  - At the outset of the EU integration project, it was unclear whether a catalogue of fundamental rights was present
    - ECSC and – later – EEC and Euratom Treaties did not mention a list of rights deemed more fundamental than others
  - Interpretation of fundamental nature of rights left to the Court of Justice (parallel development A) and to the EU legislator (parallel development B)
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- Fundamental rights as source of EU law: status quo

# Fundamental rights in the EU: status quo

- Article 2 TEU: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.
- Charter of Fundamental Rights of the EU (see next lecture)

# Fundamental rights in the EU: status quo



- Article 6 TEU
  - 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
  - 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Union law.

# Fundamental rights in the EU: status quo

- Article 7 TEU: emergency break procedure – or nuclear option – for Member State that does not respect the values of the European Union
  - Current cases:
    - Hungary (European Parliament Report vote 12 September 2018), initiated by European Parliament – ‘rule by decree’ discussions 2020
    - See also Poland:
      - Case C-619/18, *Commission v Poland*, 24 June 2019 => reliance on Article 19(1) TEU
      - Case C-791/19, *Commission v Poland*, 15 July 2021 => idem

# Lecture 2: fundamental rights in and beyond the EU

- Lecture 1: legal order based on rule of law resulted in more attention to fundamental rights
  - General principles – case law
  - Charter as culmination of decades-long political debates
- Lecture 2
  - Fundamental rights in the European Union: status quo continued
    - Charter: scope and relationship to other instruments
  - EU fundamental rights and other non-EU instruments
    - The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR)
    - National constitutionally enshrined fundamental rights
  - [Towards a more coherent fundamental rights framework?
    - Accession of the EU to the ECHR?
  - Fundamental rights in the European Union: where are we now?] – next class

# Lecture 2: fundamental rights in and beyond the EU

- Overview
  - Fundamental rights in the European Union: status quo continued
    - Charter: scope and relationship to other instruments
  - EU fundamental rights and other non-EU instruments
    - The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR)
    - National constitutionally enshrined fundamental rights



# Status quo: c'ted

- Charter
  - Title I: Dignity
    - Right to human dignity (Article 1)
    - Right to life (Article 2)
    - Right to integrity of the person (Article 3)
    - Prohibition of torture (Article 4)
    - Prohibition of slavery (Article 5)
  - Title II: Freedoms
    - Right to liberty and security (Article 6)
    - Respect for private life (Article 7)
    - Right to protection of personal data (Article 8)
    - Right to marry (Article 9)
    - ...

# Status quo: c'ted

- Charter
  - Title II: Freedoms
    - Freedom of thought (Article 10)
    - Freedom of expression (Article 11)
    - Freedom of assembly (Article 12)
    - Freedom of the arts and the sciences (Article 13)
    - Right to education (Article 14)
    - Freedom to choose an occupation (Article 15)
    - Freedom to conduct a business (Article 16)
    - Right to property (Article 17)
    - Right of asylum (Article 18)
    - Protection in the event of expulsion or removal (Article 19)

# Status quo: c'ted

- Charter
  - Title III: Equality
    - Equality before the law (Article 20)
    - Non-discrimination (Article 21)
    - Cultural, religious and linguistic diversity (Article 22)
    - Equality between women and men (Article 23)
    - Rights of the child (Article 24)
    - Rights of the elderly (Article 25)
    - Integration of persons with disabilities (Article 26)
  - Title IV: Solidarity
    - Workers' right to information (Article 27)
    - Right to collective bargaining (Article 28)

# Status quo: c'ted

- Charter
  - Title IV: Solidarity
    - Right of access to placement services (Article 29)
    - Protection in case of unjustified dismissal (Article 30)
    - Fair and just working conditions (Article 31)
    - Prohibition of child labour (Article 32)
    - Family and professional life (Article 33)
    - Social security and social assistance (Article 34)
    - Health care (Article 35)
    - Access to services of general economic interest (Article 36)
    - Environmental protection (Article 37)
    - Consumer protection (Article 38)

# Status quo: c'ted

- Charter
  - Title V: citizens' rights
    - Right to vote EP (Article 39)
    - Right to vote municipal elections (Article 40)
    - Right to good administration (Article 41)
    - Right of access to documents (Article 42)
    - European Ombudsman (Article 43)
    - Right to petition (Article 44)
    - Freedom of movement/residence (Article 45)
    - Diplomatic and consular protection (Article 46)
  - Title VI: justice
    - Effective remedy (Article 47)
    - Presumption of innocence (Article 48)
    - Principle of legality – criminal offences and penalties (Article 49)
    - Non bis in idem (Article 50)

# Status quo c'ted

- Charter = binding document, same legal/constitutional status as EU primary law
  - To whom does it apply? – scope *ratione personae*
  - Can it offer more or less protection than other human rights instruments at Member State or international level?

# Status quo c'ted

- Article 51 CFREU:
  - 1. The provisions of this Charter are addressed to
    - the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity, and
    - to the Member States *only when they are implementing Union law*. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
  - 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

# Status quo c'ted

- When are Member States implementing EU law?
  - Applying a Regulation or Decision or norm of EU primary law
  - Transposing a Directive
  - Applying national law resulting from the transposition of a Directive?
    - CJEU, C-617/10, *Fransson*: yes
  - Applying national law related to transposed directives – e.g. national criminal sanctions adopted for VAT evasion?
    - CJEU, C-617/10, *Fransson*: yes



# Status quo c'ted

- *Fransson*:

- Article 51(1) of the Charter 'confirms the Court's case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union' (para. 18)
- The requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (para 20).
- Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation ***falls within the scope of European Union law***, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter (para 21).

# Status quo c'ted

- *Fransson*: Implementation in Article 51 = acting within the scope of European Union law
  - The fact that the national legislation upon which those tax penalties and criminal proceedings are founded has not been adopted to transpose Directive 2006/112 cannot call that conclusion into question, since its application is *designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union* (Para 28).

# Status quo c'ted

The exact scope of EU law  
remains unclear – Court  
assesses on a case-by-case  
basis –  
Problem!



# Status quo c'ted

- To whom does the Charter apply?
  - EU institutions, offices, bodies, agencies (Article 51(1)), with due regard to the principle of subsidiarity
  - Member States when implementing EU law (Article 51(1))
- Can it apply to private persons dealing with EU institutions or Member States?
- Can it also apply to private persons in their legal relationships with other private persons?

# Status quo c'ted

- EU law can impose obligations on certain categories of private persons, giving rights to other private persons vis-à-vis those persons
  - Trade Unions
  - Employers
  - Private businesses
  - ...

# Status quo c'ted

- Recognition of horizontal effect of principle of non-discrimination on the basis of
  - Gender – *Defrenne*
  - Age – *Mangold*
  - Nationality - *Angonese*
- Charter does not seem to add anything to that case law, but also does not modify it...
  - See also Article 52(2) CFREU: Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
  - Potential horizontal direct effect, see Case C-569/16-570/16, *Bauer et al.*

# Status quo c'ted

- Charter = binding document, same status as EU primary law
  - To whom does it apply? – scope ratione personae
  - Can it offer more or less protection than other human rights instruments at Member State or international level?

# Status quo c'ted

- Article 52(1)
  - Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
- Article 52(2)
  - Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
    - Interpretation of charter rights in accordance with scope attached to similar general principles of law



# Status quo c'ted

- Article 52(3)
  - In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

# Status quo c'ted

- Article 52(4)
  - In so far as this 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.
- Article 53
  - Nothing in this Charter shall be interpreted as *restricting or adversely affecting* human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

# Status quo c'ted

- Article 52(5):
  - The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers.
  - They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

# Lecture 2: fundamental rights in and beyond the EU

- Overview
  - Fundamental rights in the European Union: status quo continued
    - Charter: scope and relationship to other instruments
  - EU fundamental rights and other non-EU instruments
    - The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR)
    - National constitutionally enshrined fundamental rights

# ECHR

- European Convention of Human Rights
  - Within the framework of the Council of Europe – another international organisation
    - ECHR – 47 Member States
    - ECtHR as supranational court
  - Only States could be parties to the agreement, not international organisations such as the European Union

# ECHR

- ECtHR, Bosphorus (45036/98, 30 June 2005) case law
  - para 155: State action taken in compliance with [EU] legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides [...]. By “equivalent” the Court means “comparable”; any requirement that the organisation’s protection be “identical” could run counter to the interest of international cooperation pursued [...]. However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.
  - para 156: If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.
    - rebuttable presumption!

# ECHR

- Article 52(3) CFREU:
  - In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.
    - EU confirmation of Bosphorus case law
- This provision shall not prevent **Union law** providing more extensive protection.

# Lecture 2: fundamental rights in and beyond the EU

- Overview
  - Fundamental rights in the European Union: status quo continued
    - Charter: scope and relationship to other instruments
  - EU fundamental rights and other non-EU instruments
    - The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR)
    - National constitutionally enshrined fundamental rights

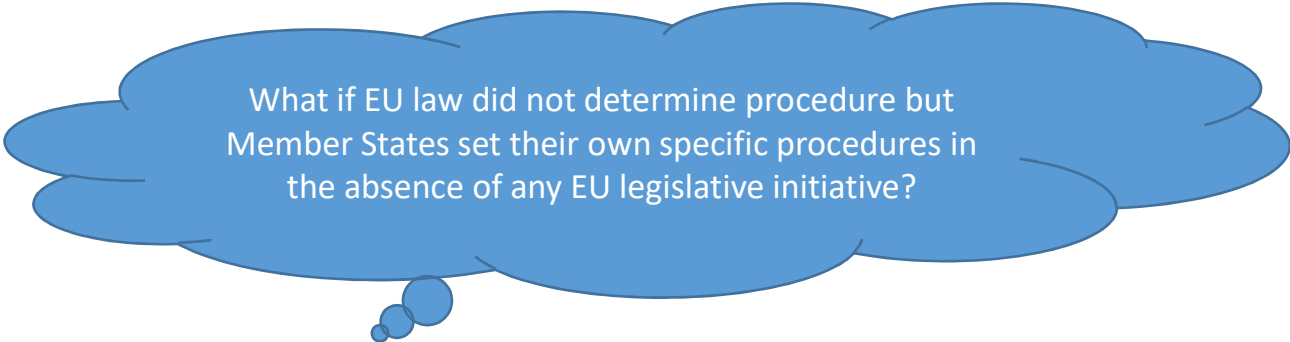


# National constitutions

- Nevertheless, C-399/11, *Melloni*
  - *Extradition to Italy, where criminal law does not tolerate a retrial when condemned in absentia*
  - *No retrial is against right to a fair trial as interpreted in Spanish constitutional law*
  - *European Arrest Warrant: EU secondary legislation does not allow Spain to invoke this ground, as that law is in conformity with interpretation of same right to fair trial in the context of EU law – Article 47 Charter + Article 6 ECHR*
- The interpretation envisaged by the national court at the outset is that Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law.
- Such an interpretation would, in particular, allow a Member State to make the execution of a European arrest warrant issued for the purposes of executing a sentence rendered *in absentia* subject to conditions intended to avoid an interpretation which restricts or adversely affects fundamental rights recognised by its constitution, even though the application of such conditions is not allowed under Article 4a(1) of Framework Decision 2002/584.

# National constitutions

- C-399/11, *Melloni*
  - Such actions would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision (para 63)
  - Primacy, unity and effectiveness call for a common standard whenever EU law determines a procedure
    - See already 11/70, Internationale Handelsgesellschaft



What if EU law did not determine procedure but Member States set their own specific procedures in the absence of any EU legislative initiative?

# National constitutions

- In *Taricco II* (Case C-42/17):
  - VAT fraud and limitation periods in Italian law
  - Member States MUST disapply provisions of EU law when national constitutional provisions interpreted harmoniously with EU fundamental right – the principle of legality in criminal law matters – impose a higher standard of protection
  - ??

# National constitutions

- In principle, harmonious interpretation
- Yet Charter = ceiling within the scope of EU law
  - National constitutions' more far-reaching protections cannot always apply
    - In case EU law provides for procedures – such as extradition under European arrest warrant – promoting some kind of '(free) movement' within the EU legal order → national constitutions may not, by virtue of primacy, unity and effectiveness, move beyond the Charter level of protections! (*Melloni*)
    - In the absence of EU procedures – yet still within the scope of EU law – Fransson situation – it is not excluded that Member States offer more stringent protection, e.g. regarding non bis in idem → national constitutions may apparently still offer more stringent protection...
      - Taricco II?

# Lecture 2: fundamental rights in and beyond the EU

- Next time
  - Towards a more coherent fundamental rights framework?
    - Accession of the EU to the ECHR?
  - Fundamental rights in the European Union: where are we now?

Questions?

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# Advanced EU law

Prof. dr. Pieter Van Cleynenbreugel

# Lecture 2: fundamental rights in and beyond the EU

- Overview
  - L1: Attention to fundamental rights thanks to Court's emphasis on rule of law and national calls for increased protection
    - Consequence of primacy and direct effect
    - Consequence of threats voiced by German and Italian constitutional courts
      - <-> recent judgment by Polish Constitutional Tribunal - <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>
  - L2(1): Fundamental rights in the European Union: status quo continued
    - Charter: scope and relationship to other instruments
  - L2(2): EU fundamental rights and other non-EU instruments
    - The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR)
    - National constitutionally enshrined fundamental rights
  - Towards a more coherent fundamental rights framework?
    - Accession of the EU to the ECHR?
  - Fundamental rights in the European Union: where are we now?

# EU accession to ECHR

- Earlier attempts for the EU to join considered impossible by the Court of Justice of the EU
  - Opinion 2/94: EU is not competent to accede to ECHR
    - Para 34: Respect for human rights is therefore a condition of the lawfulness of Community acts. Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.



# EU accession to ECHR

- Changes brought about by the Lisbon Treaty...
  - Article 6(2) TEU: The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
- ... and Protocol 14 attached to the ECHR
  - International organisations can accede to the ECHR

# EU accession to ECHR

- Protocol No 8 to TEU-TFEU - Draft agreement permitting accession prepared
- Article 3(6): In proceedings to which the [EU] is a co-respondent, if the [Court of Justice] has not yet assessed the compatibility with the rights at issue defined in the [ECHR] or in the protocols to which the [EU] has acceded of the provision of [EU] law, sufficient time shall be afforded for the [Court of Justice] to make such an assessment, and thereafter for the parties to make observations to the [ECtHR]. The [EU] shall ensure that such assessment is made quickly so that the proceedings before the [ECtHR] are not unduly delayed. The provisions of this paragraph shall not affect the powers of the [ECtHR].
  - Opinion asked to Court of Justice: Opinion 2/13

# EU accession to ECHR

- Opinion 2/13:
  - Para 157: As the Court of Justice has repeatedly held, the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals.
  - Para 158: The fact that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation, has consequences as regards the procedure for and conditions of accession to the ECHR.

# EU accession to ECHR

- Opinion 2/13
  - Para 166: as the Court of Justice has noted many times, EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States (see, to that effect, judgments in *Costa*, EU:C:1964:66, p. 594, and *Internationale Handelsgesellschaft*, EU:C:1970:114, paragraph 3; Opinions 1/91, EU:C:1991:490, paragraph 21, and 1/09, EU:C:2011:123, paragraph 65; and judgment in *Melloni*, C-399/11, EU:C:2013:107, paragraph 59), and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves (judgment in *van Gend & Loos*, EU:C:1963:1, p. 12, and Opinion 1/09, EU:C:2011:123, paragraph 65)
  - Para 167: These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'.

# EU accession to ECHR

- Opinion 2/13
  - Para 168: This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.
  - Para 170: The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU .
  - Para 171: As regards the structure of the EU, it must be emphasised that not only are the institutions, bodies, offices and agencies of the EU required to respect the Charter but so too are the Member States when they are implementing EU law (see, to that effect, judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 17 to 21).

# EU accession to ECHR

- Opinion 2/13
  - Para 174: In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law.
  - Para 176: In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law (see, to that effect, judgment in *van Gend & Loos*, EU:C:1963:1, p. 12), thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties (see, to that effect, Opinion 1/09, EU:C:2011:123, paragraphs 67 and 83).

# EU accession to ECHR

- According to the Court, at least two problems with this framework and its integration in the ECHR legal system
  - Constitutional problems of primacy, unity and effectiveness
  - Practical problems to maintain the preliminary reference mechanism in place

# EU accession to ECHR

- Opinion 2/13
  - Para 187: it must be borne in mind, in the first place, that Article 53 of the Charter provides that nothing therein is to be interpreted as restricting or adversely affecting fundamental rights as recognised, in their respective fields of application, by EU law and international law and by international agreements to which the EU or all the Member States are party, including the ECHR, and by the Member States' constitutions.
  - Para 188: The Court of Justice has interpreted that provision as meaning that the application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law (judgment in *Melloni*, EU:C:2013:107, paragraph 60).



# EU accession to ECHR

- Opinion 2/13
  - Para 189: In so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited — with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR — to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.
  - Para 190: However, there is no provision in the agreement envisaged to ensure such coordination.

# EU accession to ECHR

- Opinion 2/13
  - Para 192: when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.
  - Para 193: The approach adopted in the agreement envisaged, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law.

# EU accession to ECHR

- Opinion 2/13
  - Para 194: In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.
  - Para 195: However, the agreement envisaged contains no provision to prevent such a development.

# EU accession to ECHR

- According to the Court, at least two problems with this framework and its integration in the ECHR legal system
  - Constitutional problems of primacy, unity and effectiveness
  - Practical problems to maintain the preliminary reference mechanism in place

# EU accession to ECHR

- Opinion 2/13
  - Para 196: Protocol No 16 permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto, even though EU law requires those same courts or tribunals to submit a request to that end to the Court of Justice for a preliminary ruling under Article 267 TFEU.
  - Para 198: it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, as has been noted in paragraph 176 of this Opinion, is the keystone of the judicial system established by the Treaties.

# EU accession to ECHR

- Opinion 2/13
  - Para 246: if the Court of Justice were not allowed to provide the definitive interpretation of secondary law, and if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law.

# EU accession to ECHR

- Towards a new agreement?
  - Negotiations are once again re-opened in September 2020
    - On-going, last meeting 5-8 October 2021
    - ...
- Finding an equilibrium between two courts – if so, how?
  - Two supreme fundamental rights courts in Europe?
  - Complemented by national courts

# Lecture 2: fundamental rights in and beyond the EU

- Overview
  - Fundamental rights in the European Union: status quo continued
    - Charter: scope and relationship to other instruments
  - EU fundamental rights and other non-EU instruments
    - The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR)
    - National constitutionally enshrined fundamental rights
  - Towards a more coherent fundamental rights framework?
    - Accession of the EU to the ECHR?
  - Fundamental rights in the European Union: where are we now?



# Where are we now?

- Charter adopted
- Unclear relationships with other fundamental rights instruments
- Potential frictions between EU and ECHR remain
- Potential frictions between EU and national constitutions remain, despite Internationale Handelsgesellschaft and Melloni

# Lecture 3: fundamental freedoms and/as fundamental rights

- Fundamental freedoms
- Fundamental freedoms as fundamental rights
- Fundamental freedoms and fundamental rights
  - EU primary law

# Fundamental freedoms

- Establishment of an internal market in TFEU
  - Free movement of workers (art. 45)
  - Freedom of establishment (art. 49) and freedom to provide services (art. 52)
- Free movement of goods (art. 30, 34-36)
- Free movement of capital (art. 63)
- Citizenship free movement rights (art. 21)
- Non-discrimination on the basis of nationality (art. 18) or gender (art. 157)

# Lecture 3: fundamental freedoms and/as fundamental rights

- Fundamental freedoms
- Fundamental freedoms as fundamental rights
- Fundamental freedoms and fundamental rights

# Freedoms as fundamental rights

- Rights benefit from direct effect and constitute legal weapons to make EU law and integration work across Member State legal orders
  - Economically oriented rights, due to limited nature of EEC – EC prior to Maastricht
  - Rights associated with:
    - Freedom to choose a profession
    - Freedom to conduct a business
    - Principle of equality in socio-economic relationships

# Lecture 3: fundamental freedoms and/as fundamental rights

- Fundamental freedoms
- Fundamental freedoms as fundamental rights
- Fundamental freedoms and fundamental rights

# Freedoms and other fundamental rights?

- Problem: EEC Treaty only recognised existence of fundamental economic freedoms as fundamental rights
  - Over time, ever since *Internationale Handelsgesellschaft*, the Court recognised – on a case-by-case basis – other fundamental rights which have the legal value of ‘general principles of EU law’
    - Hauer, right to property
    - ...
  - Given that general principles are unwritten and the Treaty freedoms appear in EU primary law,
    - what is their relationship?
    - did the Charter change that relationship?

# Freedoms and other fundamental rights?

- Case C-112/00, *Schmidberger*



- *Para 77:* The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter.



# Freedoms and other fundamental rights?

- *Schmidberger*

- Para 78: First, whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances, be subject to restrictions for the reasons laid down in Article 36 of that Treaty or for overriding requirements relating to the public interest, in accordance with the Court's consistent case-law since the judgment in Case 120/78 *Rewe-Zentral* (Cassis de Dijon).
- Para 79: Second, whilst the fundamental rights at issue in the main proceedings are expressly recognised by the ECHR and constitute the fundamental pillars of a democratic society, it nevertheless follows from the express wording of paragraph 2 of Articles 10 and 11 of the Convention that freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued

# Freedoms and other fundamental rights?

- *Schmidberger*

- Para 81: In those circumstances, the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.
- Para 82: The competent authorities enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights.

# Freedoms and other fundamental rights?

- Case C-36/02, *Omega Spielhallen*



- Para 32: In this case, the competent authorities took the view that the activity concerned by the prohibition order was a threat to public policy by reason of the fact that, in accordance with the conception prevailing in public opinion, the commercial exploitation of games involving the simulated killing of human beings infringed a fundamental value enshrined in the national constitution, namely human dignity. According to the Bundesverwaltungsgericht, the national courts which heard the case shared and confirmed the conception of the requirements for protecting human dignity on which the contested order is based, that conception therefore having to be regarded as in accordance with the stipulations of the German Basic Law.

# Freedoms and other fundamental rights?

- *Omega Spielhallen*
  - Para 33: It should be recalled in that context that, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect (see, inter alia, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, paragraph 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71).

# Freedoms and other fundamental rights?

- *Omega Spielhallen*
  - Para 35: Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services (see, in relation to the free movement of goods, *Schmidberger*, paragraph 74).
  - Para 37: It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected. Although, in paragraph 60 of *Schindler*, the Court referred to moral, religious or cultural considerations which lead all Member States to make the organisation of lotteries and other games with money subject to restrictions, it was not its intention, by mentioning that common conception, to formulate a general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity.

# Viking

- C-438/05, *Viking*



# Viking

- Para 72: it cannot be disputed that collective action such as that envisaged by FSU has the effect of making less attractive, or even pointless, as the national court has pointed out, Viking's exercise of its right to freedom of establishment, inasmuch as such action prevents both Viking and its subsidiary, Viking Eesti, from enjoying the same treatment in the host Member State as other economic operators established in that State.
- Para 73: collective action taken in order to implement ITF's policy of combating the use of flags of convenience, which seeks, primarily, as is apparent from ITF's observations, to prevent shipowners from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, must be considered to be at least liable to restrict Viking's exercise of its right of freedom of establishment.

# Viking

- Para 75: It is apparent from the case-law of the Court that a restriction on freedom of establishment can be accepted only if it pursues a legitimate aim compatible with the Treaty and is justified by overriding reasons of public interest. But even if that were the case, it would still have to be suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it (see, inter alia, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and *Bosman*, paragraph 104).
- Para 77: In that regard, it must be observed that the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty (see, to that effect, *Schmidberger*, paragraph 74) and that the protection of workers is one of the overriding reasons of public interest recognised by the Court (see, inter alia, Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 36; Case C-165/98 *Mazzoleni and ISA* [2001] ECR I-2189, paragraph 27; and Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte and Others* [2001] ECR I-7831, paragraph 33).



# Viking

- Justified in practice?
  - Para 81: as regards the collective action taken by FSU, even if that action – aimed at protecting the jobs and conditions of employment of the members of that union liable to be adversely affected by the reflagging of the *Rosella* – could reasonably be considered to fall, at first sight, within the objective of protecting workers, such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat.
  - Para 82: This would be the case, in particular, if it transpired that the undertaking referred to by the national court in its 10th question was, from a legal point of view, as binding as the terms of a collective agreement and if it was of such a nature as to provide a guarantee to the workers that the statutory provisions would be complied with and the terms of the collective agreement governing their working relationship maintained.

# Viking

- Justified in practice?
  - Para 84: If, following that examination, the national court came to the conclusion that, in the case before it, the jobs or conditions of employment of the FSU's members liable to be adversely affected by the reflagging of the *Rosella* are in fact jeopardised or under serious threat, it would then have to ascertain whether the collective action initiated by FSU is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective.

# Laval

- C-341/05, *Laval*



# Laval

- Para 73: In order to ensure that the nucleus of mandatory rules for minimum protection are observed, the first subparagraph of Article 3(1) of Directive 96/71 provides that Member States are to ensure that, whatever the law applicable to the employment relationship, in the framework of the transnational provision of services, undertakings guarantee workers posted to their territory the terms and conditions of employment covering the matters listed in that provision, namely: maximum work periods and minimum rest periods; minimum paid annual holidays; the minimum rates of pay, including overtime rates; the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; health, safety and hygiene at work; protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; and equality of treatment between men and women and other provisions on non-discrimination.
- Para 75: That provision thus prevents a situation arising in which, by applying to their workers the terms and conditions of employment in force in the Member State of origin as regards those matters, undertakings established in other Member States would compete unfairly against undertakings of the host Member State in the framework of the transnational provision of services, if the level of social protection in the host Member State is higher.

# Laval

- Para 78: However, in the case in the main proceedings, it is apparent from paragraph 19 of this judgment that, in respect of some of the matters referred to in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, in particular as regards working time and annual leave, certain terms of the collective agreement for the building sector depart from the provisions of Swedish law which lay down the terms and conditions of employment applicable to posted workers, by establishing more favourable terms.
- Para 80: Nevertheless, Article 3(7) of Directive 96/71 cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection. As regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 expressly lays down the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe. Moreover, such an interpretation would amount to depriving the directive of its effectiveness.

# Laval

- Justified restriction to fundamental freedoms?
  - Restriction? Para 99-100
  - Yet, collective action = fundamental right:
    - Para 91: Although the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, it is to be protected in accordance with Community law and national law and practices.
    - Para 94: As the Court held, in *Schmidberger* and *Omega*, the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty. Such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality (see, to that effect, *Schmidberger*, paragraph 77, and *Omega*, paragraph 36).

# Laval

- Justified restriction to fundamental freedoms?
  - Para 108: as regards the specific obligations, linked to signature of the collective agreement for the building sector, which the trade unions seek to impose on undertakings established in other Member States by way of collective action such as that at issue in the case in the main proceedings, the obstacle which that collective action forms cannot be justified with regard to such an objective. In addition to what is set out in paragraphs 81 and 83 of the present judgment, with regard to workers posted in the framework of a transnational provision of services, their employer is required, as a result of the coordination achieved by Directive 96/71, to observe a nucleus of mandatory rules for minimum protection in the host Member State.
  - Para 110: collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective referred to in paragraph 102 of the present judgment, where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay (see, to that effect, *Arblade and Others*, paragraph 43).

# Freedoms and other fundamental rights?

- Interim conclusion
  - Fundamental freedoms and fundamental rights may require balancing
  - Balancing is to take place on a case-by-case basis
    - Importance of presence of EU secondary legislation in place or not!!
  - Major responsibility imposed on Member States' judges

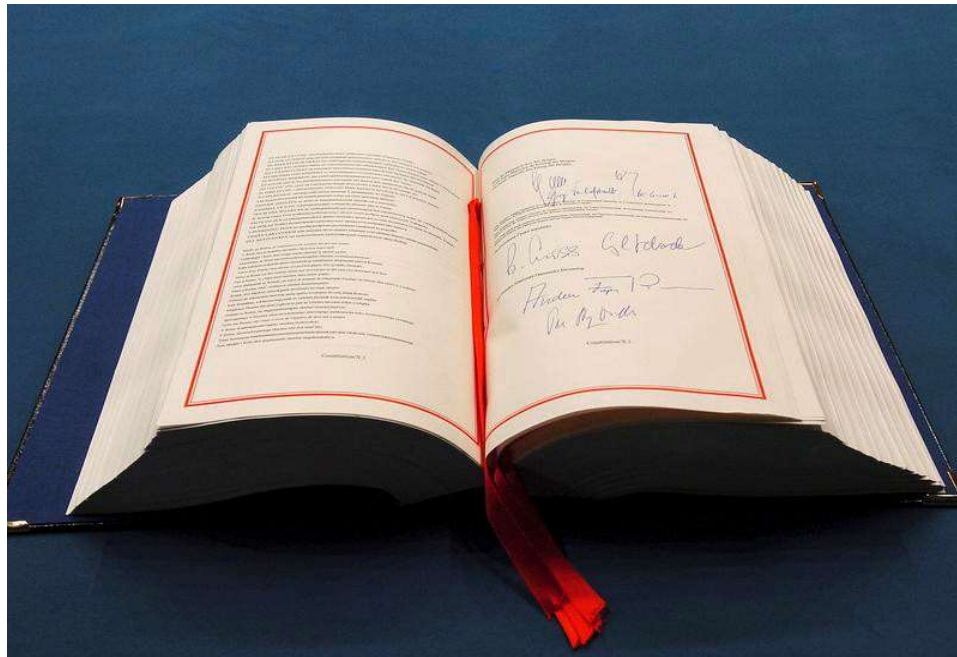


# Freedoms and other fundamental rights?

- Problem: EEC Treaty only recognised existence of fundamental economic freedoms as fundamental rights
  - Over time, ever since *Internationale Handelsgesellschaft*, the Court recognised – on a case-by-case basis – other fundamental rights which have the legal value of ‘general principles of EU law’
    - Hauer, right to property
    - ...
  - Given that general principles are unwritten and the Treaty freedoms appear in EU primary law,
    - what is their relationship?
    - did the Charter change that relationship?

# Freedoms and other fundamental rights?

- Impact of Charter?
  - Paradox...



# Questions?

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# Advanced EU law

Prof. dr. Pieter Van Cleynenbreugel

# Lecture 3 (last week)

- Fundamental freedoms and/as fundamental rights
  - Recognition of free movement rights as fundamental rights by CJEU
- No absolute fundamental rights – can be balanced against other fundamental rights
  - Free movement v. absolute right – absolute right would prevail
  - Free movement v. other relative right – finding the least restrictive way forward for both
    - Schmidberger
    - Viking (see later)
    - Even when another fundamental right is more absolute at national level?
      - Omega Spielhallen...
  - In case of harmonised procedures, legislator already strikes a balance in a certain way
    - Omega Spielhallen after adoption of services directive?
    - Laval
    - Cf. *Melloni* <-> *Taricco II*

# Viking

- C-438/05, *Viking*



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# Freedoms and other fundamental rights?

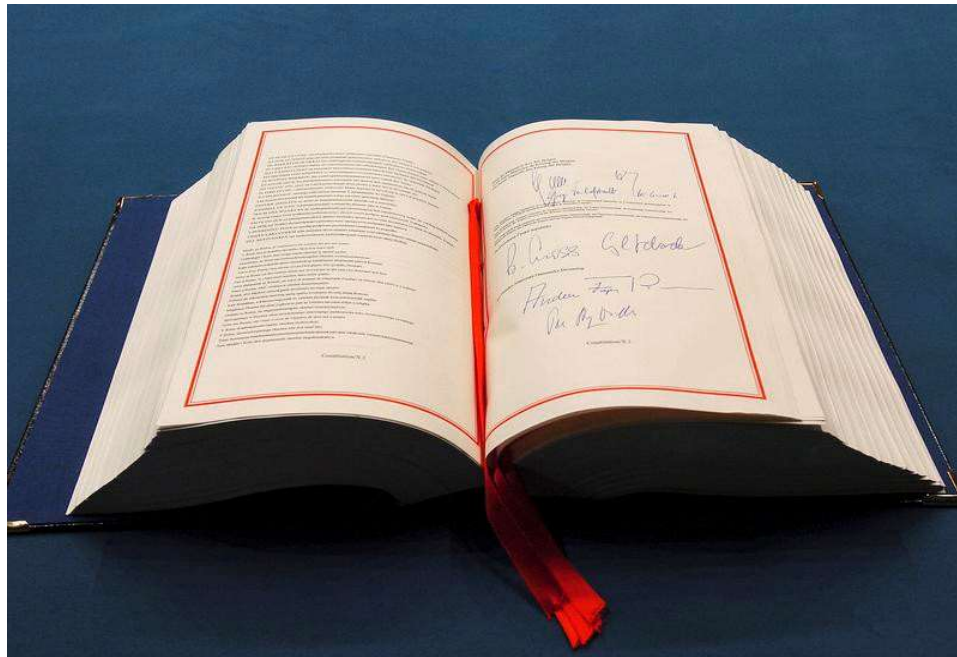
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# Freedoms and other fundamental rights?

- Impact of Charter?
  - Paradox...



# Lecture 4: citizenship rights as fundamental rights

- The emergence of citizenship rights
- Citizenship rights as fundamental rights
- Citizenship rights and other fundamental rights

# Emergence of citizenship

- Starting point: bringing European integration project closer to 'the base': people living in the territory of the EEC
  - Economic freedoms as such do not appeal to the citizen at large
- Maastricht Treaty:
  - introduction of rights attached to status of citizen

# Emergence of citizenship

- Article 20 TFEU:
  - 1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
  - 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
    - (a) the right to move and reside freely within the territory of the Member States;
    - (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
    - (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
    - (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.



# Emergence of citizenship

- Article 21 TFEU
  - 1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.
  - 2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.
  - 3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

# Emergence of citizenship

- Article 22: right to stand for and vote in municipal and EP elections
- Article 23: right to diplomatic and consular protection in third States
- Article 24: right to petition the EP and Ombudsman, right to being addressed in one's official language

# Lecture 4: citizenship rights as fundamental rights

- The emergence of citizenship rights
- Citizenship rights as fundamental rights
- Citizenship rights and other fundamental rights

# Citizenship rights as fundamental rights

- Charter?
  - Title V: citizen's rights
    - Article 39-40: right to vote and stand for election
    - Article 41: good administration
    - Article 42: access to documents (lectures 6 and 7!)
    - Article 43: ombudsman
    - Article 44: right to petition
    - Article 45: movement and residence
    - Article 46: diplomatic and consular protection

# Citizenship rights as fundamental rights

- Treaty originally did not accord any proper 'fundamental' status to these citizenship rights
- Yet, CJEU did: Case C-184/99, Grzelczyk, para 31:  
*Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.*

Citizenship as specific fundamental non-discrimination right

# Citizenship rights as fundamental rights

- From 1994-2004: citizenship as status entitling MS nationals to obtain equal access to services offered in other Member States: **every citizen automatically 'falls within the scope of EU law'**
  - Social assistance (Case C-456/02, *Trojani*)
  - Student allowances (Case C-209/03, *Bidar*)
  - Unemployment benefits (Case C-138/02, *Collins*)
  - Right to family (re-)unification (Case C-200/02, *Chen*)
- From 2004: EU harmonising procedure
  - non-discrimination conditional, however, upon maintaining citizenship status in accordance with EU harmonised procedures
  - Directive 2004/38 imposes conditions on who is a benefiting citizen 'falling within the scope of EU law'

# Citizenship rights as fundamental rights

- Conditional, however, upon having legally recognised citizenship status
  - Citizen = any EU national
  - Who is considered benefiting citizen? (Article 6, 7 and 16)
  - Only those moving to another Member State:
    - Workers
    - Students
    - Citizens with sufficient means and health insurance
    - Members of the family ((grand)parents and (grand)children))
- Who has the right not to be discriminated against?
  - Citizens legally residing on the territory of another Member State
    - 3 months without authorisation
    - Between 3 months and five years: permit may be required
    - After 5 years: application for permanent residence possible

# Citizenship rights as fundamental rights

- Non-discrimination right, subject to certain conditions: article 24(2) Directive 2004/38:
  - By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.



# Citizenship rights as fundamental rights

- Questions remaining open from a fundamental rights perspective:
  - Can a citizen who is technically not benefiting according to Directive 2004/38 still claim something from a Member State by virtue of his/her citizenship status?
    - *Brey*
    - *Zambrano*
    - *Lounes*
  - What is the role of the Charter in complementing/adding to the fundamental rights nature of citizenship rights?

# Citizenship rights as fundamental rights

- Questions remaining open from a fundamental rights perspective:
  - Can a citizen who is technically not benefiting according to Directive 2004/38 still claim something from a Member State by virtue of his/her citizenship status?
    - *Brey (+Dano)*
    - *Zambrano*
    - *Lounes*
  - What is the role of the Charter in complementing/adding to the fundamental rights nature of citizenship rights?

# Brey

- When technically not within the scope of EU law:
  - Para 63: the fact that a national of another Member State who is not economically active may be eligible, in light of his low pension, to receive a [compensatory pension supplement] benefit could be an indication that that national does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State for the purposes of Article 7(1)(b) of Directive 2004/38
    - Problem: Austria had given Mr. Brey a residence permit
  - Para 64: However, the competent national authorities cannot draw such conclusions without first carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned.
    - ➔ No automatic exclusion from right to supplement!

# Dano

- If no residence permit, scope of citizenship protection is more limited:
  - Para 84: Article 24(1) of Directive 2004/38, read in conjunction with Article 7(1)(b) thereof, and Article 4 of Regulation No 883/2004 must be interpreted as not precluding legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004, although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other Member States do not have a right of residence under Directive 2004/38 in the host Member State.

# Zambrano

- Para 44: if a refusal [to grant a work permit to third country parents of EU citizens] would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.

- ➔ substance of rights at stake

# Lounes

- Para 59: It would also follow that Union citizens who have exercised their freedom of movement and acquired the nationality of the host Member State in addition to their nationality of origin would, so far as their family life is concerned, be treated less favourably than Union citizens who have also exercised that freedom but who hold only their nationality of origin. The rights conferred on Union citizens in the host Member State, particularly the right to a family life with a third-country national, would thus be reduced in line with their increasing degree of integration in the society of that Member State and according to the number of nationalities that they hold.

# Citizenship rights as fundamental rights

- Questions remaining open from a fundamental rights perspective:
  - Can a citizen who is technically not benefiting according to Directive 2004/38 still claim something from a Member State by virtue of his/her citizenship status?
    - *Brey (+Dano)*
    - *Zambrano*
    - *Lounes*
  - What is the role of the Charter in complementing/adding to the fundamental rights nature of citizenship rights?

# Citizenship rights as fundamental rights

- Charter only applies within the scope of EU law
- *Dano*:
  - Para 91: when the Member States lay down the conditions for the grant of special non-contributory cash benefits and the extent of such benefits, they are not implementing EU law.
  - Para 92: Charter does not apply to that situation
    - Only to residence rights and non-discrimination once residence has been granted



# Lecture 4: citizenship rights as fundamental rights

- The emergence of citizenship rights
- Citizenship rights as fundamental rights
- Citizenship rights and other fundamental rights

# Tjebbes

- To the extent that citizenship rights are considered to be fundamental, can they be invoked together with or do the need to be balanced against other fundamental rights?
  - Loss of nationality of MS, implying also loss of citizenship status under EU law
- para 45: As part of that examination of proportionality, it is, in particular, for the competent national authorities and, where appropriate, for the national courts to ensure that the loss of nationality is consistent with the fundamental rights guaranteed by the Charter, the observance of which the Court ensures, and specifically the right to respect for family life as stated in Article 7 of the Charter, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of the Charter (judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 70).

# Citizenship rights and fundamental rights

- To the extent that citizenship rights are considered to be fundamental, can they be invoked together with or do they need to be balanced against other fundamental rights?
  - Recent example: Case C-434/16, *Coman*
    - Para 31: a national of a Member State who, as in the main proceedings, has exercised, in his capacity as a Union citizen, his freedom to move and reside within a Member State other than his Member State of origin, may rely on the rights pertaining to Union citizenship, in particular the rights provided for in Article 21(1) TFEU, including, where appropriate, against his Member State of origin

# Citizenship rights and fundamental rights

- Romanian government is restricting freedom of movement of individuals:
- Coman, para 47: It should be added that a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter, it being the task of the Court to ensure that those rights are respected
- Para 48: the right to respect for private and family life guaranteed by the Charter is a fundamental right.

# Citizenship rights and fundamental rights

- Coman, para 50: it is apparent from the case-law of the European Court of Human Rights that the relationship of a homosexual couple may fall within the notion of ‘private life’ and that of ‘family life’ in the same way as the relationship of a heterosexual couple in the same situation (ECtHR, 7 November 2013, *Vallianatos and Others v. Greece*, CE:ECHR:2013:1107JUD002938109, § 73, and ECtHR, 14 December 2017, *Orlandi and Others v. Italy*, CE:ECHR:2017:1214JUD002643112, § 143).
  - ➔ in EU law, family member from third country may derive rights (para 56)

# Citizenship rights and fundamental rights

- Coman, para 49: In that regard, as is apparent from the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), in accordance with Article 52(3) of the Charter, the rights guaranteed by Article 7 thereof have the same meaning and the same scope as those guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950

# Conclusion

- Citizenship rights are considered fundamental rights 'within the scope of EU law'
  - Beyond non discrimination, however, 'principles' in Charter language, requiring legislative implementation
- No absolute rights, conditions set by legislator conform to scope of citizenship status
- Citizenship rights need to be interpreted in light of other fundamental rights → potential for a more extensive application of citizenship rights in future

# Lessons to be learnt from previous lectures

- Charter lists fundamental rights
  - Previously already acknowledged as general principles of European Union law
- Does not change meaningfully the interpretation and interrelationships already existing between types of fundamental rights
  - Economic freedoms – social rights – citizenship rights
  - Important role for national judge in balancing different types of rights guided by CJEU
  - EU fundamental rights only come into play when falling within the 'scope' of EU law
    - Scope unclear – Court of Justice plays an important safeguarding role
    - Impact of EU legislation as well...



# Questions?

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# Advanced EU law

Prof. dr. Pieter Van Cleynenbreugel

# Lecture 4: citizenship rights as fundamental rights

- The emergence of citizenship rights
- Citizenship rights as fundamental rights
  - Originally movement right – art. 21 TFEU as « right » in Charter language, later on considered as « principle », limited by EU legislation and confirmed by Charter – only fundamental rights guarantees within the scope of EU law
- Citizenship rights and other fundamental rights

# Tjebbes

- To the extent that citizenship rights are considered to be fundamental, can they be invoked together with or do they need to be balanced against other fundamental rights?
  - Loss of nationality of MS, implying also loss of citizenship status under EU law
- para 45: As part of that examination of proportionality, it is, in particular, for the competent national authorities and, where appropriate, for the national courts to ensure that the loss of nationality is consistent with the fundamental rights guaranteed by the Charter, the observance of which the Court ensures, and specifically the right to respect for family life as stated in Article 7 of the Charter, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of the Charter (judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 70).

# Citizenship rights and fundamental rights

- To the extent that citizenship rights are considered to be fundamental, can they be invoked together with or do they need to be balanced against other fundamental rights?
  - Recent example: Case C-434/16, *Coman*
    - Para 31: a national of a Member State who, as in the main proceedings, has exercised, in his capacity as a Union citizen, his freedom to move and reside within a Member State other than his Member State of origin, may rely on the rights pertaining to Union citizenship, in particular the rights provided for in Article 21(1) TFEU, including, where appropriate, against his Member State of origin

# Citizenship rights and fundamental rights

- Romanian government is restricting freedom of movement of individuals:
- Coman, para 47: It should be added that a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter, it being the task of the Court to ensure that those rights are respected
- Para 48: the right to respect for private and family life guaranteed by the Charter is a fundamental right.

# Citizenship rights and fundamental rights

- Coman, para 50: it is apparent from the case-law of the European Court of Human Rights that the relationship of a homosexual couple may fall within the notion of ‘private life’ and that of ‘family life’ in the same way as the relationship of a heterosexual couple in the same situation (ECtHR, 7 November 2013, *Vallianatos and Others v. Greece*, CE:ECHR:2013:1107JUD002938109, § 73, and ECtHR, 14 December 2017, *Orlandi and Others v. Italy*, CE:ECHR:2017:1214JUD002643112, § 143).
  - ➔ in EU law, family member from third country may derive rights (para 56)

# Citizenship rights and fundamental rights

- Coman, para 49: In that regard, as is apparent from the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), in accordance with Article 52(3) of the Charter, the rights guaranteed by Article 7 thereof have the same meaning and the same scope as those guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950



# Conclusion

- Citizenship rights are considered fundamental rights ‘within the scope of EU law’
  - Beyond non discrimination, however, ‘principles’ in Charter language, requiring legislative implementation
- No absolute rights, conditions set by legislator conform to scope of citizenship status
  - Principles in the language of the Charter, despite the Court’s earlier case law (prior to Directive 2004/38)
- Citizenship rights need to be interpreted in light of other fundamental rights → potential for a more extensive application of citizenship rights in future

# Lessons to be learnt from previous lectures

- Charter lists fundamental rights
  - Previously already acknowledged as general principles of European Union law
- Does not change meaningfully the interpretation and interrelationships already existing between types of fundamental rights
  - Economic freedoms – social rights – citizenship rights
  - Important role for national judge in balancing different types of rights guided by CJEU
  - EU fundamental rights only come into play when falling within the 'scope' of EU law
    - Scope unclear – Court of Justice plays an important safeguarding role
    - Impact of EU legislation as well...

# Lecture 5: the horizontal application of EU fundamental rights

# Overview

- Personal scope of application of EU fundamental rights
- Horizontal scope of application of (certain) fundamental rights
  - Non-discrimination on the basis of gender and age
  - Fundamental freedoms (non-discrimination on the basis of nationality or residence)?
- The Charter and the horizontal scope of application of EU fundamental rights

# Overview

- Personal scope of application of EU fundamental rights
- Horizontal scope of application of (certain) fundamental rights
  - Non-discrimination on the basis of gender and age
  - Fundamental freedoms (non-discrimination on the basis of nationality or residence)?
- The Charter and the horizontal scope of application of EU fundamental rights

# Personal scope of application of FR

- *Raison d'être* of fundamental rights = protection of individuals against public authorities
  - Charter of Fundamental rights adheres to that philosophy
- Some rights considered as fundamental are deemed so important that individuals also have to respect them vis-à-vis other individuals
  - Constitutional courts play a major role in identifying the horizontal application of those rights in light of the spirit and context within which they have been adopted
  - CJEU is no stranger to that approach...

# Overview

- Personal scope of application of EU fundamental rights
- Horizontal scope of application of (certain) fundamental rights
  - Non-discrimination on the basis of gender and age
  - Fundamental freedoms (non-discrimination on the basis of nationality or residence)?
- The Charter and the horizontal scope of application of EU fundamental rights

# Non-discrimination on the basis of gender and age

- *Defrenne, 43/75*





# Non-discrimination on the basis of gender and age

- Art. 157(1) TFEU: Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied
- *Defrenne:*
  - *Para 8: Article [157]pursues a double aim .*
  - *Para 9: First , in the light of the different stages of the development of social legislation in the various member states , the aim of article [157] is to avoid a situation in which undertakings established in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-community competition as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay .*
  - *Para 10: Secondly , this provision forms part of the social objectives of the community , which is not merely an economic union , but is at the same time intended , by common action , to ensure social progress and seek the constant improvement of the living and working conditions of their peoples , as is emphasized by the preamble to the treaty .*
  - *Para 11: This aim is accentuated by the insertion of article [157]into the body of a chapter devoted to social policy whose preliminary provision , article [151], marks ' the need to promote improved working conditions and an improved standard of living for workers , so as to make possible their harmonization while the improvement is being maintained ' .*
  - *Para 12: This double aim , which is at once economic and social , shows that the principle of equal pay forms part of the foundations of the community .*

# Non-discrimination on the basis of gender and age

- *Defrenne:*
  - *Para 21: among the forms of direct discrimination which may be identified solely by reference to the criteria laid down by [Art. 157(1)] must be included in particular those which have their origin in legislative provisions or in collective labour agreements and which may be detected on the basis of a purely legal analysis of the situation .*
  - *Para 22: this applies even more in cases where men and women receive unequal pay for equal work carried out in the same establishment or service , whether public or private .*
  - *Para 23: as is shown by the very findings of the judgment making the reference , in such a situation the court is in a position to establish all the facts which enable it to decide whether a woman worker is receiving lower pay than a male worker performing the same tasks .*
  - *Para 24: in such situation , at least , [Art. 157(1)] is directly applicable and may thus give rise to individual rights which the courts must protect .*

# Non-discrimination on the basis of gender and age

- *Defrenne:*

- Para 31: *indeed , as the court has already found in other contexts , the fact that certain provisions of the treaty are formally addressed to the member states does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down .*
- Para 32: *the very wording of [Art. 157] shows that it imposes on states a duty to bring about a specific result to be mandatorily achieved within a fixed period .*
- Para 33: *the effectiveness of this provision cannot be affected by the fact that the duty imposed by the Treaty has not been discharged by certain Member States and that the joint institutions have not reacted sufficiently energetically against this failure to act .*
- Para 39: *since Art. 157 is mandatory in nature , the prohibition on discrimination between men and women applies not only to the action of public authorities , but also extends to all agreements which are intended to regulate paid labour collectively , as well as to contracts between individuals .*

# Non-discrimination on the basis of gender and age



# Non-discrimination on the basis of gender and age

- Case C-144/04, *Mangold*
  - Para 75: The principle of non-discrimination on grounds of age must thus be regarded as a general principle of Community law. [...]

# Non-discrimination on the basis of gender and age

- *Mangold*
  - Para 76: Consequently, observance of the general principle of equal treatment, in particular in respect of age, cannot as such be conditional upon the expiry of the period allowed the Member States for the transposition of a directive intended to lay down a general framework for combating discrimination on the grounds of age, in particular so far as the organisation of appropriate legal remedies, the burden of proof, protection against victimisation, social dialogue, affirmative action and other specific measures to implement such a directive are concerned.
    - Member State was already acting within the scope of EU law, having adopted preparatory legislation prior to Directive's transposition!

# Non-discrimination on the basis of gender and age

- *Mangold*
  - Para 77: In those circumstances it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law (see, to that effect, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 21, and Case C-347/96 *Solred* [1998] ECR I-937, paragraph 30).
- Confirmed in Case C-555/07, *Kücükdeveci*

# Overview

- Personal scope of application of EU fundamental rights
- Horizontal scope of application of (certain) fundamental rights
  - Non-discrimination on the basis of gender and age
  - Fundamental freedoms (non-discrimination on the basis of nationality or residence)?
- The Charter and the horizontal scope of application of EU fundamental rights



# Horizontal application of fundamental freedoms

- Fundamental freedoms:
  - Art. 34-35 TFEU: quantitative restrictions on imports/exports and all measures having equivalent effect shall be prohibited *between Member States*;
  - Art. 45 TFEU: freedom of movement for workers shall be secured *within the Union*;
  - Art. 49 TFEU: restrictions on the freedom of establishment of *nationals of a Member State in the territory of another Member State* shall be prohibited;
  - Art. 56 TFEU: restrictions on freedom to provide services within the Union shall be prohibited in respect of *nationals of Member States who are established in a Member State other than that of the person for whom the services are intended*;
  - Art. 63 TFEU: all restrictions on the movement of capital/payments between Member States and between Member States and third countries shall be prohibited.

# Horizontal application of fundamental freedoms

- Personal scope of application yet no guidance on invocability of provisions in private legal relationships
- Court of Justice:
  - fundamental freedoms recognised by the Treaty apply in principle to relationships between individuals and public authorities
    - C-159/00, *Sapod Audic*, para 74: ‘a contractual provision cannot be regarded as a barrier to trade for the purposes of Article [34] of the Treaty since it was not imposed by a Member State but agreed between individuals’
  - extension of *fundamental freedom provisions* to private individuals in only three (more or less) exceptional situations

# Horizontal application of fundamental freedoms

- (1) failure to act by a Member State
  - Case C-265/95, *Commission v France*
    - para 65: the French Government has manifestly and persistently abstained from adopting appropriate and adequate measures to put an end to the acts of vandalism which jeopardize the free movement on its territory of certain agricultural products originating in other Member States and to prevent the recurrence of such acts.
  - Case C-112/00, *Schmidberger*
    - para 60: the 'obligation upon each Member State to ensure the free movement of products in its territory [implies] taking the measures necessary and appropriate for the purposes of preventing any restriction due to the acts of individuals applies without the need to distinguish between cases where such acts affect the flow of imports or exports and those affecting merely the transit of goods'.

# Horizontal application of fundamental freedoms

- (2) private organisations or bodies acting in the ‘collective interest’ or taking a decision with a ‘collective impact’
  - sports associations:
    - Case 36/74, *Walrave and Koch*, para 17: ‘the abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services, [...], would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations which do not come under public law’
    - Case C-415/93, *Bosman*
  - trade unions:
    - Case C-438/05, *Viking*
    - Case C-341/05, *Laval*
  - hospital associations:
    - Case C-411/98, *Ferlini*, para 50: ‘the Treaty also applies in cases where a group or organisation such as the EHL exercises a certain power over individuals and is in a position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed under the Treaty’

# Horizontal application of fundamental freedoms

- (3) private employers taking a decision with *de facto collective impact* consisting in discriminating on the basis of nationality of (future) workers
  - Case C-281/98, *Angonese*, para 35: ‘designed to ensure that there is no discrimination on the labour market’ => based on *Defrenne*
    - para 34: The Court has also ruled that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down (see Case 43/75 *Defrenne v Sabena* [1976] ECR 455, paragraph 31). The Court accordingly held, in relation to a provision of the Treaty which was mandatory in nature, that the prohibition of discrimination applied equally to all agreements intended to regulate paid labour collectively, as well as to contracts between individuals (see *Defrenne*, paragraph 39).
  - Case C-94/07, *Raccanelli*, para 46: the prohibition of discrimination based on nationality laid down by Article [45 TFEU] applies equally to private-law associations such as [Max Planck Gesellschaft].

# Overview

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# Impact of the Charter

- *Association de médiation sociale*, Case C-176/12
  - Para 41: Can Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, be invoked in a dispute between individuals in order to preclude, as the case may be, the application of the national provision which is not in conformity with that directive?
  - Para 42: In respect of Article 27 of the Charter, as such, it should be recalled that it is settled case-law that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law (see Case C-617/10 *Åkerberg Fransson* [2013] ECR, paragraph 19).
  - Para 43: Thus, since the national legislation at issue in the main proceedings was adopted to implement Directive 2002/14, Article 27 of the Charter is applicable to the case in the main proceedings.
  - Para 44: It must also be observed that Article 27 of the Charter, entitled ‘Workers’ right to information and consultation within the undertaking’, provides that workers must, at various levels, be guaranteed information and consultation in the cases and under the conditions provided for by European Union law and national laws and practices.
  - Para 45: It is therefore clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law.
  - Para 46: It is not possible to infer from the wording of Article 27 of the Charter or from the explanatory notes to that article that Article 3(1) of Directive 2002/14, as a directly applicable rule of law, lays down and addresses to the Member States a prohibition on excluding from the calculation of the staff numbers in an undertaking a specific category of employees initially included in the group of persons to be taken into account in that calculation.

# Impact of the Charter

- *Association de médiation sociale*, Case C-176/12
  - Para 47: In this connection, the facts of the case may be distinguished from those which gave rise to *Kücükdeveci* in so far as the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such.
  - Para 48: Accordingly, Article 27 of the Charter cannot, as such, be invoked in a dispute, such as that in the main proceedings, in order to conclude that the national provision which is not in conformity with Directive 2002/14 should not be applied.
  - Para 49: That finding cannot be called into question by considering Article 27 of the Charter in conjunction with the provisions of Directive 2002/14, given that, since that article by itself does not suffice to confer on individuals a right which they may invoke as such, it could not be otherwise if it is considered in conjunction with that directive.
  - Para 50: However, a party injured as a result of domestic law not being in conformity with European Union law can none the less rely on the judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357 in order to obtain, if appropriate, compensation for the loss sustained (see *Dominguez*, paragraph 43).
  - Para 51: It follows from the foregoing that Article 27 of the Charter, by itself or in conjunction with the provisions of Directive 2002/14, must be interpreted to the effect that, where a national provision implementing that directive, such as Article L. 1111-3 of the Labour Code, is incompatible with European Union law, that article of the Charter cannot be invoked in a dispute between individuals in order to disapply that national provision.



# Impact of the Charter

Evangelisches Werk  
für Diakonie  
und Entwicklung

Diakonie  Deutschland  Brot  
für die Welt

- Case C-414/16, *Egenberger*
  - Para 76: The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law (see, with respect to the principle of non-discrimination on grounds of age, judgment of 15 January 2014, *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 47).
  - Para 78: it must be pointed out that, like Article 21 of the Charter, Article 47 of the Charter on the right to effective judicial protection is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such.

# Impact of the Charter

- *Egenberger*

- Para 80: That conclusion is not called into question by the fact that a court may, in a dispute between individuals, be called on to balance competing fundamental rights which the parties to the dispute derive from the provisions of the FEU Treaty or the Charter, and may even be obliged, in the review that it must carry out, to make sure that the principle of proportionality is complied with. Such an obligation to strike a balance between the various interests involved has no effect on the possibility of relying on the rights in question in such a dispute (see, to that effect, judgments of 12 June 2003, *Schmidberger*, C-112/00, EU:C:2003:333, paragraphs 77 to 80, and of 11 December 2007, *International Transport Workers' Federation and Finnish Seamen's Union*, C-438/05, EU:C:2007:772, paragraphs 85 to 89).

# Impact of the Charter

- *Egenberger*
  - Para 81: Further, where the national court is called on to ensure that Articles 21 and 47 of the Charter are observed, while possibly balancing the various interests involved, such as respect for the status of churches as laid down in Article 17 TFEU, it will have to take into consideration the balance struck between those interests by the EU legislature in Directive 2000/78, in order to determine the obligations deriving from the Charter in circumstances such as those at issue in the main proceedings (see, by analogy, judgment of 22 November 2005, *Mangold*, C-144/04, EU:C:2005:709, paragraph 76, and order of 23 April 2015, *Commission v Vanbreda Risk & Benefits*, C-35/15 P(R), EU:C:2015:275, paragraph 31).

# Impact of the Charter

- *Bauer et al.* (C-569/16 and C-570/16)
  - Para 79: it is necessary [...] to examine the scope of Article 31(2) of the Charter, in order to determine whether that provision, for which it has been established, in paragraphs 52 to 63 of the present judgment, that it is intended to apply to situations such as those in the main proceedings and must be interpreted as meaning that it precludes legislation such as that at issue in the main proceedings, may be invoked in a dispute between individuals, such as that arising in Case C-570/16, in order to require that the national court sets aside that national legislation and grants the deceased worker's legal heirs an allowance, payable by the former employer, in lieu of paid annual leave not taken to which that worker was entitled under EU law at the time of his death.

# Impact of the Charter

- *Bauer et al.* (C-569/17 and C-570/16)
  - Para 80: it should be recalled that the right to paid annual leave constitutes an essential principle of EU social law.
  - Para 81: That principle is itself mainly derived both from instruments drawn up by the Member States at EU level, such as the Community Charter of the Fundamental Social Rights of Workers, which is moreover mentioned in Article 151 TFEU, and from international instruments on which the Member States have cooperated or to which they are party. Among them is the European Social Charter, to which all Member States are parties in so far as they ratified it in its original version, its revised version or both versions, also referred to in Article 151 TFEU. Mention should also be made of Convention No 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay (revised) which, as the Court noted in paragraphs 37 and 38 of the judgment of 20 January 2009, *Schultz-Hoff and Others* (C-350/06 and C-520/06, EU:C:2009:18), sets out certain principles of that organisation which recital 6 of Directive 2003/88 states must be taken into account.
  - Para 82: In that regard, the fourth recital of Directive 93/104 states, in particular, that paragraph 8 of the Community Charter of the Fundamental Social Rights of Workers provides that every worker in the Union has a right, inter alia, to paid annual leave, the duration of which must be progressively harmonised in accordance with national practices (see, to that effect, judgment of 26 June 2001, *BECTU*, C-173/99, EU:C:2001:356, paragraph 39).

# Impact of the Charter

- *Bauer et al.* (C-569/17 and C-570/17)
  - Para 84: By providing in mandatory terms that ‘every worker’ has ‘the right’ ‘to an annual period of paid leave’ without referring in particular in that regard — like, for example, Article 27 of the Charter which led to the judgment of 15 January 2014, *Association de médiation sociale* (C-176/12, EU:C:2014:2) — to ‘the cases and ... conditions provided for by Union law and national laws and practices’, Article 31(2) of the Charter reflects the essential principle of EU social law from which there may be derogations only in compliance with the strict conditions laid down in Article 52(1) of the Charter and, in particular, the fundamental right to paid annual leave.
  - Para 85: The right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter, is thus, as regards its very existence, both mandatory and unconditional in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law, which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right. It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter (see, by analogy, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 76).
  - Para 86: Article 31(2) of the Charter therefore entails, in particular, as regards the situations falling within the scope thereof, first, that the national court must disapply national legislation such as that at issue in the main proceedings pursuant to which the death of a worker retroactively deprives him of his entitlement to paid annual leave acquired before his death, and, accordingly, his legal heirs of the entitlement to the allowance in lieu thereof by way of the financial settlement of those rights, and, second, that employers cannot rely on that national legislation in order to avoid payment of the allowance in lieu which they are required to pay pursuant to the fundamental right guaranteed by that provision.

# Impact of the Charter

- *Bauer et al.* (C-569/17 and C-570/17)
  - Para 87: With respect to the effect of Article 31(2) of the Charter on an employer who is a private individual, it should be noted that, although Article 51(1) of the Charter states that the provisions thereof are addressed to the institutions, bodies, offices and agencies of the European Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing EU law, Article 51(1) does not, however, address the question whether those individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility.
  - Para 88: First of all, as noted by the Advocate General in point 78 of his Opinion, the fact that certain provisions of primary law are addressed principally to the Member States does not preclude their application to relations between individuals (see, to that effect, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 77).
  - Para 89 Next, the Court has, in particular, already held that the prohibition laid down in Article 21(1) of the Charter is sufficient in itself to confer on individuals a right which they may rely on as such in a dispute with another individual (judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 76), without, therefore, Article 51(1) of the Charter preventing it.
  - Para 90: Finally, as regards, more specifically, Article 31(2) of the Charter, it must be noted that the right of every worker to paid annual leave entails, by its very nature, a corresponding obligation on the employer, which is to grant such periods of paid leave.
  - Para 91: In the event that the referring court is unable to interpret the national legislation at issue in a manner ensuring its compliance with Article 31(2) of the Charter, it will therefore be required, in a situation such as that in the particular legal context of Case C-570/16, to ensure, within its jurisdiction, the judicial protection for individuals flowing from that provision and to guarantee the full effectiveness thereof by disapplying if need be that national legislation (see, by analogy, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 79).

# General observations

- EU fundamental rights can apply horizontally
  - Depends on nature of right
  - Depends on willingness of Court to acknowledge such effect
- Charter does not result in automatic extension of horizontal effect to all EU fundamental rights
  - Depends on nature of right – case-by-case analysis
    - Somewhat clearer horizontal effect criteria within the Charter framework
    - No change in terms of fundamental freedoms
  - Could also depend on willingness of EU legislator to apply or implement EU fundamental right in horizontal legal relationships



# Questions?

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# Advanced EU law

Prof. dr. Pieter Van Cleynenbreugel

# Lectures 6-7: access to documents

- So far:
  - How did fundamental rights come to being?
  - When are EU fundamental rights applicable?
  - What fundamental rights discussions take place in EU internal market law?
    - Fundamental freedoms as justiciable/invocable EU fundamental rights
    - Balance with other fundamental rights: freedom of expression, right to worker consultation, non-discrimination
    - Balancing necessary
    - Citizenship rights: invocable rights in exceptional circumstances, in other circumstances secondary legislation required
    - Horizontal application of fundamental rights in the internal market
    - IMPORTANT NUANCE IN EU FUNDAMENTAL RIGHTS DEBATES: 219  
RIGHTS VERSUS PRINCIPLES

# Lectures 6-7: access to documents

- Fundamental freedoms = rights (because CJEU said so)
- Freedom of expression, human dignity, non-discrimination on grounds of gender, age, nationality = rights (CJEU + Charter Art. 21)
- Paid holidays = right (Charter, Art. 31, Bauer)
- Worker consultation = principle (Charter, Art. 27, Association de médiation sociale)
- Citizenship entitlements = principles made operational thanks to Directive 2004/38
  - Rights in cases where Member States 'made a kind of mistake'
- Access to documents and data protection = principles 220

# Lectures 6-7: access to documents

- A most specific EU fundamental right/principle
  - Requires operationalisation by means of secondary legislation in order to be justiciable/invocable!!!
  - Fundamental right serves as standard against which secondary legislation is interpreted (C-342/19 P, *Varoufakis*)
    - Interpretation of fundamental right determines the way in which EU gives something to individuals...
- Developed in secondary legislation and accompanying case law
- Grounded in the ideas of good governance and the principle of transparency

# Lectures 6-7: access to documents

- Transparency: from policymaking principle to individual right of access to documents
- Operationalising the individual right: Regulation 1049/2001
- Access to documents in light of the new Article 15 TFEU: openness and access
- Limits of the EU's transparency framework
  - Access to CJEU and ECB documents – des *cas spéciaux*?

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# Transparency from practice to individual right

- Transparency – why important?
  - Directly related to ‘accountability’
  - Accountability related to legitimacy
  - Helps legitimise the actions taken by the European Union institutions
    - Different practices in different Member States – contribution to trust in governance systems
- The Rome Treaty did not foresee anything on transparency except for publication of EU legislative measures
  - What about documents/studies/other information that guided legislators in making policy choices and in drafting legislation?



# Transparency from practice to individual right

We are not talking about access to the case file concerning one individual's case before an administration (falls within the right to/principle of good administration – Art. 41 Charter), but access to documents of a general or individual nature in another person's case that may also be of interest to the general public or other individuals!!



In the wake of the EU's internal market project in the late 1980s and the significant increase in harmonised legislation flowing from it, some steps needed to be taken in that regard

# Transparency from practice to individual right

- Earliest appearances: public procurement law – Member States' authorities have to be transparent in relation to tenders for public works
- Maastricht Treaty 1992 – Creation of European Union – TEU
  - Article 1 TEU – still Article 1 TFEU today (after Amsterdam, Nice and Lisbon Treaties)
    - Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen
- Legal value of Article 1 TFEU??

# Transparency from practice to individual right

- Calls/early initiatives favouring more transparency
  - Declaration 17 to the Maastricht Treaty (1992)
    - *Transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions*
  - Commission Communication 93/C 156/05 concerning public access to the institutions' documents, [1993] O.J. C 156/5
  - Communication 93/C 166/04 on openness in the Community, [1993] O.J. C 166/4
  - Code of Conduct concerning public access to Council and Commission documents, [1993] O.J. L 340/37

# Transparency from practice to individual right

- Calls/early initiatives favouring more transparency:
  - Council Decision 93/731/EC on public access to Council documents, [1993] O.J. L 340/43
  - Commission Decision 94/90/ECSC, EC, EURATOM on public access to Commission documents, [1994] O.J. L 46/58
  - European Parliament Decision 97/632/EC, ECSC, Euratom on public access to European Parliament documents, [1997] O.J. L 263/27

# Transparency from practice to individual right



- Establishment of European Ombudsman – Maastricht Treaty
  - Own initiative investigation powers – see Article 228 TFEU
    - Inspired by Scandinavian traditions – Sweden, Finland...
  - 1995-1997 investigation into transparency in EU decision-making
  - 1997 recommendation – non binding advice from Ombudsman
- Access to documents is an important tool to enhance legitimate and accountable governance
- “it is important to recognize that an information strategy is not a substitute for rules about what to do when citizens take the initiative by asking for documents that have not been put in the public domain. In particular, citizens have a legitimate interest in the organisation and functioning of institutions and bodies that are paid for from public funds. This may lead to requests for administrative documents, which are not usually covered by an information strategy”

# Transparency from practice to individual right

- Treaty of Amsterdam (1997): Article 255 TEC:
  - 1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have **a right of access to European Parliament, Council and Commission documents**, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.
  - 2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.
  - 3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.
- Provision does not have direct effect, but requires secondary legislation to be made effective – General Court, Case T-191/99, *Petrie et al*, EU:T:2001:284, para 35.
  - Regulation 1049/2001
- That idea translated into Art. 42 Charter of Fundamental Rights of the EU

# Transparency from practice to individual right

- Charter of Fundamental Rights of the European Union:
  - Article 42 - Right of access to documents
    - Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.
      - *A principle, rather than a right !!!!!!!*
  - Article 43 – European Ombudsman
    - Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role.

# Lectures 6-7: access to documents

- Transparency: from policymaking principle to individual right of access to documents
- Operationalising the individual right: Regulation 1049/2001
- Access to documents in light of the new Article 15 TFEU: openness and access
- Limits of the EU's transparency framework
  - Access to CJEU and ECB documents – des *cas spéciaux*?



# Regulation 1049/2001

- Recitals
  - (2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union
  - (4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty

# Regulation 1049/2001

- Obligations imposed on institutions
  - Art. 11: obligation to set up a register of publicly accessible documents – if possible in electronic register (Art. 12)
  - Art. 14: obligation to make accessible to the public Commission proposals and Council and European Parliament's common positions in legislative procedures
  - Art. 15 - administrative practice in the institutions
    - 1. The institutions shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by the Regulation.
    - 2. The institutions shall establish an interinstitutional committee to examine best practice, address possible conflicts and discuss future developments on public access to documents.

# Regulation 1049/2001

- Art. 13: obligation to publish preparatory documents in Official Journal of the EU
  - Commission proposals
  - International agreements concluded by the European Union
- Institutions obliged to act as openly as possible
  - Complemented by individual right of access to documents that have not been published in that manner

# Regulation 1049/2001

Aim = to ensure the widest possible access to documents

Widest possible does not equal full access to all documents!

However, exceptions to full access need to be justified and be known in advance

# Regulation 1049/2001

- Article 2(1)
  - Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation
    - Only European Parliament, Council and Commission
    - Exceptions nevertheless exist, yet only those recognised by this Regulation
  - Court of Justice, Court of Auditors and European Central Bank?
  - European Council – only institution since 2009?

# Regulation 1049/2001

- What is a document?
  - Article 3 (a):
    - any content whatever its medium
      - written on paper or stored in electronic form
      - a sound, visual or audiovisual recording
    - concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility
  - Article 2(3): documents held by an institution = documents drawn up or received by it and in its possession, in all areas of activity of the European Union

# Regulation 1049/2001

- Article 5 Regulation:
  - if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.
  - exceptions shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years.
  - in case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

# Regulation 1049/2001

- Special guarantees for sensitive documents
  - Art. 9(1): Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as "TRÈS SECRET/TOP SECRET", "SECRET" or "CONFIDENTIEL" in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.
  - Only competent members of staff may deal with those procedures + access only with explicit permission of originator of document
  - Motivation for refusal may not give away contents of document



# Regulation 1049/2001

- Procedure for obtaining access to documents – Article 6
  - Applications for access to a document shall be made in any written form, including electronic form, in one of the languages of the EU and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.
  - If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.
  - In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.

# Regulation 1049/2001

- Procedure for obtaining access to documents – Article 7
  - An application for access to a document shall be handled promptly.
    - acknowledgement of receipt shall be sent to the applicant.
  - Within 15 working days from registration of the application, the institution shall
    - either grant access to the document requested and provide access
    - or, in a written reply, state the reasons for the total or partial refusal.
  - In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position
    - obligation to inform the applicant of his or her right to make a confirmatory application
    - same 15 working days for confirmatory application – can be doubled in case of long or complex document
  - Appeals before the General Court and Court of Justice possible

# Regulation 1049/2001

- How is access made possible? – Art. 10
  - either by consulting them on the spot – electronic register (Art. 12)
  - or by receiving a copy, including, where available, an electronic copy, according to the applicant's preference.
    - to be supplied in an existing version and format (including electronically or in an alternative format such as Braille, large print or tape) with full regard to the applicant's preference
- The cost of producing and sending copies may be charged to the applicant. This charge shall not exceed the real cost of producing and sending the copies.
  - Consultation on the spot, copies of less than 20 A4 pages and direct access in electronic form or through the register shall be free of charge.
  - If a document has already been released by the institution concerned and is easily accessible to the applicant, the institution may fulfil its obligation of granting access to documents by informing the applicant how to obtain the requested document.

# Lectures 6-7: access to documents

- Transparency: from policymaking principle to individual right of access to documents
- Operationalising the individual right: Regulation 1049/2001
- Access to documents in light of the new Article 15 TFEU: openness and access
- Limits of the EU's transparency framework
  - Access to CJEU and ECB documents – des *cas spéciaux*?

# Regulation 1049/2001

- Widest possible access upon request
- In principle, access is to be granted, save for exceptional circumstances – Art. 4
  - Art. 4(1) - *categorical* exceptions: the institutions *shall refuse* access to a document where disclosure would undermine the protection of:
    - (a) the public interest as regards:
      - public security,
      - defence and military matters,
      - international relations,
      - the financial, monetary or economic policy of the Community or a Member State;
    - (b) privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data (see Regulation 2018/1725)

# Regulation 1049/2001

- Categorical?
  - Institution concerned has to motivate that document contains information falling into one of the categories
    - Motivating that it would undermine a particular objective protected by Art. 4(1) of the Regulation
    - Highlighting that there is a real risk that disclosing the document would undermine one of the objectives listed in Art. 4(1).
  - Institution will have to show that document cannot be published by deleting that information
    - If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released (Art. 4(6)).

# Regulation 1049/2001

- In principle, access is to be granted, save for exceptional circumstances – Article 4
  - Art. 4(2): exceptions where the institution has to justify that no other overriding public interest requires the disclosure of the document(s) concerned
    - protection of commercial interests of a natural or legal person, including intellectual property
    - protection of court proceedings and legal advice
    - protecting the purpose of inspections, investigations and audits
    - Art. 4(3): documents drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution
  - In practice, three stages, see Case C-350/12 P, *In 't Veld*, para 96

# Regulation 1049/2001

- the Council must first satisfy itself that the document which it is asked to disclose does indeed relate to [one of the categories covered by Art. 4(2), in this case] legal advice.
- Secondly, it must examine whether disclosure of the parts of the document in question which have been identified as relating to legal advice would undermine the protection which must be afforded to that advice, in the sense that it would be harmful to an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice. The risk of that interest being undermined must, in order to be capable of being relied on, be reasonably foreseeable and not purely hypothetical.
- Thirdly and lastly, if the Council takes the view that disclosure of a document would undermine the protection of legal advice as defined above, it is incumbent on the Council to ascertain whether there is any overriding public interest justifying disclosure despite the fact that its ability to seek legal advice and receive frank, objective and comprehensive advice would thereby be undermined



# Regulation 1049/2001

- In principle, access is to be granted, save for exceptional circumstances – Article 4
  - Art. 4(4): as regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.
  - A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

# Regulation 1049/2001

- In principle, access is to be granted, save for exceptional circumstances – Article 4
  - Art. 4(3): access to a document containing ***opinions for internal use as part of deliberations and preliminary consultations*** within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure
    - Case C-280/11 P, *Access Info Europe*
    - Case C-576/16 P, *ClientEarth v Commission*

# Regulation 1049/2001

- Court of Justice, Joined Cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council*, [2008] ECR I-04723, para 34; Case C-266/05 P, *Sison v Council*, [2007] ECR I-01233, para 63:
  - exceptions need to be interpreted strictly as they derogate from the idea of granting the *widest possible access to documents* held by EU institutions
  - at the same time, however, does this also mean that every request for documents has to be assessed individually without the possibility to per se exclude certain categories of documents from ever being granted access to?

# Regulation 1049/2001

- Cases C-280/11 P, *Access Info Europe*
  - Para 72: As regards the substance, it should be noted that, according to settled case-law, although, in order to justify refusing access to a document, it is not sufficient, in principle, for the document to fall within an activity or an interest referred to in Article 4 of Regulation No 1049/2001, as the institution concerned must also explain how access to that document could specifically and actually undermine the interest protected by an exception laid down in that provision, it is nevertheless open to that institution to base its decisions in that regard on general presumptions which apply to certain categories of document, as similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature
  - Para 73: in such a case, the institution concerned would not be under an obligation to carry out a specific assessment of the content of each of those documents, it must nevertheless specify on which general considerations it bases the presumption that disclosure of the documents would undermine one of the interests protected by the exceptions under Article 4 of Regulation No 1049/2001

# Regulation 1049/2001

- Difference between legislative processes and administrative procedures!, see also recently C-57/16 P, *ClientEarth v Commission*
  - Access Info Europe, para 74: such considerations not sufficient in context of legislative procedures
  - particular relevance where the Council is acting in its legislative capacity, a fact reflected in recital 6 to Regulation No 1049/2001, which states that wider access must be granted to documents in precisely such cases. Openness in that respect contributes to strengthening democracy by enabling citizens to scrutinise all the information which has formed the basis for a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights
- Only refusal of access if a genuine risk that the interest protected by the Regulation in Article 4 would be undermined

# Regulation 1049/2001

- Nevertheless, in administrative procedures
  - documents relating to restrictive anticompetitive behaviour (Case C-365/12 P, *Commission v EnBW*, EU:C:2014:112, para 65)
  - concentration control (Case C-404/10 P, *Commission v Éditions Odile Jacob*, EU:C:2012:393, para ; Case C-477/10 P, *Commission v Agrofert Holding*, ECLI:EU:C:2012:394, para 59)
  - State aid proceedings (Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, [2010] ECR I-05885, para 53)
  - documents relating to pre-litigation infringement procedures based upon Article 258 TFEU (Joined Cases C-514/11 P and C-605/11 P, *LPN and Finland v Commission*, ECLI:EU:C:2013:738, para 55)
- Can be presumed *confidential*
- Mere reference to the fact that those documents belong to one of those categories would seem to suffice rather than having to point out in detail as to why they cannot be accessed

# Regulation 1049/2001

- According to the Court, the presumption of confidentiality is rebuttable
  - Specific example: the context of *leniency documents* in EU competition law
    - Case T-677/13, *Axa Versicherung v Commission*
      - Applicant has to bring specific arguments as to why the general presumption of confidentiality could not be applied here...
        - Impossible for an applicant to do this??

# Regulation 1049/2001

- Access to documents (and CJEU case law on it) in practice
  - Charter principle made operational by inter alia Regulation 1049/2001
  - In practice, case law focuses on access requests having been refused
    - General Court has to review whether the institution concerned respected Regulation 1049/2001's procedure and substantive refusal grounds
    - General Court cannot replace institution's refusal with its own decision granting access
      - Evaluates whether the institution sufficiently motivated refusal – if not, new decision has to be adopted
      - Appeal possible on points of law before the Court of Justice, which has the final authority on the interpretation of the access right and the refusal grounds
      - In practice, if motivated carefully, access can still be refused.



# Regulation 1049/2001

- Access to documents (and CJEU case law on it) in practice
  - As a consequence, case law is relatively difficult to read, use (or comment on in the framework of this course)
    - General Court evaluates respect for Regulation 1049/2001 framework
    - Court of Justice has final authority in interpreting right of access and its exceptions
  - Examples in practice
    - Case T-540/14, *De Capitani v European Parliament*
    - Case C-350/12 P, *In 't Veld v Council*

# Regulation 1049/2001

- T-540/15, *De Capitani v European Parliament*



# Regulation 1049/2001

- What about international relations?

- Case C-350/12 P, *In 't Veld*



- recommendation from the Commission to the Council to authorise the opening of negotiations between the European Union and the United States of America for an international agreement to make available to the United States Treasury Department financial messaging data to prevent and combat terrorism and terrorist financing'
    - Council = > exceptions of international relations
      - General rule that differences in position between EU institutions cannot as such be made transparent? → No, see Para 56

# Regulation 1049/2001

- Interim conclusion
  - Widest possible access
  - Exceptions exist, to be assessed on a case-by-case basis
    - No real balancing analysis required for some exceptions
    - Balancing interests of disclosure and non-disclosure
  - In addition,
    - Court accepts 'safe zones' = categories of documents that are safe from disclosure relying on a general presumption
      - Mostly in the realm of competition law and infringement proceedings
      - Such general presumptions have no place in legislative procedures anymore (see C-57/16 P, *ClientEarth v Commission*)
    - Presumption is always rebuttable nevertheless

# Lectures 6-7: access to documents

- Transparency: from policymaking principle to individual right of access to documents
- Operationalising the individual right: Regulation 1049/2001
- Access to documents in light of the new Article 15 TFEU: openness and access
- Limits of the EU's transparency framework
  - Access to CJEU and ECB documents – des *cas spéciaux*?

# Article 15 TFEU

- Regulation 1049/2001 based upon Article 255 EC Treaty
  - Calls for update to the smartphone era – European Ombudsman, 16 November 2021
- Provision has been upgraded in light of the Lisbon Treaty and has been replaced by Article 15 TFEU

# Article 15 TFEU

- 1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.
- 2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.

# Article 15 TFEU

- 3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.
  - General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.
  - Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.
  - The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.
  - The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph.



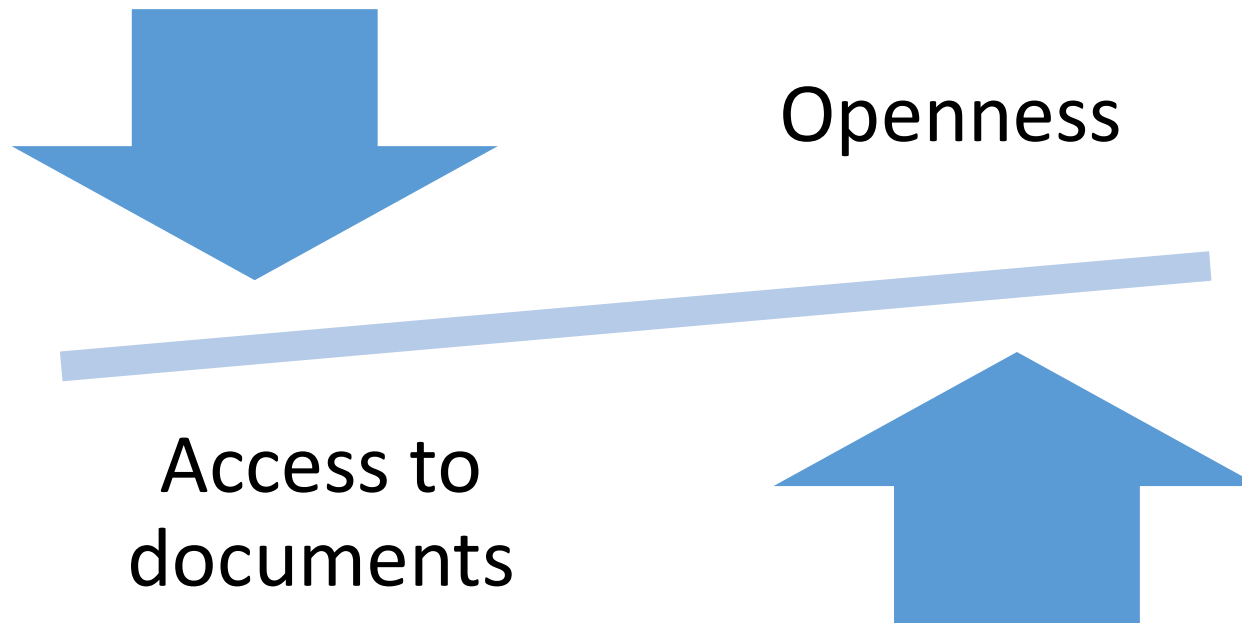
# Article 15 TFEU

- Two complementary principles enshrined in one Treaty provision
  - Openness in decision-making
  - Access to documents
- How to ensure transparency?
  - Making available all kinds of information prior to decisions being adopted – ex ante transparency
  - Making public, automatically once the decision adopted, information that has informed decision-making by institutions – ex post transparency
  - Communicating as clearly as possible about what has been done – ex post transparency
  - Giving individuals the right to ask for access to documents made available previously to policymakers – ex post access to documents

# Article 15 TFEU

- How to balance openness and access?
  - Absence of any balance? Two distinctive principles
  - Living apart together – different kinds of obligations imposed on EU institutions
  - Communicating vessels – more openness, less access or vice versa

# Article 15 TFEU



# Lectures 6-7: access to documents

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# Transparency limits

- Article 15(3) TFEU
  - The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject [the obligation to give access to their documents] only when exercising their ***administrative tasks***.
  - What are administrative tasks?
    - Art. 15(3) justifies a less generous access to documents regime for documents not relating to those tasks (Case C-342/19 P, *Varoufakis v ECB*)

# Transparency limits

- Some EU institutions operate on the basis of confidential decision-making
  - Court of Justice of the European Union
    - Article 35 Statute CJEU, attached to Treaties: The deliberations of the Court of Justice shall be and shall remain secret.
  - European Central Bank
    - Article 132(2) TFEU, Article 10.4 Statute ECB, Article 23.1 ECB Rules of Procedure
    - Confirmed as legal under EU law in *Espirito Santo*, C-442/18 P, para. 42.

# Lectures 6-7: access to documents

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# CJEU transparency

- Access to Court of Justice documents?
  - Decision of 11 December 2016 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions
  - No definition of administrative documents...
  - Same exceptions as Regulation 1049/2001 + ...



# CJEU transparency

- Access to Court of Justice documents?
  - Access to a document drawn up by the Court of Justice of the European Union for internal use or received by it, which relates to a matter on which the decision has not been taken by it, shall be refused if disclosure of the document would seriously undermine the decision-making process of the Court of Justice of the European Union.
  - Access to a document containing opinions for internal use as part of deliberations and preliminary consultations carried out within the Court of Justice of the European Union or outside thereof if the Court has participated in them shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the decision-making process of the Court of Justice of the European Union
  - Can be overruled if there is an overriding reason in the public interest justifying disclosure!!

# CJEU transparency

- Case T-433/17, 20 September 2017, *Dehousse v Court of Justice*
  - In support of the action, the applicant relies on three pleas in law in relation to his claim for annulment and a single plea in law in relation to his claim for damages.
    - 1. First plea in law, alleging infringement of the Decision of the Court of Justice of the European Union of 11 October 2016 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (OJ 2016 C 445, p. 3), Article 15(3) TFEU and Article 42 of the Charter of Fundamental Rights of the European Union, in relation to public access to documents of the institutions and the duty of transparency. In particular, the applicant submits that the contested decisions must be annulled in so far as they refuse to provide certain documents, and provide others either in an incomplete manner or with numerous redactions.
    - 2. Second plea in law, alleging infringement of Article 296 TFEU and Article 41 of the Charter, in that the contested decisions are vitiated by a failure to provide a statement of reasons or by an insufficient statement of reasons.
    - 3. Third plea in law, alleging infringement of the principle of proportionality.

# Other CJEU accountability mechanisms

- Communication of annual report
- Motivation/reasoning of judgments
- Press releases?

*Sufficiently open and transparent?*

# ECB transparency



- Decision 2004/258/EC
  - Article 3(a): right of access to any document
  - Same exceptions as in Regulation 1049/2001
  - Exceptions: specific public interest grounds
    - - the confidentiality of the proceedings of the ECB's decision-making bodies,
    - - the financial, monetary or economic policy of the Community or a Member State,
    - - the internal finances of the ECB or of the NCBs,
    - - protecting the integrity of euro banknotes
- Categories of documents *per se* excluded from access?
- Case-by-case assessment on the basis of public interest criteria
  - Case T-590/10, *Thesing*
  - Case C-342/19 P, *Varoufakis*

# ECB transparency

- Other accountability tools of the ECB
  - Hearings before the European Parliament
  - Annual Report
  - Communication strategies
  - Monetary dialogue...
  - In financial supervision, reports to national parliaments

# General conclusion

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# Advanced EU law

Prof. dr. Pieter Van Cleynenbreugel

# Case notes

- Second case note
  - Case chosen out of topics lectures 5-10
  - Same format as first case note – feedback can be obtained in February upon request
  - Take into account formal and substantive feedback received
    - < 4/8 insufficiently taken feedback into account, incorrect analysis
    - 4/8: descriptive case note, little relevant literature or analysis
    - 5/8: adequate/good case note reflecting some analysis, correct analysis of relevant facts and legal questions
    - 6/8: very good case note containing reasoned analysis, choice made between one more relevant legal question – taking some position yourself in the debates triggered by the case
    - > 6,5/8: excellent case note, analysis with taking position and proposing a way forward in addition to all other elements mentioned previously



# ECB transparency



- Decision 2004/258/EC
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# ECB transparency

- Other accountability tools of the ECB
  - Hearings before the European Parliament
  - Annual Report
  - Communication strategies
  - Monetary dialogue...
  - In financial supervision, reports to national parliaments

# Questions?

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# Data protection

## Article 8 Charter - protection of personal data

- 1. Everyone has the right to the protection of personal data concerning him or her.
- 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
- 3. Compliance with these rules shall be subject to control by an independent authority.

# Data protection

- A fundamental right in the making...
  - Started out as pure internal market – free movement oriented field
  - Gradually more attention to individual – fundamental-rights-oriented legal framework
  - Fundamental right in full development – EU legislator and Court start attaching rights to data protection tools
    - Art. 8 Charter - principle rather than right in Charter language!

# Today

- Data protection regulation as a tool to perfect the internal market
  - Inherent part of EU internal market – free movement law in itself not sufficient
  - First regulatory intervention: a 1995 Directive
  - The need for an updated regulatory framework...
  - The 2016 Regulation
  - The complementary data retention framework
  - The role of fundamental rights in guaranteeing data protection?

# Data protection as part of EU internal market law

- Internal market = area without obstacles to free movement of goods, persons, services and capital
  - promoting movement
  - easier to also allow movement of personal data (information on health, preferences, past, background of individuals) → inherently related to privacy as an individual fundamental right
    - in EU law, problem of division of powers between EU and Member States

# Data protection as part of EU internal market law

- Internal market = area without obstacles to free movement of goods, persons, services and capital
  - Article 114 TFEU – legal basis to harmonise discrepancies in the EU internal market – protection of personal data, as the commercial pendant of the right to privacy – Court recognises fundamental rights as general principles of EU law – balancing free movement and fundamental rights
  - Directive 95/46 as a direct response – EU itself making this balance and taking this away from judges on a case-by-case basis



# Today

- Data protection regulation as a tool to perfect the internal market
  - Inherent part of EU internal market – free movement law in itself not sufficient
  - First regulatory intervention: a 1995 Directive
  - The need for an updated regulatory framework...
  - The 2016 Regulation
  - The complementary data retention framework
  - The role of fundamental rights in guaranteeing data protection?

# 1995: the EU legislator intervenes

- Framework text in force = Directive 95/46
  - Complemented by e-privacy Directive 2002 in relation to electronic communications, most notably telecommunications – enhancing security in public telecommunications networks (FYI)
  - Adopted in the pre-Facebook and –Google age: before rise of the internet and online platforms – targeting all traders potentially exchanging data in cross-border settings

# 1995: the EU legislator intervenes

- Article 1
  - 1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.
  - 2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.
    - Privacy never a justification for free movement restriction to go beyond the level of protection offered by the Directive

# 1995: the EU legislator intervenes

- What is processing data?
  - Article 2(a): 'personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity
  - Article 2(b): 'processing of personal data' ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction

# 1995: the EU legislator intervenes

- Article 4: obligation for Member States to apply the directive where:
  - (a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;
  - (b) the controller is not established on the Member State's territory, but in a place where its national law applies by virtue of international public law;
  - (c) the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community.

# 1995: the EU legislator intervenes

- Art. 2(d): “controller” shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or [EU] laws or regulations, the controller or the specific criteria for his nomination may be designated by national or [EU] law;
  - Catches a wide variety of data processing practices: from door-to-door preaching to search engines and social networks

# 1995: the EU legislator intervenes

- Article 6: Personal data must be:
  - (a) processed fairly and lawfully;
  - (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;
  - (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
  - (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;
  - (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.

# 1995: the EU legislator intervenes

- Article 7: processing can take place only if
  - (a) the data subject has *unambiguously given his consent*; or
  - (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or
  - (c) processing is necessary for compliance with a legal obligation to which the controller is subject; or
  - (d) processing is necessary in order to protect the vital interests of the data subject; or
  - (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or
  - (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1).



# 1995: the EU legislator intervenes

- Article 10 – information obligations
- Member States shall provide that the controller or his representative must provide a data subject from whom data relating to himself are collected with at least the following information , except where he already has it:
  - (a ) the identity of the controller and of his representative, if any;
  - (b) the purposes of the processing for which the data are intended ;
  - (c ) any further information such as
    - the recipients or categories of recipients of the data,
    - whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply,
    - the existence of the right of access to and the right to rectify the data concerning him in so far as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.

# 1995: the EU legislator intervenes

- Guarantees available to 'data subjects'
  - Information obligations when data not obtained from subject itself – Art. 11
  - Establishment of independent national authority – Art. 28
  - Liability of processors – Art. 23
  - Limits on transferring data to third countries when no adequate level of protection can be ensured there – Art. 25

# 1995: the EU legislator intervenes

- Specific rights available to ‘data subjects’
  - Art. 12: every data subject can obtain from the controller:
    - (a) without constraint at reasonable intervals and without excessive delay or expense, the confirmation, communication and knowledge of the logic involved in any automatic processing of data concerning him;
    - (b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;
    - (c) notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort.

# 1995: the EU legislator intervenes

- Open questions regarding interpretation of those notions in light of both societal and technological developments
  - Case C-131/12, 13 May 2014, Google Spain
  - Case C-25/17, 10 July 2018, Tietosuojaaltuutettu
  - Case C-210/16, 5 June 2018, Wirtschaftsakademie
  - Case C-40/17, 29 July 2019, Fashion ID

# 1995: the EU legislator intervenes

- Open questions regarding interpretation of those notions in light of both societal and technological developments
  - Case C-131/12, 13 May 2014, Google Spain
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  - Case C-40/17, 29 July 2019, Fashion ID

# 1995: the EU legislator intervenes

- C-131/12, Para 22
  - According to Google Spain and Google Inc., the activity of search engines cannot be regarded as processing of the data which appear on third parties' web pages displayed in the list of search results, given that search engines process all the information available on the internet without effecting a selection between personal data and other information.
  - Furthermore, even if that activity must be classified as 'data processing', the operator of a search engine cannot be regarded as a 'controller' in respect of that processing since it has no knowledge of those data and does not exercise control over the data.

# 1995: the EU legislator intervenes

- C-131/12, para 30:
  - The Court has already held that the operations referred to in Article 2(b) of Directive 95/46 must also be classified as such processing where they exclusively concern material that has already been published in unaltered form in the media. It has indeed observed in that regard that a general derogation from the application of Directive 95/46 in such a case would largely deprive the directive of its effect (see, to this effect, Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* EU:C:2008:727, paragraphs 48 and 49).

# 1995: the EU legislator intervenes

- C-131/12, para 33-37:
  - It is the search engine operator which determines the purposes and means of that activity and thus of the processing of personal data that it itself carries out within the framework of that activity and which must, consequently, be regarded as the 'controller' in respect of that processing pursuant to Article 2(d).
  - Furthermore, it would be contrary not only to the clear wording of that provision but also to its objective — which is to ensure, through a broad definition of the concept of 'controller', effective and complete protection of data subjects — to exclude the operator of a search engine from that definition on the ground that it does not exercise control over the personal data published on the web pages of third parties.
  - In this connection, it should be pointed out that the processing of personal data carried out in the context of the activity of a search engine can be distinguished from and is additional to that carried out by publishers of websites, consisting in loading those data on an internet page.
  - Moreover, it is undisputed that that activity of search engines plays a decisive role in the overall dissemination of those data in that it renders the latter accessible to any internet user making a search on the basis of the data subject's name, including to internet users who otherwise would not have found the web page on which those data are published.
  - Also, the organisation and aggregation of information published on the internet that are effected by search engines with the aim of facilitating their users' access to that information may, when users carry out their search on the basis of an individual's name, result in them obtaining through the list of results a structured overview of the information relating to that individual that can be found on the internet enabling them to establish a more or less detailed profile of the data subject.



# 1995: the EU legislator intervenes

- C-131/12, para 38-40
- Inasmuch as the activity of a search engine is therefore liable to affect significantly, and additionally compared with that of the publishers of websites, the fundamental rights to privacy and to the protection of personal data, the operator of the search engine as the person determining the purposes and means of that activity must ensure, within the framework of its responsibilities, powers and capabilities, that the activity meets the requirements of Directive 95/46 in order that the guarantees laid down by the directive may have full effect and that effective and complete protection of data subjects, in particular of their right to privacy, may actually be achieved.
- Finally, the fact that publishers of websites have the option of indicating to operators of search engines, by means in particular of exclusion protocols such as 'robot.txt' or codes such as 'noindex' or 'noarchive', that they wish specific information published on their site to be wholly or partially excluded from the search engines' automatic indexes does not mean that, if publishers of websites do not so indicate, the operator of a search engine is released from its responsibility for the processing of personal data that it carries out in the context of the engine's activity.
- That fact does not alter the position that the purposes and means of that processing are determined by the operator of the search engine. Furthermore, even if that option for publishers of websites were to mean that they determine the means of that processing jointly with that operator, this finding would not remove any of the latter's responsibility as Article 2(d) of Directive 95/46 expressly provides that that determination may be made 'alone or jointly with others'.

# 1995: the EU legislator intervenes

- The Directive applies to
  - the activity of a search engine consisting in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference
    - This must be classified as 'processing of personal data' within the meaning of Article 2(b) when that information contains personal data
  - the operator of the search engine must be regarded as the 'controller' in respect of that processing, within the meaning of Article 2(d)

# 1995: the EU legislator intervenes

- Open questions regarding interpretation of those notions in light of both societal and technological developments
  - Case C-131/12, 13 May 2014, Google Spain
  - Case C-25/17, 10 July 2018, Tietosuojaaltuutettu
  - Case C-210/16, 5 June 2018, Wirtschaftsakademie
  - Case C-40/17, 29 July 2019, Fashion ID

# 1995: the EU legislator intervenes

- C-25/17:
  - The members of the Jehovah's Witnesses Community take notes in the course of their door-to-door preaching about visits to persons who are unknown to themselves or that Community. The data collected may consist, among other things, of the name and addresses of persons contacted, together with information concerning their religious beliefs and their family circumstances. Those data are collected as a memory aid and in order to be retrieved for any subsequent visit without the knowledge or consent of the persons concerned.

# 1995: the EU legislator intervenes

- C-25/17
  - Para 53: As is clear from Article 3(1) and recitals 15 and 27 of Directive 95/46, that directive covers both automatic processing of data and the manual processing of such data, so that the scope of the protection it confers on data subjects does not depend on the techniques used and avoids the risk of that protection being circumvented. However, it is also clear that that directive applies to the manual processing of personal data only where the data processed form part of a filing system or are intended to form part of a filing system.

# 1995: the EU legislator intervenes

- C-25/17

- Para 59: it is clear from the findings of the referring court that the data collected in the course of the door-to-door preaching at issue in the main proceedings are collected as a memory aid, on the basis of an allocation by geographical sector, in order to facilitate the organisation of subsequent visits to persons who have already been contacted. They include not only information relating to the content of conversations concerning the beliefs of the person contacted, but also his name and address. Furthermore, those data, or at least a part of them, are used to draw up lists kept by the congregations of the Jehovah's Witnesses Community of persons who no longer wish to receive visits by members who engage in the preaching of that community.

# 1995: the EU legislator intervenes

- C-25/17
  - Para 60: Thus, it appears that the personal data collected in the course of the door-to-door preaching at issue in the main proceedings are structured according to criteria chosen in accordance with the objective pursued by that collection, which is to prepare for subsequent visits and to keep lists of persons who no longer wish to be contacted. Thus, as it is apparent from the order for reference, those criteria, among which are the name and address of persons contacted, their beliefs or their wish not to receive further visits, are chosen so that they enable data relating to specific persons to be easily retrieved.

# 1995: the EU legislator intervenes

- C-25/17
  - Para 73: the Jehovah's Witnesses Community, by organising, coordinating and encouraging the preaching activities of its members intended to spread its faith, participates, jointly with its members who engage in preaching, in determining the purposes and means of processing of personal data of the persons contacted, which is, however, for the referring court to verify with regard to all of the circumstances of the case.



# 1995: the EU legislator intervenes

- Open questions regarding interpretation of those notions in light of both societal and technological developments
  - Case C-131/12, 13 May 2014, Google Spain
  - Case C-25/17, 10 July 2018, Tietosuojaaltuutettu
  - Case C-210/16, 5 June 2018, Wirtschaftsakademie
  - Case C-40/17, 29 July 2019, Fashion ID

# 1995: the EU legislator intervenes

- Case C-210/16, *Wirtschaftsakademie Schleswig-Holstein*
  - Wirtschaftsakademie is a private foundation focused on offering courses
  - Sets up a Facebook fan page
  - Concludes with Facebook an agreement, allowing Facebook to track users and maintain statistics on who visits the page

# 1995: the EU legislator intervenes

- Case C-210/16, *Wirtschaftsakademie Schleswig-Holstein*
  - Facebook thus places cookies on computers of visitors
    - Facebook is a controller of data, which it processes
  - Allows both Facebook and Wirtschaftsakademie to target their clients in a more efficient way
  - The Schleswig-Holstein Data protection supervisor (*Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein*) initiates administrative proceedings against Wirtschaftsakademie
    - Breach of data protection law (transposed 1995 Directive)
    - Obligation to remove fan page + fine

# 1995: the EU legislator intervenes

- Case C-210/16, *Wirtschaftsakademie Schleswig-Holstein*
  - Case ends up before Bundesverwaltungsgericht, asking questions to CJEU
    - Is the administrator of a fan page breaching the Directive when it allows Facebook to track users?
    - Can supervisory authorities take action, even when Facebook data processing is done somewhere else?
    - Do supervisory authorities have to coordinate with each other?

# 1995: the EU legislator intervenes

- Case C-210/16, *Wirtschaftsakademie Schleswig-Holstein*
  - Para 35: While the mere fact of making use of a social network such as Facebook does not make a Facebook user a controller jointly responsible for the processing of personal data by that network, it must be stated, on the other hand, that the administrator of a fan page hosted on Facebook, by creating such a page, gives Facebook the opportunity to place cookies on the computer or other device of a person visiting its fan page, whether or not that person has a Facebook account.

# 1995: the EU legislator intervenes

- Case C-210/16, *Wirtschaftsakademie Schleswig-Holstein*
  - Para 36: Administrator contributes actively to parameters set for cookie use
  - Para 37: In particular, the administrator of the fan page can ask for — and thereby request the processing of — demographic data relating to its target audience, including trends in terms of age, sex, relationship and occupation, information on the lifestyles and centres of interest of the target audience and information on the purchases and online purchasing habits of visitors to its page, the categories of goods and services that appeal the most, and geographical data which tell the fan page administrator where to make special offers and where to organise events, and more generally enable it to target best the information it offers.
    - The statistical information is subsequently transmitted in anonymised form

# 1995: the EU legislator intervenes

- Case C-210/16, *Wirtschaftsakademie Schleswig-Holstein*
  - Para 40: The fact that an administrator of a fan page uses the platform provided by Facebook in order to benefit from the associated services cannot exempt it from compliance with its obligations concerning the protection of personal data.
    - All the more since you do not need a Facebook account to access fan pages (para 41)
    - A fan page administrator is also a data controller, subject to the requirements of the Directive (para 44)

# 1995: the EU legislator intervenes

- Case C-210/16, *Wirtschaftsakademie Schleswig-Holstein*
  - Para 43: the existence of joint responsibility does not necessarily imply equal responsibility of the various operators involved in the processing of personal data. On the contrary, those operators may be involved at different stages of that processing of personal data and to different degrees, so that the level of responsibility of each of them must be assessed with regard to all the relevant circumstances of the particular case.



# 1995: the EU legislator intervenes

- Open questions regarding interpretation of those notions in light of both societal and technological developments
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# Next time – no class on 3 December, remaining classes on 10 and 17 December

- Data protection regulation as a tool to perfect the internal market
  - Inherent part of EU internal market – free movement law in itself not sufficient
  - First regulatory intervention: a 1995 Directive
  - The need for an updated regulatory framework...
  - The 2016 Regulation
  - The complementary data retention framework
  - The role of fundamental rights in guaranteeing data protection?



# Advanced EU law

Prof. dr. Pieter Van Cleynenbreugel

# Overview

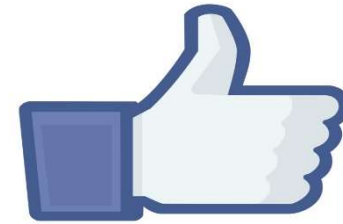
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# 1995: the EU legislator intervenes

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# 1995: the EU legislator intervenes

- C-40/17, Fashion ID:
  - Facebook 'Like' button



- it seems to be apparent from the order for reference that, when a visitor consults the website of Fashion ID, that visitor's personal data are transmitted to Facebook Ireland as a result of that website including that button. It seems that that transmission occurs without that visitor being aware of it regardless of whether or not he or she is a member of the social network Facebook or has clicked on the Facebook 'Like' button.

# 1995: the EU legislator intervenes

- The referring German court court “is uncertain whether the operator of a website, such as Fashion ID, that embeds on that website a social plugin allowing personal data to be collected can be considered to be a controller within the meaning of Article 2(d) of Directive 95/46 despite the latter having no control over the processing of the data transmitted to the provider of that plugin.”
- That court is unsure who is required to obtain the consent of and inform the data subjects whose personal data are processed in a situation such as that at issue in the main proceedings.
  - The referring court takes the view that the matter of who is obliged to inform the persons concerned, as provided for in Article 10 of Directive 95/46, is particularly important given that any embedding of third-party content on a website gives rise, in principle, to the processing of personal data, the scope and purpose of which are, however, unknown to the person embedding that content, namely the operator of the website concerned. That operator could not, therefore, provide the information required, to the extent that it is required to, meaning that the imposition of an obligation on the operator to inform the data subjects would, in practice, amount to a prohibition on the embedding of third-party content.

# 1995: the EU legislator intervenes

- The Court's response
  - Para 65: it should be noted that, in accordance with the aim pursued by Directive 95/46, namely to ensure a high level of protection of the fundamental rights and freedoms of natural persons, in particular their right to privacy, with respect to the processing of personal data, Article 2(d) of that directive defines the concept of 'controller' broadly as the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data (see, to that effect, judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, EU:C:2018:388, paragraphs 26 and 27).



# 1995: the EU legislator intervenes

- The Court's response:
  - Para 67: since, as Article 2(d) of Directive 95/46 expressly provides, the concept of 'controller' relates to the entity which 'alone or jointly with others' determines the purposes and means of the processing of personal data, that concept does not necessarily refer to a single entity and may concern several actors taking part in that processing, with each of them then being subject to the applicable data-protection provisions (see, to that effect, judgments of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, EU:C:2018:388, paragraph 29, and of 10 July 2018, *Jehovan todistajat*, C-25/17, EU:C:2018:551, paragraph 65).

# 1995: the EU legislator intervenes

- The Court's response
  - Para 70: since the objective of Article 2(d) of Directive 95/46 is to ensure, through a broad definition of the concept of 'controller', the effective and comprehensive protection of the persons concerned, the existence of joint liability does not necessarily imply equal responsibility of the various operators engaged in the processing of personal data.
  - On the contrary, those operators may be involved at different stages of that processing of personal data and to different degrees, with the result that the level of liability of each of them must be assessed with regard to all the relevant circumstances of the particular case.

# 1995: the EU legislator intervenes

- The Court's response – consequences of that interpretation
  - Para 96: Given that, in the light of the answer to the second question, it seems that, in a situation such as that at issue in the main proceedings, the operator of a website that embeds on that website a social plugin causing the browser of a visitor to that website to request content from the provider of that plugin and, to that end, to transmit to that provider the personal data of the visitor can be considered to be a controller responsible, jointly with that provider, for operations involving the processing of the personal data of visitors to its website in the form of collection and disclosure by transmission, it is necessary that each of those controllers should pursue a legitimate interest, within the meaning of Article 7(f) of Directive 95/46, through those processing operations in order for those operations to be justified in respect of each of them.

# 1995: the EU legislator intervenes

- The Court's response – consequences of that interpretation
  - Para 100: the duties that may be incumbent on that controller under Directive 95/46, such as the duty to obtain the consent of the data subject under Article 2(h) and Article 7(a) of that directive and the duty to inform under Article 10 thereof, must relate to the operation or set of operations involving the processing of personal data in respect of which it actually determines the purposes and means.

# 1995: the EU legislator intervenes

- The Court's response – consequences
  - Para 101: while the operator of a website that embeds on that website a social plugin causing the browser of a visitor to that website to request content from the provider of that plugin and, to that end, to transmit to that provider the personal data of the visitor can be considered to be a controller, jointly with that provider, in respect of operations involving the collection and disclosure by transmission of the personal data of that visitor, its duty to obtain the consent from the data subject under Article 2(h) and Article 7(a) of Directive 95/46 and its duty to inform under Article 10 of that directive relate only to those operations.
  - By contrast, those duties do not cover operations involving the processing of personal data at other stages occurring before or after those operations which involve, as the case may be, the processing of personal data at issue.

Interim conclusion: a  
very flexible Directive?

# Today

- Data protection regulation as a tool to perfect the internal market
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  - The need for an updated regulatory framework...
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# Towards a new regulatory framework?

- Charter of Fundamental Rights
- Court of Justice intervention calling for a more detailed regulatory framework
  - Right to be forgotten
  - Exchange of data with third countries
  - Video-sharing
  - Surveillance in private buildings by a private operator



# Towards a new regulatory framework?

- Case C-131/12, Google Spain + C-507/17, Google v CNIL
- Case C-362/14, Schrems
- Case C-210/16, Wirtschaftsakademie
- Case C-345/17, Buivids
- Case C-708/18, M5A-ScaraA

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# Towards a new regulatory framework?

- Court of Justice, Case C-131/12 – the right to be forgotten



# Towards a new regulatory framework?

- Google is considered a data controller subject to Directive 95/46
- As a result,
  - the operator of a search engine is *obliged to remove* from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.
  - however, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.

# Towards a new regulatory framework?

- C-507/17
  - where a search engine operator grants a request for de-referencing pursuant to those provisions, that operator is not required to carry out that de-referencing on all versions of its search engine, but on the versions of that search engine corresponding to all the Member States, using, where necessary, measures which, while meeting the legal requirements, effectively prevent or, at the very least, seriously discourage an internet user conducting a search from one of the Member States on the basis of a data subject's name from gaining access, via the list of results displayed following that search, to the links which are the subject of that request.

# Towards a new regulatory framework?

- Case C-131/12, Google Spain + C-507/17, Google v CNIL
- Case C-362/14, Schrems
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- Case C-345/17, Buivids
- Case C-708/18, M5A-ScaraA

# Towards a new regulatory framework?

- Court of Justice, Case C-362/14 – Schrems



# Towards a new regulatory framework?

- ▶ Mr. Schrems, a lawyer, realised that the transfer of his data to US authorities could take place in contravention of Directive 95/46, as the EU had adopted Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46 on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, by which the European Commission found that the U.S. ensured an adequate level of protection
  - Complaint in Ireland to contest this
  - Complaint rejected
  - High Court nevertheless raised questions of
    - power of national data protection supervisors to hear arguments on infringements of data processing by Facebook Ireland when transferring data to the U.S.
    - compatibility of equivalence decision with Article 8 Charter and Directive 95/46/EC



# Towards a new regulatory framework?

- Facebook is to be considered as a processor of personal data,
  - Established a subsidiary in Ireland
  - Its servers are located in the United States
  - Data are processed in the United States
- Data processed and/or available in the United States
- U.S. public authorities, including its National Security Agency (NSA) engage in surveillance activities (e.g. the PRISM programme)
- International safe harbor principles

# Towards a new regulatory framework?

- ▶ Mr. Schrems, a lawyer, realised that the transfer of his data to such authorities could take place in contravention of Directive 95/46, as the EU had adopted Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46 on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce, by which the European Commission found that the U.S. ensured an adequate level of protection
  - Complaint in Ireland to contest this
  - Complaint rejected
  - High Court nevertheless raised questions of
    - power of national data protection supervisors to hear arguments on infringements of data processing by Facebook Ireland when transferring data to the U.S.
    - compatibility of Decision with Article 8 Charter and Directive 95/46/EC

# Towards a new regulatory framework?

- Case C-362/14, *Schrems*
  - §40: As regards the powers available to the national supervisory authorities in respect of transfers of personal data to third countries, it should be noted that Article 28(1) of Directive 95/46 requires Member States to set up one or more public authorities responsible for monitoring, with complete independence, compliance with EU rules on the protection of individuals with regard to the processing of such data. In addition, that requirement derives from the primary law of the European Union, in particular Article 8(3) of the Charter and Article 16(2) TFEU

# Towards a new regulatory framework?

- Case C-362/14, *Schrems*
  - §43: the national supervisory authorities have a wide range of powers for that purpose. Those powers, listed on a non-exhaustive basis in Article 28(3) of Directive 95/46, constitute necessary means to perform their duties, as stated in recital 63 in the preamble to the directive. Thus, those authorities possess, in particular, investigative powers, such as the power to collect all the information necessary for the performance of their supervisory duties, effective powers of intervention, such as that of imposing a temporary or definitive ban on processing of data, and the power to engage in legal proceedings.

# Towards a new regulatory framework?

- Case C-362/14, *Schrems*
  - §44: It is, admittedly, apparent from Article 28(1) and (6) of Directive 95/46 that the powers of the national supervisory authorities concern processing of personal data carried out on the territory of their own Member State, so that they do not have powers on the basis of Article 28 in respect of processing of such data carried out in a third country.
  - §45: However, the operation consisting in having personal data transferred from a Member State to a third country constitutes, in itself, processing of personal data within the meaning of Article 2(b) of Directive 95/46

# Towards a new regulatory framework?

- Case C-362/14, *Schrems*
  - §47: As, in accordance with Article 8(3) of the Charter and Article 28 of Directive 95/46, the national supervisory authorities are responsible for monitoring compliance with the EU rules concerning the protection of individuals with regard to the processing of personal data, each of them is therefore vested with the power to check whether a transfer of personal data from its own Member State to a third country complies with the requirements laid down by Directive 95/46.
  - §52: When the Commission adopted an equivalence decision, however, they may only do so when that decision has been declared invalid by the CJEU

# Towards a new regulatory framework?

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  - compatibility of Decision with Article 8 Charter and Directive 95/46/EC

# Towards a new regulatory framework?

- Overall outcome:
  - Article 25(6) of Directive 95/46/EC [...], read in the light of Articles 7, 8 and 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a decision adopted pursuant to that provision, such as Commission Decision 2000/520/EC does not prevent a supervisory authority of a Member State, within the meaning of Article 28 of that directive as amended, *from examining the claim of a person concerning the protection of his rights and freedoms in regard to the processing of personal data relating to him which has been transferred from a Member State to that third country when that person contends that the law and practices in force in the third country do not ensure an adequate level of protection.*



# Towards a new regulatory framework?

- Lessons from the Schrems case:
  - Time to reconsider EU-U.S. data protection equivalence
    - New privacy shield agreed on in July 2016, operational since August 2016
    - Mr. Schrems continued to fight Facebook, see also Case C-498/16 and, above all, C-311/18 (EU-US privacy shield once again deemed incompatible with EU fundamental rights!!, see next class)
  - Time to reconsider system of supervision/enforcement at EU level?
    - Towards more and better coordination between authorities?
    - All seems to flow from acknowledging fundamental right status to data protection...

# Towards a new regulatory framework?

- Case C-131/12, Google Spain + C-507/17, Google v CNIL
- Case C-362/14, Schrems
- Case C-210/16, Wirtschaftsakademie
- Case C-345/17, Buivids
- Case C-708/18, M5A-ScaraA

# Towards a new regulatory framework?

- Case C-210/16, *Wirtschaftsakademie Schleswig-Holstein*
  - Case ends up before Bundesverwaltungsgericht, asking questions to CJEU
    - Is the administrator of a fan page subject to the Directive when it allows Facebook to track users?
    - Can supervisory authorities take action, even when Facebook data processing is done somewhere else?
    - Do supervisory authorities have to coordinate with each other?

# Towards a new regulatory framework?

- Case C-210/16, *Wirtschaftsakademie Schleswig-Holstein*
  - Argument by Facebook: we are established in Ireland and U.S., we only have advertising unit in Germany
  - §56: all the more since fundamental rights are at stake
  - German supervisory authorities are competent over this, both over Wirtschaftsakademie and Facebook actions

# Towards a new regulatory framework?

- Case C-210/16, *Wirtschaftsakademie Schleswig-Holstein*
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    - Is the administrator of a fan page subject to the Directive when it allows Facebook to track users?
    - Can supervisory authorities take action, even when Facebook data processing is done somewhere else?
    - Do supervisory authorities have to coordinate with each other?

# Towards a new regulatory framework?

- Case C-210/16, *Wirtschaftsakademie Schleswig-Holstein*
  - Essentially, no, every authority is independent
  - Even when different outcomes in interpretation of Directive
    - Irish v. Schleswig-Holstein authorities...

# Towards a new regulatory framework?

- Lessons from the Wirtschaftsakademie case
  - Extensive interpretation of the right to data protection by extending the notion of controller
    - Fundamental rights approach?
    - Need for more legal certainty – GDPR initiatives...
  - Need for better coordination between supervisors?
    - Divergent interpretations as to EU data protection law remain possible
    - Time to streamline such enforcement

# Towards a new regulatory framework?

- Case C-131/12, Google Spain + C-507/17, Google v CNIL
- Case C-362/14, Schrems
- Case C-210/16, Wirtschaftsakademie
- Case C-345/17, Buivids
- Case C-708/18, M5A-ScaraA



# Towards a new regulatory framework?

- Can videos be shared online when taped without people in it knowing?
- C-345/17, para 15-17
  - Mr Buivids made a video recording in a station of the Latvian national police while he was making a statement in the context of administrative proceedings which had been brought against him.
  - Mr Buivids published the recorded video ('the video in question'), which showed police officers going about their duties in the police station, on the internet site [www.youtube.com](http://www.youtube.com), which is an internet site that allows users to publish, share and watch videos.
  - After that video had been published, the National Data Protection Agency found, by decision of 30 August 2013, that Mr Buivids had infringed Article 8(1) of the Personal Data Protection Law because he had not informed the police officers, as persons concerned, in the manner laid down by that provision, of the intended purpose of the processing of personal data concerning them. It is submitted that Mr Buivids also failed to provide any information to the National Data Protection Agency as to the purpose of the recording and publication of the recorded video on an internet site such as to prove that the objective pursued was compliant with the provisions of the Personal Data Protection Law. The National Data Protection Agency therefore requested Mr Buivids to remove that video from the internet site [www.youtube.com](http://www.youtube.com) and from other websites.

# Towards a new regulatory framework?

- Does this action constitute the processing of personal data?
  - Para 47: Article 3 of Directive 95/46 must be interpreted as meaning that the recording of a video of police officers in a police station, while a statement is being made, and the publication of that video on a video website, on which users can send, watch and share videos, are matters which come within the scope of that directive.
- Is this processing justified for journalistic purposes (Art. 9 of the Directive)?
  - ??

# Towards a new regulatory framework?

- Is this processing justified for journalistic purposes?
  - Para 62; should it transpire that the recording and publication of the video were not intended solely to disclose information, opinions or ideas to the public, it cannot be held that the processing of the personal data at issue was carried out 'solely for journalistic purposes'.
  - Para 63: It should be noted that the exemptions and derogations in Article 9 of Directive 95/46 must be applied only where they are necessary in order to reconcile two fundamental rights, namely the right to privacy and the right to freedom of expression (see, to that effect, judgment of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, paragraph 55).

# Towards a new regulatory framework?

- Para 64 Thus, in order to achieve a balance between those two fundamental rights, the protection of the fundamental right to privacy requires that the derogations and limitations in relation to the protection of data provided for in Chapters II, IV and VI of Directive 95/46 must apply only in so far as is strictly necessary (see, to that effect, judgment of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, paragraph 56).
- Para 65 It should be noted that Article 7 of the Charter, concerning the right to respect for private and family life, contains rights which correspond to those guaranteed by Article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, ('the ECHR') and that, in accordance with Article 52(3) of the Charter, Article 7 thereof is thus to be given the same meaning and the same scope as Article 8(1) ECHR, as interpreted by the case-law of the European Court of Human Rights (judgment of 17 December 2015, *WebMindLicenses*, C-419/14, EU:C:2015:832, paragraph 70). The same is true of Article 11 of the Charter and Article 10 ECHR (see, to that effect, judgment of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraph 147).
- Para 66 In that connection, it is apparent from that case-law that, in order to balance the right to privacy and the right to freedom of expression, the European Court of Human Rights has laid down a number of relevant criteria which must be taken into account, inter alia, contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication, and the manner and circumstances in which the information was obtained and its veracity (see, to that effect, judgment of the ECtHR of 27 June 2017, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, CE:ECHR:2017:0627JUD000093113, § 165). Similarly, the possibility for the controller to adopt measures to mitigate the extent of the interference with the right to privacy must be taken into account.

# Towards a new regulatory framework?

- Case C-131/12, Google Spain + C-507/17, Google v CNIL
- Case C-362/14, Schrems
- Case C-210/16, Wirtschaftsakademie
- Case C-345/17, Buivids
- Case C-708/18, M5A-ScaraA

# Towards a new regulatory framework?

- Is installing a video surveillance system in the common parts of an apartment building (and the infringement on the right to privacy that flows from it) compatible with the right to personal data protection?
  - Article 6(1)(c) and Article 7(f) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, read in the light of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding national provisions which authorise the installation of a video surveillance system, such as the system at issue in the main proceedings, installed in the common parts of a residential building, for the purposes of pursuing legitimate interests of ensuring the safety and protection of individuals and property, without the consent of the data subjects, if the processing of personal data carried out by means of the video surveillance system at issue fulfils the conditions laid down in Article 7(f), which it is for the referring court to determine.

# Questions?

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# Advanced EU law

Prof. dr. Pieter Van Cleynenbreugel



# Today

- Data protection regulation as a tool to perfect the internal market
  - Inherent part of EU internal market – free movement law in itself not sufficient
  - First regulatory intervention: a 1995 Directive
  - The need for an updated regulatory framework...
  - The 2016 Regulation
  - The complementary data retention framework
  - The role of fundamental rights in guaranteeing data protection

# The 2016 Regulation

- Regulation 2016/679: art. 99 §2, only applicable from 25 May 2018
  - Why?
    - New Treaty basis: article 16 TFEU (+ art. 8 Charter as background principle)
  - Recitals 6-7:
    - Rapid technological developments and globalisation have brought new challenges for the protection of personal data. The scale of the collection and sharing of personal data has increased significantly. [...]
    - These developments require a strong and more coherent data protection framework in the Union, backed by strong enforcement, given the importance of creating the trust that will allow the digital economy to develop across the internal market.
    - Natural persons should have control of their own personal data. Legal and practical certainty for natural persons, economic operators and public authorities should be enhanced.

# The 2016 Regulation

- Recital 4: This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity.

# The 2016 Regulation

- Recital 9:
  - The objectives and principles of Directive 95/46/EC remain sound, but it has not prevented fragmentation in the implementation of data protection across the Union, legal uncertainty or a widespread public perception that there are significant risks to the protection of natural persons, in particular with regard to online activity.
  - Differences in the level of protection of the rights and freedoms of natural persons, in particular the right to the protection of personal data, with regard to the processing of personal data in the Member States may prevent the free flow of personal data throughout the Union.
  - Those differences may therefore constitute an obstacle to the pursuit of economic activities at the level of the Union, distort competition and impede authorities in the discharge of their responsibilities under Union law. Such a difference in levels of protection is due to the existence of differences in the implementation and application of Directive 95/46/EC.

# The 2016 Regulation

- Does not apply to EU institutions!
  - Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC
  - Overseen by the European Data Protection Supervisor

# The 2016 Regulation

- Impact of case law discussed last week...
- Same definitions of data, processing, controller
  - Data also contains online identifier
  - Controller = determining purpose of data processing
  - Processing: any type of (non)-automated treatment or use of data
- Extraterritorial reach
  - Article 3, §1 and 3:
    - controller or processor established in the European Union, regardless of whether the processing takes place in the Union or not
    - MS law applies by virtue of public international law
  - NEW: processing of personal data of *data subjects who are in the Union*
    - By a controller or processor not established in the Union
    - Where processing relates to offering of goods or services to such data subjects
    - Monitoring of behaviour taking place in the Union

# The 2016 Regulation

- Principally consent-based regime
  - Article 5: data processing for specified, explicit and legitimate purposes...
  - Article 6: consent, which can be withdrawn (Art. 7)
    - Unambiguous active consent
    - See also recital 32 - cf. Case C-673/17, Planet49
    - No consent when necessary for the purposes of the *legitimate interest pursued by a private controller or by a third party*
  - Art. 4(11): consent: any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her
    - Possibility to refuse? What happens then?

# The 2016 Regulation

- Article 9: some data cannot be processed unless *explicit* consent has been given or vital interests need to be protected...
  - Processing of personal data shall be prohibited when they reveal
    - racial or ethnic origin
    - political opinions
    - religious or philosophical beliefs
    - trade union membership
    - the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person
    - data concerning health
    - data concerning a natural person's sex life
    - sexual orientation.



# The 2016 Regulation

- More enhanced obligations imposed on data controllers
  - Article 7: data controller has to prove consent
  - Article 24: implementation of measures facilitating compliance with Regulation
  - Article 27: obligation to designate a representative in the European Union
  - Article 30: obligation to keep records
  - Article 32: security obligation
  - Article 35: impact assessment obligation

# The 2016 Regulation

- More and new rights granted to data subjects
  - Article 12: transparency obligation
  - Article 13: information to be provided
  - Article 14: information to be provided when data obtained from a third party – not the data subject

# The 2016 Regulation

- Article 15: right of access
- Article 16: right to rectification
- Article 17: right to be forgotten – right to erasure
- Article 18: right to restriction of processing

# The 2016 Regulation

- Article 20: right to data portability
- Article 21: right to object against data processing in the legitimate interest of a private controller; controller would then have to demonstrate compelling legitimate grounds for the processing, which override the interests, rights and freedoms of the data subject
- Article 22: the right not to be subject to a decision based solely on automated processing, unless authorised and surrounded by sufficient safeguards
- Article 23: in relation to public and criminal law investigations, rights outlined in the Regulation may be limited
- Article 25 – by design by default

# The 2016 Regulation

- New Article 26: joint controllers of data
  - Cf. Facebook case discussed last week

# The 2016 Regulation

- An enhanced framework for data protection supervision
  - Data protection officers (Article 37)
  - Independent supervisory authorities (Articles 51-58)
    - Powers to impose administrative fines (Article 83)
    - Significant powers of inspection
    - The exercise of the powers conferred on the supervisory authority pursuant to [Art. 58] shall be subject to appropriate safeguards, including effective judicial remedy and due process, set out in Union and Member State law in accordance with the Charter.
    - Case C-645/19, Facebook Ireland, 15 June 2021
  - Cooperation mechanisms (Articles 59-62)
  - European Data protection board (Articles 63-65)

# The 2016 Regulation

- Protection beyond the European Union?
  - Case C-311/18, Schrems (II)
    - 2016: new adequacy decision concluded between EU and US on data protection (Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46 on the adequacy of the protection provided by the EU-US Privacy Shield)
      - Levels of data protection presumed similar
      - Transfers of personal data from EU to third country (USA) can proceed
      - Takes place in accordance with the Standard Contractual Clauses decision (SCC) - Commission Decision 2010/87/EU of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46, as amended by Commission Implementing Decision (EU) 2016/2297 of 16 December 2016
      - According to Mr. Schrems, US authorities can still have access to his data and do not offer an effective remedy to combat infringements of data protection law => Irish Data protection authority agrees, asks for a preliminary reference to the Court of Justice

# The 2016 Regulation

- Protection beyond the European Union?
  - Case C-311/18, Schrems (II)
  - Para 101: a transfer of personal data, such as that at issue in the main proceedings, for commercial purposes by an economic operator established in one Member State to another economic operator established in a third country, falls, as is apparent from the answer to the first question, within the scope of the GDPR and, second, the purpose of that regulation is, inter alia, as is apparent from recital 10 thereof, to ensure a consistent and high level of protection of natural persons within the European Union and, to that end, to ensure a consistent and homogeneous application of the rules for the protection of the fundamental rights and freedoms of such natural persons with regard to the processing of personal data throughout the European Union, the level of protection of fundamental rights required by Article 46(1) of that regulation must be determined on the basis of the provisions of that regulation, read in the light of the fundamental rights enshrined in the Charter.
  - Para 105: the appropriate safeguards, enforceable rights and effective legal remedies required by those provisions must ensure that data subjects whose personal data are transferred to a third country pursuant to standard data protection clauses are afforded a level of protection essentially equivalent to that guaranteed within the European Union by that regulation, read in the light of the Charter.



# The 2016 Regulation

- Protection beyond the European Union?
  - Case C-311/18, Schrems (II)
  - Para 185: the limitations on the protection of personal data arising from the domestic law of the United States on the access and use by US public authorities of such data transferred from the European Union to the United States, which the Commission assessed in the Privacy Shield Decision, are not circumscribed in a way that satisfies requirements that are essentially equivalent to those required, under EU law, by the second sentence of Article 52(1) of the Charter.
  - Adequacy decision is invalid

# Today

- Data protection regulation as a tool to perfect the internal market
  - Inherent part of EU internal market – free movement law in itself not sufficient
  - First regulatory intervention: a 1995 Directive
  - The need for an updated regulatory framework...
  - The 2016 Regulation
  - The complementary data retention framework
  - The role of fundamental rights in guaranteeing data protection

# Data retention as a complementary data protection legislative instrument

- Data processed also often are stored somewhere
  - Useful for law enforcement purposes, not necessarily marketing
  - How long can they be stored? For how much time?
- EU law initiative: Directive 2006/24/EC – **invalidated by the Court in Digital Rights Ireland – Case C-293/12**
- Member States' initiatives – Case C-203/15, *TeleSverige AB + and Case C-623/17, Privacy International*, and Joined Cases C-511/18, *La Quadrature du Net and Others*, C-512/18, *French Data Network and Others*, and C-520/18, *Ordre des barreaux francophones et germanophone and Others*; Case C-746/18, *H.K.*

# Data retention as a complementary data protection legislative instrument

- *Digital Rights Ireland*
  - Interference with fundamental rights, needs to be justified
  - Para 51: an objective of general interest, however fundamental – such as the fight against serious crime – does not in itself suffice to make any data retention measure justifiable
  - Para 58: the Directive *applies even to persons for whom there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime. Furthermore, it does not provide for any exception, with the result that it applies even to persons whose communications are subject, according to rules of national law, to the obligation of professional secrecy*
  - No criteria on access, no limitation on persons having access...

# Data retention as a complementary data protection legislative instrument

- *Digital Rights Ireland*
  - In relation to the fundamental right to data protection in particular,
    - Para 66:
      - no sufficient safeguards effectively to protect the data and risk unlawful use or access
      - attention to sufficient level of security and protection appears lacking
      - control by independent data protection authority is lacking...

# Data retention as a complementary data protection legislative instrument

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# The role of fundamental rights in ensuring data protection

- EU legislation from the very start strikes a balancing framework between free movement and the privacy of data subjects => already in 1995
- Court intervenes, filling certain gaps in order to point out limited adaptedness of legislation to new developments
  - Importance of fundamental rights in the Court's case law!
  - Fundamental rights become more important – cf. data retention cases
- EU legislator has responded...
- Court will have to clarify many of the new rights and obligations mentioned in the new Regulation...
  - Rendering Article 8 of the Charter operational



# General conclusions

- Fundamental rights
  - A key role in the European Union
  - As a matter of law, they guide interpretation of other legal norms
- Careful balance needs to be made and done on a case-by-case basis
  - Legislator can make balance
  - CJEU can be called upon to complete the balance in concrete situation

# Exam

- Oral exam
  - 2 questions, 30 minute preparation time
  - Questions will be focused on cases dealt with throughout the lectures
    - Analyse relevant facts
    - Link to course theme
    - Expect additional questions
  - Study the slides and read the cases discussed – importance of being able to show that you can identify relevant questions and that you can criticise in some ways reasoning of the Court or gaps in the legislation studied

# Exam

- Oral exam
  - Exam lasts 20 minutes, 30 minutes preparation
    - <6/12: wrong answers to questions, not being able to situate cases in their context, wrong answers to supplementary questions
    - 6/12: you know what the cases are about and can make a link – without necessarily fully making it – to course theme
    - 7/12: you can restate the case and show that you have understood it and its relevance for fundamental rights in the EU
    - 8/12: you have insight into how the case contributed to the development of fundamental rights in the EU and can link it explicitly to the developments taken place since the entry into force of the Charter
    - 9/12: you can show you have reflected about the cases and its contents and you can take a somewhat critical approach to those cases, demonstrating that you can play with the concepts used by the Court
    - 10/12: you can directly and clearly integrate the case in the overall system of fundamental rights in the European Union and you are able to establish links between cases and course subjects without me having to ask for this
    - > 10/12: you add insights to the case that were not discussed in class but are relevant for the course theme

Thank you for your  
attention!

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