# Documentation

ERA
Academy of European Law

# APPLYING THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

417DT84 Bucharest, 15-16 May 2017

This series of seminars is organised with the financial support of the Justice Programme 2014-2020 of the European Union.

# Table of contents

# EU Fundamental Rights

Takis Tridimas

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- European Convention on Human Rights (ECHR), 1950, Council of Europe
- European Court of Human Rights (ECtHR), Strasbourg
- EU:
- Evolution of case law
- Article 6 TEU
- Why are rights so important in EU law?

- 29/69 *Stauder* v *City of Ulm* [1969] ECR 419
- 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125
- 4/73 *Nold* v *Commission* [1974] ECR 491
- 44/79 *Hauer* [1979] ECR 3727
- 5/88 *Wachauf* [1989] ECR 2609
- C-260/89 *ERT* [1991] ECR I-2925
- C-222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651

## Fundamental rights and EU freedoms as converging forces

- C-260/89 *ERT* [1991] ECR I-2925
- C-368/95 *Familiapress Zeitungsverlags* [1997] ECR I-3689
- C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279

## Fundamental Rights v Free movement

- C-159/90 *Society for the Protection of Unborn Children Ireland Ltd v Grogan*[1991] ECR I-4685
- C-112/00 *Schmidberger* [2003] ECR I-5659
- C-36/02 *Omega* [2004] ECR I-9609 (cf *Brown, Governor of California v Entertainment Merchants Association,* US SC 27 June 2011.

## The EU's constitutional space

- Joined Cases T-315/01 and T-306/01 *Kadi v Council and Commission* (Kadi I)*,* [2005] ECR II-3649, rvrsd on appeal:
- Joined Cases C-402/05 P & C-415/05 P *Kadi I* [2008] ECR I-6351
- T-85/09 *Kadi II*, [2010] ECR II-05177, rvrsd on appeal:
- Joined Cases C-584/10 P, C-593/10 P *Kadi II*, judgment of 18 July 2013

## Article 6 TEU

- The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights … which shall have the same legal value as the Treaties. (Art 6(1))
- The Union shall accede to the ECHR (Art 6(2))
- 'Fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law' (Art 6(3))

## General Principles of Law

- Extrapolated from the national constitutional traditions but the ECJ is not looking for a common denominator
- Equality, proportionality, fundamental rights, protection of legitimate expectations, rights of defence
- See e.g. Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143

## The Charter

- Article 6(1) TEU:
- The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
- The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

- What is protected?
- Scope of application
- Relationship with general body of EU law and other sources of fundamental rights
- Impact

## What rights are protected?

- Human dignity, civil liberties, social and economic rights
- Non-discrimination (Arts 20-21)
- Right to judicial protection (Art 47)
- Principles, freedoms and rights
- Direct effect?

## Examples

- Art 20: Everyone is equal before the law.
- Art 21(1): Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Direct – indirect discrimination

- Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22), Article 2(2)
- Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;
- indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Indirect discrimination

- Case C-237/94 *O'Flynn v Adjudication Office* [1996] ECR I-2617:
- Conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers or the great majority of those affected are migrant workers, where they are indistinctly applicable but can be more easily satisfied by national workers than by migrant workers or where there is a risk that they may operate to the particular detriment of migrant workers.
- It is otherwise only if those provisions are justified by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by national law.

- C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143
- Joined cases C-122 and C-125/99 *D and Sweden v Council* [2001] ECR I-4319
- C-144/04 *Mangold* [2005] ECR I-9981
- C-236/09, *Association Belge des Consommateurs Test-Achats*, judgment of 1 March 2011
- C-83/14 *CHEZ*, EU:C:2015:480
- Case C-303/06 *Coleman v Attridge Law*, EU:C:2008:415
- Cf *San Antonio Independent School District v. Rodriguez* 411 U.S. 1 (1973)

Discrimination based on religious beliefs

- C-188/15 *Bougnaoui*, 14.3.2017

Dress requirement must be:

- 1) facially neutral i.e not depend on religious, political beliefs
- 2) based on internal employer rule based on a policy of neutrality, i.e. a rule in force within the undertaking
- if it not based on an internal rule of the employer, it could be justified if it is based on a genuine and determining occupational requirement
- 3) It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer.
- 4) limited only to customers who interact with clients

- See also C-157/15 *Achbita*, 14.3.17
- Cf *S.A.S. v. France* (application no. 43835/11)

Article 7

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8

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.

- Right to family life: Article 7 (*Carpenter*)
- Protection of personal data: Article 8
- Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications*, judgment of 8 April 2014
- Case C-131/12 *Google Spain v AEPD*, judgment of 13 May 2014
- Case C-362/14 *Schrems*, 6 10.2015
- Joined Cases C-203 & C-698/15 *Tele2 Sverige* AB, 21.12.16

Right to judicial protection

Article 47

Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised,defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

## Anti-terrorism measures

- Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission et al v Kad*i (*Kadi II*, judgment of 18 July 2013
- The ECJ concretised the process requirements that the EU institutions must fulfill when listing a person and provided guidelines regarding the scope and intensity of judicial review
- Disagreement with the GC and Bot AG

- The EU authority must (para 135):
- (i) disclose to the person concerned the summary of reasons provided by the Sanctions Committee;
- (ii) enable him effectively to make known his observations on that subject; and
- (iii) examine, carefully and impartially, whether the reasons alleged are well founded, in the light of the observations presented by that person and any exculpatory evidence that may be produced by him

- The EU Courts will review, in the light of the information and evidence which have been disclosed whether:
- the reasons relied on in the summary provided by the Sanctions Committee are sufficiently detailed and specific and,
- where appropriate, whether the accuracy of the facts relating to the reason concerned has been established (para 136)

- Judicial review cannot be restricted to an assessment of the cogency of the abstract of the reasons relied upon
- The court must be able to verify the facts
- A decision cannot be taken on the basis of undisclosable evidence
- What about sensitive evidence?
- Where the court concludes that overriding considerations pertaining to security preclude the disclosure to the person concerned of evidence produced before the court, a balance must be struck. It is for the EU courts to assess whether and to what extent the failure to disclose confidential evidence to the person concerned and his consequential inability to submit observations on them are such as to affect its probative value (paras 128- 129)

- Conclusions - implications
- principle of ‘full review’; the ECJ adopts a civil liberties model rather than a manifest error or emergency constitution model.
- Case C-300/11 *ZZ v Secretary of State for the Home Department*, judgment of 4 June 2013
- Disclosure of the ‘essence of the grounds’ is the minimum obligation
- See now Article 105 RP of GC

- Art 22: The Union shall respect cultural, religious and linguistic diversity.
- Art 14: Right to education
- 1. Everyone has the right to education and to have access to vocational and continuing training.
- 2. This right includes the possibility to receive free compulsory education.
- 3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

## Scope of application

- Who is bound by the Charter? Article 51(1)
- EU institutions bodies and agencies
- Member States when they implement EU law:

C-617/10 *Fransson* , judgment of 26 February 2013; Case C-650/13 *Delvigne* EU:C:2015:648; *Dereci*; *Dano*

- Individuals?
- *Benkharbouche* [2015] EWCA Civ 33

## The Charter in context

- Articles 51-54 (Horizontal provisions)
- Limitations (Art 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.

- Relationship with EU Treaties (Art 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.
- Relationship with ECHR (Art 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.

- Level of protection (Art 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.

## Impact of Charter

- Case C-438/05 *Viking Line* [2007] ECR I-10779
- C-236/09 *Association belge des Consommateurs Test-Achats*, judgment of 1 of March 2011
- C-544/10 *Deutsches Weintor*, judgment of 6 June 2012
- C-617/10 *Fransson*, judgment of 26 February 2013

- Case C-399/11 *Melloni v Ministerio Fiscal*, judgment of 26 February 2013
- Cf US *Knapp – Patane* litigation
- Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department*, judgment of 21 December 2011
- Cf *R (on the application of EM (Eritrea)) v Secretary of State for the Home Department* [2014] UKSC 12

- Standard of proportionality in Charter and inter-state trade
- Where a national restriction on inter-state trade fails the test of proportionality and is therefore found to be in breach of the free movement of services, it is also an impermissible restriction on Articles 15 to 17 of the Charter which protect respectively the freedom to choose an occupation, the freedom to conduct a business, and the right to property *Pfleger*, C-390/12, EU:C:2014:281
- Direct effect C-441/14 *Ajos* case, 19.4.2016

ECJ ECHR

- *Matthews v United Kingdom*, ECHR, 18 February 1999
- *Bosphorus v Ireland*, ECHR, 30 June 2005

EU Accession to the ECHR

- Opinion 2/13
- See Tridimas, *Fundamental Rights, General Principles of Law, and the Charter*, (2013-2014) 16 Cambridge Yearbook of European Legal Studies, 361-392

## Mutual recognition versus protection of fundamental rights

- Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department*, EU:C:2011:865:
- Under Dublin II, A Member State examining an asylum application may refuse to return an asylum seeker to the Member State responsible for examining his application only where there are substantial grounds for believing that there are 'systemic flaws' in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment within the meaning of Article 4 of the Charter

- Cf *MSS v Belgium and Greece* (2011) 53 EHRR 28
- But see now *C.K., H.F., A.S. v Republica Slovenija*, Case C-578/16 PPU, EU:C:2017:127:
- Under Dublin III, the transfer of an asylum seeker to the Member State responsible for examining her application cannot take place where there is a real risk of her suffering inhuman or degrading treatment. The Court departed from the systemic flaws requirement. It held that, where the transfer of an asylum seeker with a particularly serious mental or physical illness would result in a real and proven risk of a significant and permanent deterioration in her state of health, that transfer would constitute inhuman and degrading treatment. The authorities of the Member State were therefore under an obligation to examine the medical evidence and refuse the transfer if it would lead to a violation of Article 4 of the Charter

- Joined Cases C-404/15 and C-659/15 PPU *Aranyosi* EU:C:2016:198.

# The scope of application of the Charter

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## Article 51(1)

- The Charter applies with due regard to the principle of subsidiarity and has two constituencies. It is addressed to:
- The institutions, bodies, offices and agencies of the Union
- The Member States "only when they are implementing Union law"

## Constituencies

- EU institutions and bodies
- Member States
- Non-state actors

## International agreements

- Does the Charter apply to
- (a) action undertaken under parallel international treaties concluded by Member States?
- (b) EU institutions when they act as delegates of the Member States or international organisations?
- C-370/12 *Pringle:* Treaties did not confer competence on the Union to establish the ESM. Therefore the ESM was not "implementing EU law". Hence, Article 47 Charter was not applicable

- Language of Article 51 shows that the Charter applies to EU institutions irrespective of whether they act under EU law
- Institutions may be delegated tasks which "do not alter the essential character of the powers conferred on those institutions by the Treaties" (*Pringle*)
- Were institutions not bound, it would run counter to the fundamental principle of legality

- But see now:
- ECJ Judgments of 20 September 2016:
  - Joint Cases C-8/15 P to C-10/15 P (*Ledra Advertising et al*)
  - Joint Cases C-105/15 P to C-109/15 P (*Mallis and Malli* et al)

Cf. Case T-257/16 *NM v European Council*, EU:T:2017:130 (EU-Turkey Statement on exchange of migrants)

## National measures (I)

- Art 51 Charter confirms case law (AG Trstenjak in C-411/10 and C-493/10 *N.S.*)
- C-617/10 *Fransson* the Court did not follow the narrow interpretation based on Villalón AG's model of 'specific interest'. It held, instead, that the Charter is "applicable in all situations governed by EU law" (C-260/89 *ERT*); Uncertain criterion
- The case law assumes the Charter does not establish any new power for the Union (C-339/10 *Asparuhov Estov;* C-27/11 *Vinkov*). Thus it does not apply to areas of shared competence where the EU can potentially legislate

## National measures (II)

- C-206/13 *Siragusa*: objectives-based and effects-based test
- In determining whether a national measure implements EU law, the Court will take into account, among others, the following factors: whether the measure is intended to implement a provision of EU law; the nature of that measure; whether it pursues objectives other than those covered by EU law even if it is capable of indirectly affecting EU law; and whether there are specific rules of EU law on the matter or capable of affecting it.

- Rationale of this approach:
- To ensure that EU standards are not infringed in areas of EU activity, whether through action at EU level or through the implementation of EU law by the Member States.
- To avoid that the level of protection of fundamental rights varies according to the national law
- But the criteria are uncertain (C-198/13 *Hernández*)

## National measures (III)

- If EU law mandates Member States to act, their action falls within the scope of EU law even if the EU does not provide for the specific conditions or arrangements of the measure
- C-650/13 *Delvigne* questioned the compatibility with the Charter of French law depriving him of the right to vote for the European Parliament's elections. The Court held that his situation fell within the scope of the Charter and was incompatible with Arts 39 (right to vote) and 49 (right to retroactive application of lighter penalty)

- Villalón AG drew a distinction between the Articles 39 and 49: the same national action may fall both within and outside the scope of the Charter depending on the provision invoked.
- This narrow approach fails to take into account the inter-relationship of rights and focuses on the wrong criterion?

## National measures (iv)

- C-411/10 and C-493/10 *N.S.*, the conferment of discretion to Member States makes the discretionary power subject to EU law
- C-333/13 *Dano* the Court took a narrower view of Article 51(1) suggesting that the existence of an inter-state element does not necessarily trigger the application of the Charter; cf C-256/11 *Dereci*

## Horizontal application

- C-282/10 *Dominguez* Advocate General Trstenjak read Article 51(1) as precluding the horizontal effect of the Charter relying on an *a contrario* argument
- Charter may aid the interpretation of both state measures which affect private relations and also private obligations arising from contract
- Courts are bound not to give effect to private obligations which breach fundamental rights

## Horizontal application (II)

- Direct horizontality: C-144/04 *Mangold*; C-555/07 *Kücükdeveci*; cf *Shelley v. Kraemer* 334 U.S. 1 (1948)
- Villalón AG stated in C-176/12 *AMS* that the Charter rights - other that the principle of equality, or the rights of free movement - are not of inferior status
- C-441/14 *Ajos* case, 19.4.2016

## National cases

- *Benkharbouche v Embassy of the Republic of Sudan and Libya*. Can the Charter be invoked against foreign governments? Relying on *Mangold* and *Kücükdeveci*, the Court of Appeal came to the view that, in certain circumstances, a Charter right could be applied horizontally
- The Court of Appeal expanded the scope of application of the Charter beyond the addressees expressly stated in Article 51(1). It also transcended the public – private divide
- *R (Chester) v Secretary of State for Justice* more restrictive view of the scope of application of the general principles of law

## Conclusion

- Is the case law consistent?
- What model of constitutionalism?

Università Commerciale Luigi Bocconi

# Applying the Charter of fundamental rights of the European Union

## Relationship between the Charter of Fundamental Rights of the EU and the European Convention on Human rights and Fundamental Freedoms: complementing or competing systems?

Prof. Oreste Pollicino

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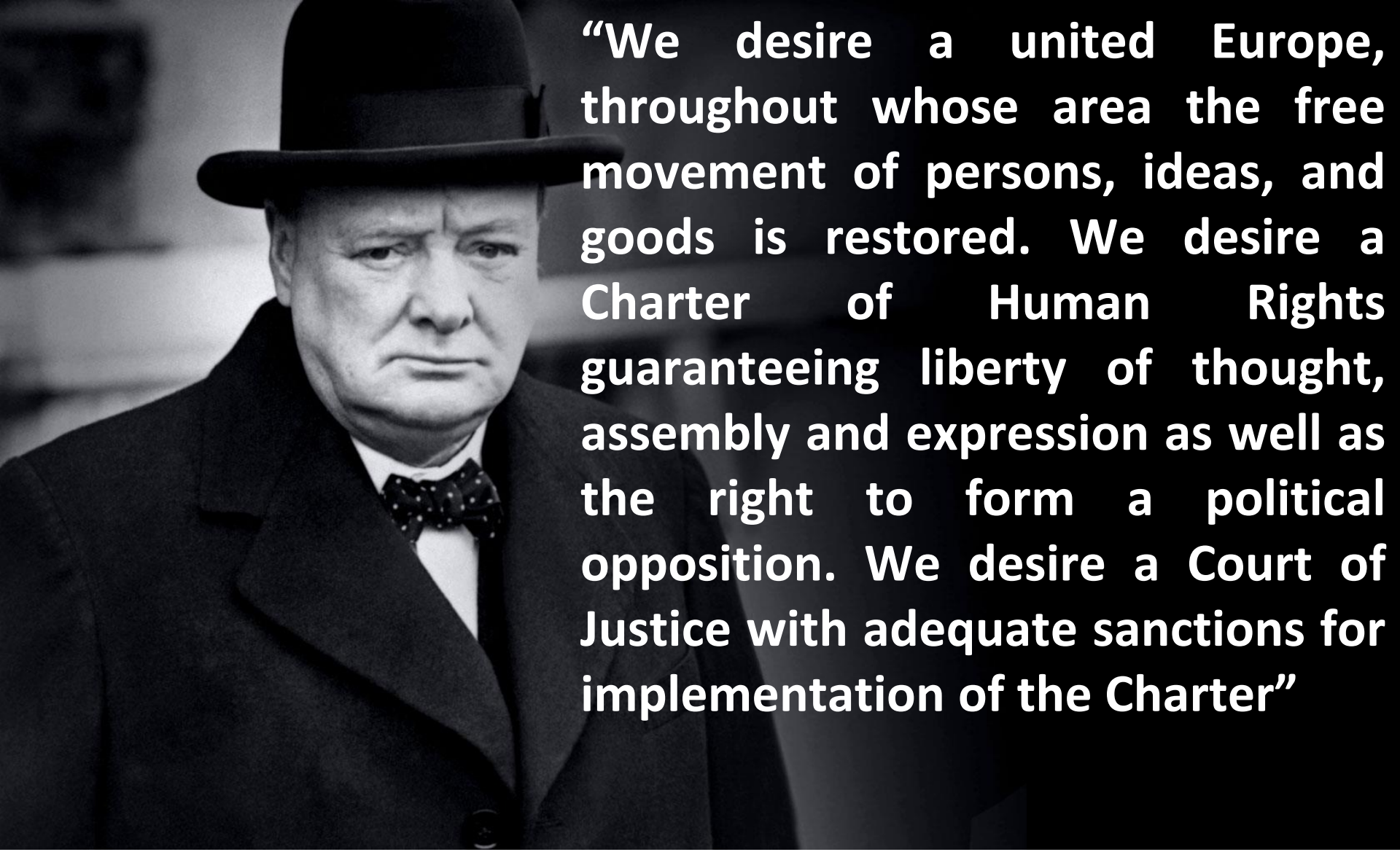
# Outline

1. The roles of the ECtHR and the CJEU
2. Principle of equivalent protection
3. EU Accession to the ECHR

# Europe as Country of Rights


- International legal order having the **specific purpose** of protecting human rights
- 47 Contracting Parties
- European Convention on Human Rights ("ECHR")
- **European Court of Human Rights** (based in Strasbourg) ensuring the respect of the rights and freedoms enshrined in the ECHR

- A system designed to ensure peace through economic integration: legal order having **general purposes**
- 28 (27) Member States
- Charter of Fundamental Rights of the European Union
- **Court of Justice of the EU** (based in Luxembourg) ensuring the supremacy of the Treaties and the consistent application of EU law among MS




*Conference on the European Federalist Movement* (1948)

# Two Diverging Paths

- Deterioration of the relationship between the Soviet Union and the Western powers
- Failure to create a more ambitious integration at the Community level

# The Genesis

Treaty of Rome (1957):

**European Economic Community (EEC)**

► Economic vocation

European Convention of Human Rights (**1950**)

► A merely ideological creation of a system of fundamental values?

# The ECHR

- A *sui generis* system: «*More than mere reciprocal engagements between contracting States*»
- Individual petitions
- Inter-state petitions

# The EEC

-Origins: International law but…

-…not an ordinary set of international treaties

-Competence to enact acts:

- External relevance (not for the internal functioning of the organization)
- Unilaterally adopted by institutional bodies
- Obligatory and binding (no *soft law*)

Bocconi

# «A tale of two courts»

EUROPEAN COURT OF HUMAN RIGHTS

COUR EUROPÉENNE DES DROITS DE L'HOMME

# The Court of Justice of the European Union

**28 judges, 1 from each of the Member States**

**11 Advocates General**

The Court may sit as a full court, in a Grand Chamber of 15 Judges or in Chambers of three or five Judges.

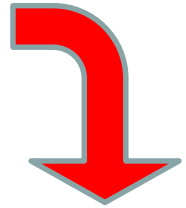

**Judges and AG are appointed for a term of office of six years (renewable)**

The Court sits as a full court in the particular cases prescribed by the Statute of the Court and where the Court considers that a case is of exceptional importance.

The Court sits in a Grand Chamber when a Member State or an institution which is a party to the proceedings so requests, and in particularly complex or important cases.

# The preliminary reference

**Art. 267 TFEU**

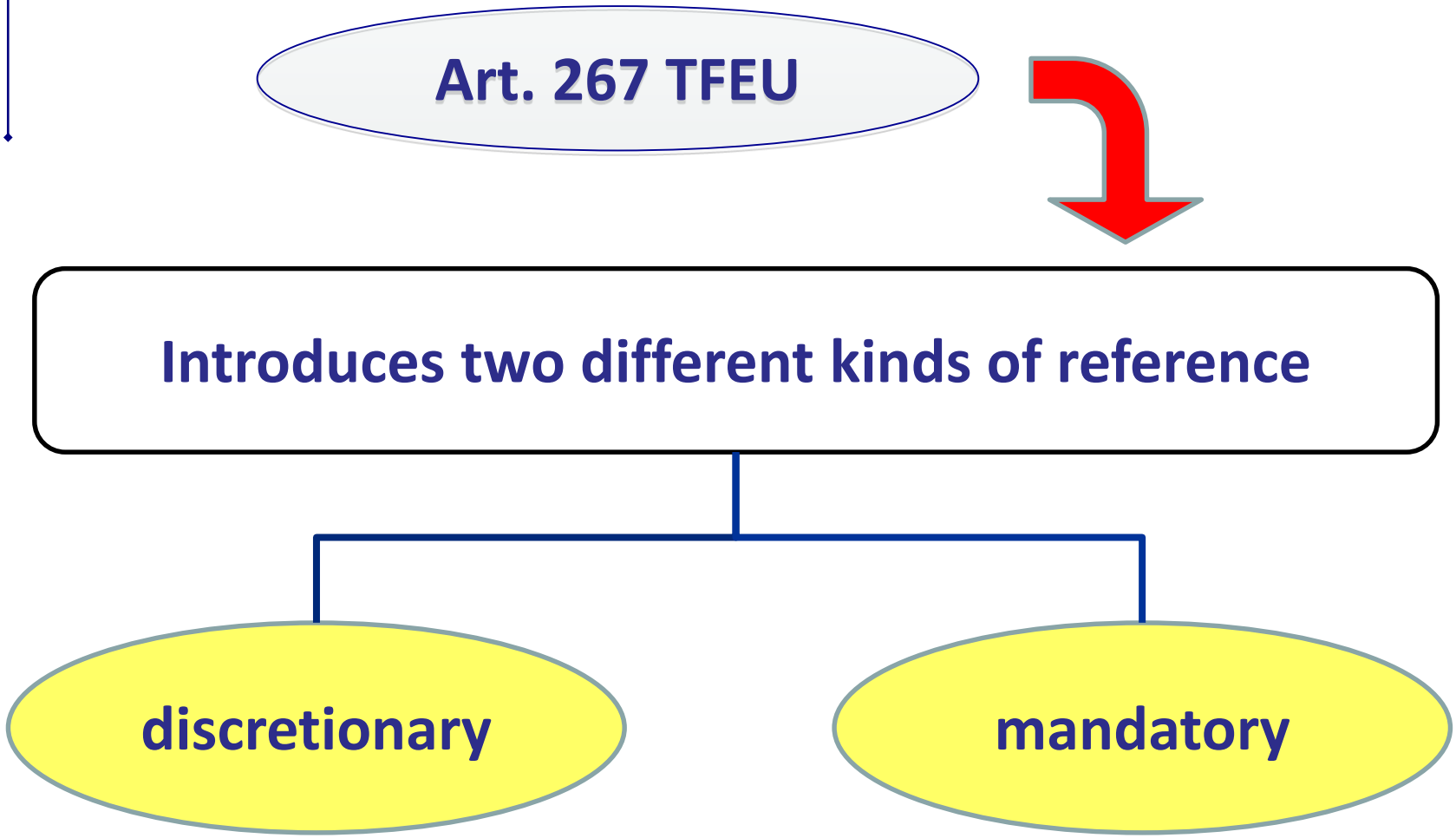


"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) **the validity and interpretation** of acts of the institutions, bodies, offices or agencies of the Union"

# The preliminary reference



# The preliminary reference

**mandatory**

**discretionary**

Any national court **MAY** ask for preliminary rulings, **if it considers that a decision on the question is necessary**

Question **TO BE BROUGHT** before the Court, **if the national right of appeal is exhausted**

# Procedural aspects

**Preliminary ruling** → **A reference from one judge to another**

**The referral to the CJEU MAY be requested by one of the parties involved**


**the decision to do so rests upon the national court**

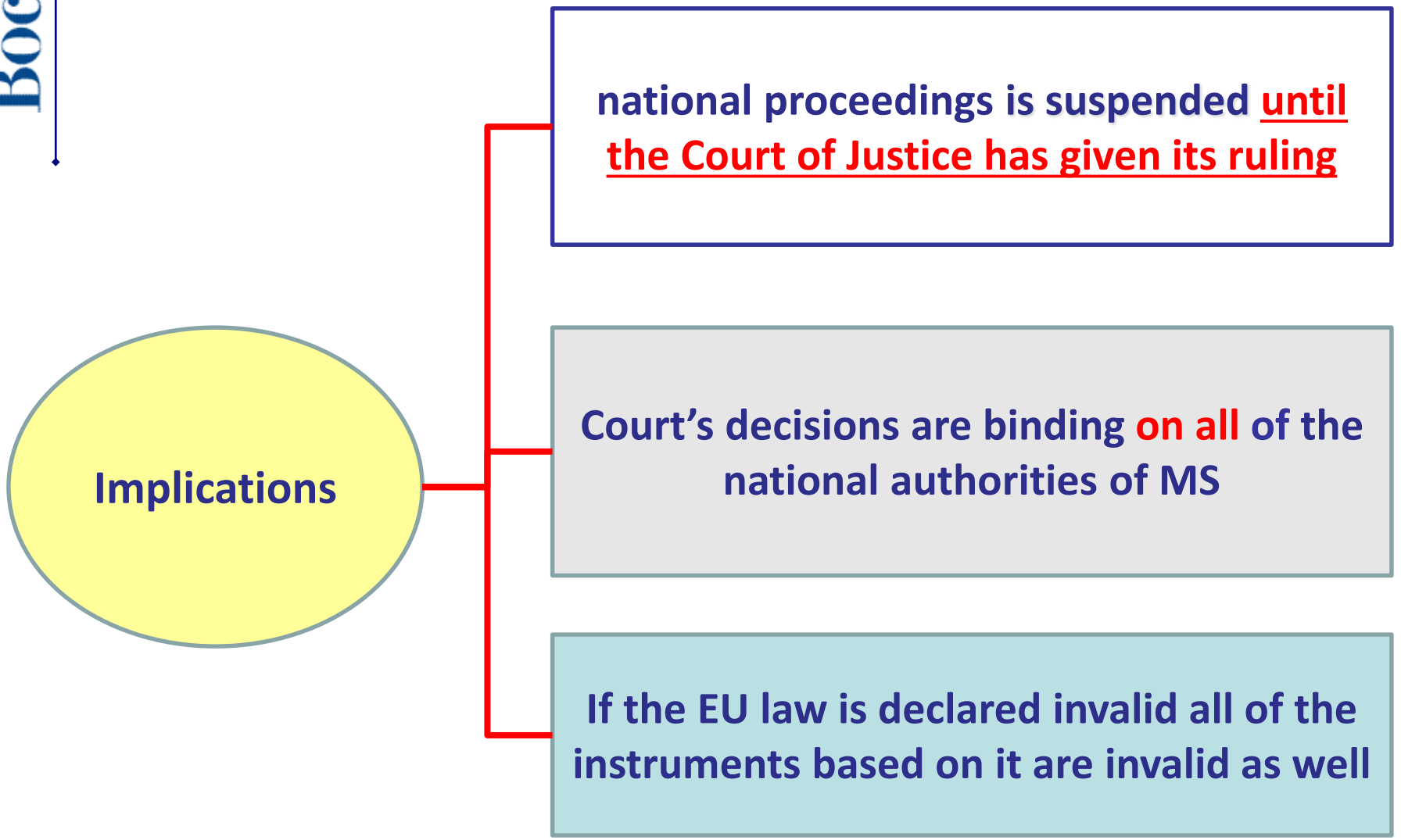
# Procedural aspects

**However**

**If a national court is a court of final resort and one of the parties requests it, it is obliged to exercise the reference for p.r.**

**A national court may submit a request for a p.r. if it finds that a ruling on the interpretation or validity of EU law is necessary for the final judgment.**

# Implications of the preliminary ruling mechanism



# Fundamental Rights Protection in the EEC Legal Order: the First Stage

- The silence of the Treaty of Rome
- Leaving protection of fundamental rights in the hands of ECHR/Member States?
- The turning point: **primacy and direct effect doctrine**
- The “Golden Age” of the ECJ

# ECJ as driving force of the European integration

- "Constitutional doctrine by a common law method"


*Van Gend en Loos*

«the European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereing right, albeit within limited fields, and the subjects of which comprise not only the Member states, but also their nationals»

# The EEC


*Costa c. Enel*

A community «of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation of 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 case law of the ECJ on fundamental rights

**Doctrine of supremacy**
(Costa v. ENEL)

**The subordination of national laws, to European Union law requires the ECJ to be responsible for protecting fundamental rights**

# The case law of the ECJ on fundamental rights

**Direct effects**
(Van Gend en Loos v. Netherlands )

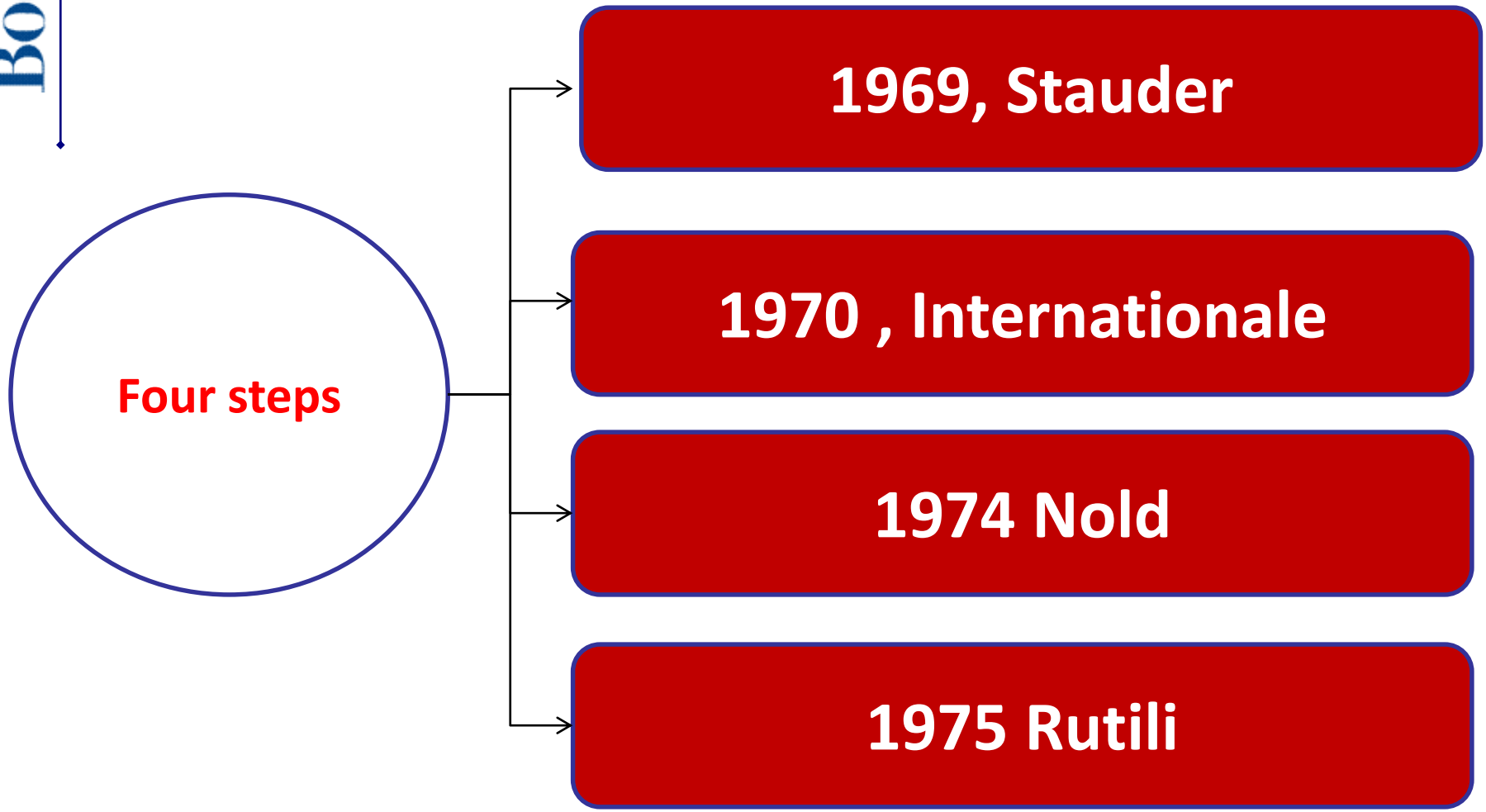
**National courts must protect individual rights provided by Treaty.**

# The case law of the ECJ on fundamental rights

***Effet Utile***
**(Simmenthal )**

**A national court is under a duty to give full effect to EC provisions, if necessary refusing to apply any conflicting provision of national legislation**

# The case law of the ECJ on fundamental rights



# But …

…the exercise of fundamental rights
cannot be without limits…

Wachauf [1991]

→ Fundamental rights are not absolute

→ Restrictions correspond to objectives of general interest pursued by the Community

→ Restrictions correspond to objectives of general interest pursued by the Community

# Fundamental rights vs fundamental freedoms

Schmidberger v. Austria [2003]

Free speech and free association *vs* free movement of goods

→The Court draws inspiration from the constitutional traditions and from the guidelines supplied by international treaties

→ The protection of those rights is a legitimate interest which, in principle, justifies a restriction of the Community law obligations

# Fundamental rights vs fundamental freedoms

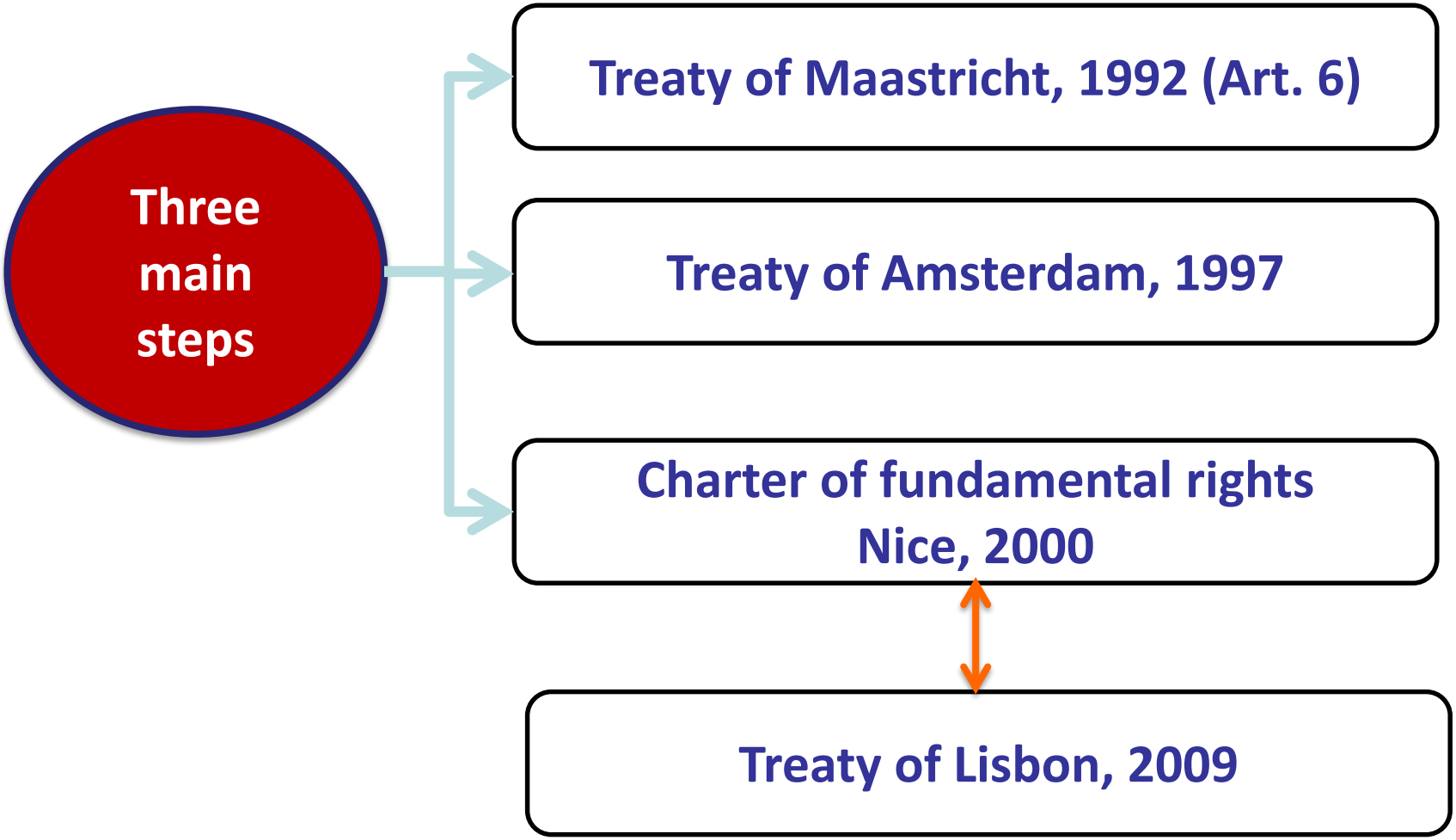
Omega [2004]

Respect for human dignity vs freedom to provide services

→ Community legal order undeniably strives respect for human dignity as a general principle of law

→ Objective of protecting human dignity is compatible with Community law

# The Court of Justice and the protection of fundamental rights



# The EU and fundamental rights

## Article 6 TEU

*1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. […]*

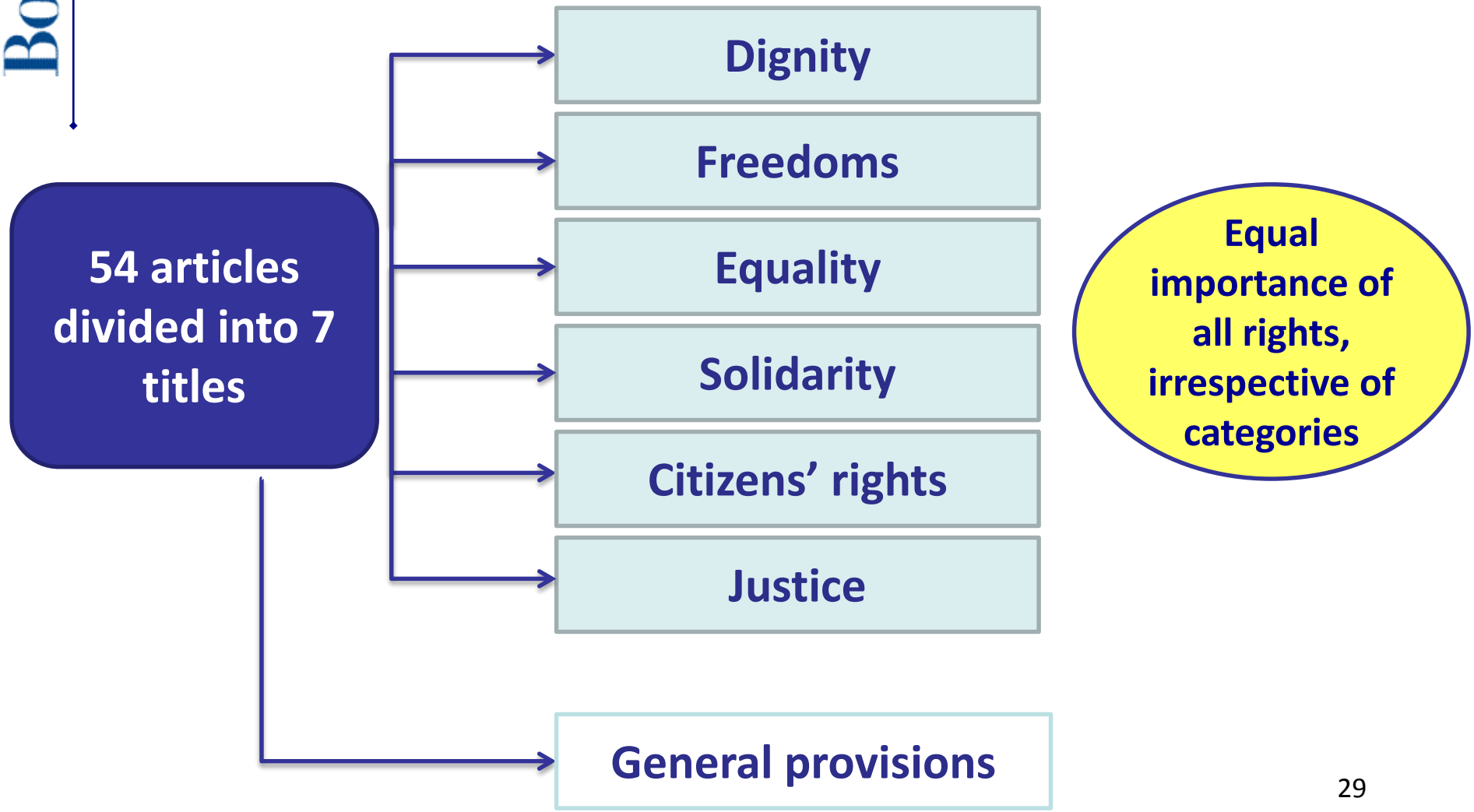
*2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.*

*3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*

## Preamble to the Treaty of Lisbon

*"drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law, … confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law, confirming their attachment to fundamental social rights … have decided to establish a European Union."*

# Charter of Fundamental Rights of the EU

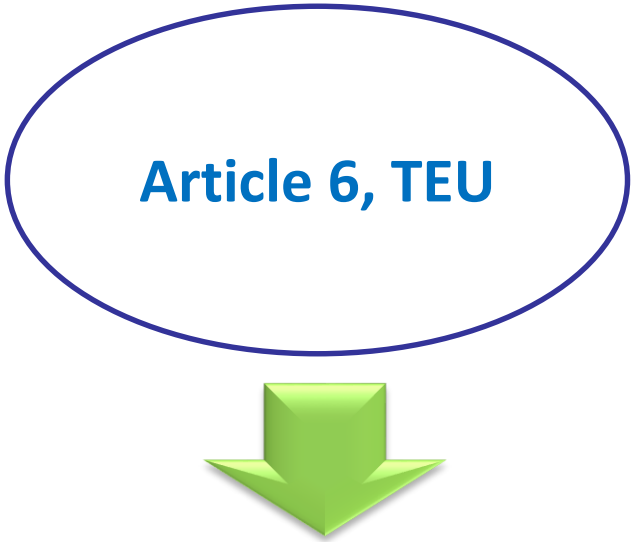


# Prior to Lisbon: which value for the Charter?

It has not been recognised as having genuine legislative scope → it is not in itself binding


**It includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments (Advocate General Tizzano, Case C-173/99, [2001] ECR I-4881, paras. 27-28)**

# After Lisbon: which value for the Charter?




**1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.**

# The impact of the Charter on EU/Member States relationships

**Art. 51**

**1.** The provisions of this Charter are addressed to the **institutions and bodies 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.

**2.** This Charter **does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.**

# The End of the ECJ Golden Age: the Second Stage

**Single European Act (1987)** | **Treaty of Maastricht (1992)**

**States regain the position as Community legislators?**

MS: no excessive intrusion in the symbolic areas of national sovereignty (proportionality, subsidiarity)

Crisis of the "constitutional tolerance" of MS: self-restraint

# The European Court of Human Rights


- Main role: the ECtHR receives applications from any person, non-governmental organization or group of individuals that claims to be the victim of a violation of the rights set forth in the ECHR by one of the Contracting Parties
- More recently, extension of the quasi-nomophylactic function (advisory jurisdiction: see Article 47): Protocol 16 to the ECHR
- The ECHR is more and more "a constitutional instrument of European public order" (*Loizidou)*
- Individual applications: similarities to *recurso de amparo* and *verfassungsbeschwerde*

# The ECHR Dimension: the First Stage

- A “slow motion” start
- States reluctance to external control on human rights protection
- The right to individual petition

# The ECHR Dimension: the First Stage

- Very prudent approach: Impact of the judgments on the MS legal orders
- Margin of appreciation
- Safeguarding the principle of “constitutional tolerance”
- The ECtHR restricted itself to develop the “horizontal” rather than “vertical” aspects of the precedent

# The ECHR Dimension: the Second Stage

- Two disadvantages for the ECtHR:
  - Judgments are only binding on the Member States according to which they are delivered;
  - ECtHR judgments focus on individual cases.

- Protocol no. 11: a turning point
- Shift from individual to constitutional justice?

# The European Court of Human Rights

47 judges, 1 from each of the Contracting States

A1 judge may rule on the admissibility of the case and 3 committee judges may rule on the repetitive cases

Judges are elected for a 9 years non-renewable term

Each Chamber is composed of the President of the relevant Section, the "national judge" and 5 other judges

# The European Court of Human Rights

- President of the Court
- Vice-Presidents
- National judge
- Other judges

The Grand Chamber is made up of 17 judges

The GC can be requested to hear a case….

- …by the parties, after a Chamber judgment has been delivered (referral)
- …by a Chamber, if the case raises a serious question on the interpretation of the ECHR or a risk of inconsistency with prior rulings (relinquishment)

# The European Court of Human Rights

**Irrelevance of the nature of the act reviewed**

Even mere behaviours, administrative and judicial acts, Constitutions…

- Hungarian Constitution: Freedom of expression of police officials (*Rekvény v. Hungary,* 1999)
- Lenght of constitutional proceedings (*Ruiz Mateos v. Spain,* 1993)
- Injunction of the Irish Supreme Court restricting the right to research information about abortion (*Open Door v. Ireland,* 1992)
- Ban of a political party regardless of its dangerousness (*United Communist Party v. Turkey,* 1998)

# Judicial remedies before the European Courts


- Application can be submitted by any citizen of a High Contracting Party…
- …only after all the national judicial remedies failed to address the violation (and within 6 months from the exploitation of the last national remedy)
- Scope of the scrutiny: rulings on alleged violations of the ECHR
- Protocol 16?


- Court of the complex EU system: many functions
- Usually not triggered by individual citizens
- Proceedings against a Member State for failure to fulfil an obligation (art. 258-259 TFEU)
- Annulment proceeding (art. 263 TFEU)
- Proceeding for failure to act (art. 265 TFEU)
- Preliminary ruling (art. 267 TFEU)

# Complementing or contrasting systems?

The constitutionalization of the EU and ECHR systems creates some possible overlaps between the two orders of protection of human rights

However, many differences exist in the functioning of the two Courts:

- Impossibility for the ECtHR to invalidate the act subject to scrutiny
- The ECtHR target includes national legislation and practices while the scope of the CJEU scrutiny is limited to the interpretation of EU law

# Attempts to avoid contrasts: the principles of best and equivalent protection

- Possibile contrasts and overlaps:
  - The CJEU can interpret the Convention as part of «general principles of EU law»
  - The ECtHR could indirectly review EU law when High Contracting Parties (being also Members States to the EU) acted to implement EU law

- Attempt to avoid clashes:
  - ➢ Principle of best protection (art. 53 ECHR and artt. 52 and 53 Charter)

**Art. 53 ECHR**

*Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party*.

**Art. 53 Charter**

*Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, 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*.

# The (non) EU accession to ECHR

- The road not taken (1952)
- The first attempts
- * 1975
- *1990

# The (not) EU accession to the ECHR

- The formal request of the Council
- Opinion 2/94
- The issue of admissibility
- The issue of competence

## In the meantime….

### The *Bosphorus (2004)* case and the principle of equivalent protection

*In the Court's view,* ***State action taken in compliance with such legal obligations is justified as long as the relevant organization 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.***

*However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights* ***was manifestly deficient****. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a* ***constitutional instrument of European public order*** *in the field of human rights*.

# EU Accession to the European Convention on Human Rights

## the Leopoardian mandate

**Former art. 59 ECHR: only States can accede to the ECHR**

- Art 59 was amended with Protocol 14 that inserted the following statement: "The European Union may accede to this Convention"
- This made possible for the EU, notwithstanding it is not a State, to accede to

**EU side**

- The new article 6 (2) TEU establishes that "*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms*"
- The Accession not only become possible but also

- Once the legal hindrances were overcome, it was possible to discuss the Accession Agreement.

- Negotiations lasted three years and a Draft Agreement on Accession (DAA) was eventually reached by EU institutions and the COE

- However, the CJEU ruled against the compatibility between the accession treaty and the Community Treaties → **Opinion 2/13**

# Opinion 2/13

160. Thus, first of all, having provided that the EU is to accede to the ECHR, Article 6(2) TEU makes clear at the outset, in the second sentence, that **'[s]uch accession shall not affect the Union's competences as defined in the Treaties'.**

161. Next, Protocol No 8 EU, which has the same legal value as the Treaties, provides in particular that the accession agreement is to make provision for preserving the specific characteristics of the EU and EU law and **ensure that accession does not affect the competences of the EU or the powers of its institutions, or the situation of Member States in relation to the ECHR, or indeed Article 344 TFEU.**

162. Lastly, by the Declaration on Article 6(2) of the Treaty on European Union, the Intergovernmental Conference which adopted the Treaty of Lisbon agreed that **accession must be arranged in such a way as to preserve the specific features of EU law.**

# Opinion 2/2013

258. In the light of all the foregoing considerations, it must be held that the agreement envisaged is not compatible with Article 6(2) TEU or with Protocol No 8 EU in that:

– it is liable adversely to affect the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter, does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined, and makes no provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU;

– it is liable to affect Article 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope *ratione materiae* of EU law **being brought before the ECtHR**;

– it does not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the Court of Justice that enable the specific characteristics of the EU and EU law to be preserved; and

– it fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters in that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body.

# Protocol 16/preliminary reference

- Two main difference
- Compulsory vs. discretional
- Abstract versus Concrete

# Opinion 2/2013

Consequently, the Court (Full Court) gives the following Opinion:

**The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms**

# What's next?

Negotiation of another Accession Agreement by taking into consideration the indications given by the CJEU?

Modify the Treaties to proceed to the EU Accession notwithstanding the contrary opinion of the Court?

Abandonment of the Accession?

→ Incompatibility because of the new article 6 (2) TEU:

*"The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms"*

# The advataneges of the accession

- Symbolic relevance: Europe as the continent with the best human rights protection and the EU as an institution really concerned with fundamental rights and liberties concerns

- Possibility for EU citizens to challenge directly, before the ECtHR, an EU law act for a violation of human rights

- Convergence of the case law of the Court of Justice and European Court:
  - Legal certainty
  - Uniform protection of human rights all over Europe

# Enforcement of the judgments

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

- Art. 46 ECHR: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties"
- Ruling only relevant to the State that is party of the proceeding…
- …However, always stronger nomophylactic function
- Example: Italian Constitutional Court 349/2007


- Different rules of enforcement, according to the concerned actor and the type of penalty
- General rule: "Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out." – art. 299 TFEU
- Power of the EU to overcome Member States' sovereignty in those areas in which MS gave up their sovereignty in favor of the EU itself

**ERA Seminar "Applying the Charter of Fundamental Rights of the European Union**
**Focus on the rights of Union citizens"**
Bucharest, 15 – 16 May 2017

*This publication has been produced with the financial support of the European Union's Justice Programme 2014-2020. The contents of this publication are the sole responsibility of the author and can in no way be taken to reflect the views of the European Commission.*

1

# Right to good administration

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*The contents of this presentation are the sole responsibility of their author and do not reflect the legal position of the CJEU*

2

## The protection of the right to good administration in the EU legal order

**Overview of the Presentation:**

1) Introduction
2) Origins and development of the right to good administration in the national, EU and European legal orders
3) Praetorian development of the principle of good administration
4) Good administration as a fundamental right provided for in Article 41 CFR
5) Content of the right to good administration
6) The scope of protection of good administration as a GPL and as a CFR right
   a) The « personal » scope of protection of good administration as a GPL and as a CFR right
   b) The « material » scope of protection of good administration as a GPL and as a CFR right
   c) The « institutional » scope of protection of good administration as a GPL and as a CFR right
7) Various functions of the right to good administration
   a) To ensure the « judicialisation » of the administration
   b) Good administration as a counterweight to the discretionary powers of the administration
   c) Good administration as a « ticket » for individuals' procedural protection in « composite » administrative proceedings
8) Conclusions
9) Some bibliographic references on the protection of the right to good administration in the EU legal order

3

# 1. Introduction

"To include [the right to good administration] in the Charter could have a broad impact (…) helping to make the 21st century the "century of good administration""

*(Speech of the European Ombudsman Jacob Söderman at the occasion of the Public Hearing on the draft Charter of Fundamental Rights of the European Union, Preliminary remarks' (Brussels, Belgium, February 2000), available on <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/355/html.bookmark>).*

This audacious assertion highlights the reality of a modern Administration of the EU which is more and more concerned with the protection of "third generation rights" such as the right to good administration.

4

## 2. Origins and development of the right to good administration at national, EU and European levels

Multiple initiatives have been taken – at both national and European levels – in the continuous search to strengthen the procedural protection of individuals in their relations with the administration:

**a) At the national level**:

A vast majority of the EU Member States have "explicitly" (Finland, Netherlands, Belgium, Estonia) or "implicitly" (France, Romania, Germany, Denmark, Austria, Spain, Italy etc) recognized the principle of good administration in their respective domestic orders, either by codifying it in Administrative Procedural Acts (APA) or by providing for its protection in constitutional provisions

*(For further details in this regard, see e.g. the comparative study carried out by the Swedish Statskontoret, Principles of Good Administration in the Member States of the European Union (Stockholm: Statskontoret, 2005) available at <http://www.statskontoret.se/upload/Publikationer/2005/200504.pdf>, pp. 1-119.*

5

## 2. Origins and development of the right to good administration at national, EU and European levels

**b) At the European level** :

**Contribution of the European Court of Human Rights (ECtHR) and of the Council of Europe to the development of the right to good administration :**

Although there is no explicit reference to the right to good administration in the European Convention of Human Rights (ECHR), the ECtHR and especially the Council of Europe have been active in seeking to reinforce the procedural protection of the individual in administrative proceedings. See e.g. :

- Resolution 77(31) of the Council of Europe, 'On the Protection of the Individuals in Relation to the Acts of the Administrative Authorities' (28 September 1977).
- Resolution 77(31) of the Council of Europe, 'On the Protection of the Individuals in Relation to the Acts of the Administrative Authorities' (28 September 1977); Recommendation CM/Rec (2007)7 of the Committee of Ministers to Member Sates on Good Administration (20 June 2007).
- Council of Europe, *The Administration and You. A Handbook* (Strasbourg, Council of Europe Publishing 1996).
- Many conferences on Good Administration organized at the initiative of the Council of Europe - see e.g. Conference 'The Right to Good Administration' (Warsaw, 4 and 5 December 2003); Conference 'Pursuit of Good Administration' (Vilnius, 27-28 October 2005; European Conference 'Training of Civil Servants to Achieve Good Administration' (Warsaw, 29-30 November 2007).
- A Project Group on Administrative Law (CJ-DA) has seen the light (CJ-DA is responsible for carrying out the legal activities of the Council of Europe in the field of administrative law and justice. For further details as regards the CJ-DA's work on good administration, see Recommendation CM/Rec (2007)7, which added - in Appendix - a Code of good administration).

6

## 2. Origins and development of the right to good administration at national, EU and European levels

**c) At the EU level :**

**c1) Contribution of the European Ombudsman :**

Various initiatives taken by the EO in seeking to clarify the meaning of good administration in the EU legal order – see e.g. the European Code of Good Administrative Behaviour *(Luxembourg, Office for Official Publications of the European Communities 2005, pp. 1-20)*.

**Obs. 1** : Following the example of the European Ombudsman, multiple Codes of Good Administration have been adopted by the institutions and bodies of the Union, with the aim of ensuring individuals' protection vis-à-vis the administration – see e.g. the Commission's 'Code of Good Administrative Behaviour for Staff of the European Commission and their Relations with the Public' *(2000, OJ L 267/20)* and the European Parliament's 'Guide to the obligations of officials and other servants of the European parliament' *(Code of conduct, 2000, OJ C 97, 1)*.

**Obs. 2** : The insertion of the right to good administration in the Charter is partly due to the European Ombudsman's suggestion to codify therein "a fundamental right to an open, accountable and service-minded administration" (EO's statement available on <http://www.ombudsman.europa.eu/en/activities/speech.faces/en/355/html.bookmark>).

7

## 2. Origins and development of the right to good administration at national, EU and European levels

**c2) Contribution of the EU legislator / constitutional legislator:**

**C2.1) Contribution of the constitutional legislator** :

Various Treaty dispositions explicitly provide for certainprocedural rights which have been usually protected by the EU Courts under the "umbrella" of the principle of good administration and which are now enshrined in Article 41 CFR – see e.g. Article 24(4) TFEU provides for language rights (Article 41(5) CFR); Article 296(2) TFEU provides for the right to have a reasoned decision (Article 41(2)(c) CFR and Article 340 TFEU, for the right to have the Union make good any damage cause by its institutions or by its servants in the performance of their duties (Article 41(4) CFR).

**C2.2) Contribution of the EU legislator** :

Several pieces of sector-specific or subject-specific secondary legislation provide for the need to respect the principle of good administration – see e.g. Articles 7 and 8 of the European Parliament and Council Regulation (EC) 1331/2008 of 16 December 2008 establishing a common authorization procedure for food additives, food enzymes and food flavourings *(2008, OJ L 354)*.

**Obs.** : A more detailed codification in the form of an EU Administrative law is currently under discussion

*(See European Parliament Resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INI)). See also ReNEUAL, 'Working Document: State of Play and Future Prospects for the EU Administrative Law (19 October 2011), pp. 1-39 and more generally the ReNEUAL's Books, available on: < http://reneual.eu/>).*

8

## 2. Origins and development of the right to good administration at national, EU and European levels

**c3) Contribution of the EU Courts :**

The notion of good administration has gained significance in the EU legal order especially due to the decisions of the EU Courts; the synonymous concepts of "good" (Case 32/62 *Alvis* [1963] ECR 49, para 1A; Joined Cases 56 and 58-64 *Consten and Grundig v Commission* [1966] ECR 299), "sound" (Joined Cases 1-57 and 14-57 *Société des usines à tubes de la Sarre* [1957] ECR 105, para 113) or "proper" (Case C-255/90 P *Burban* [1992] ECR I-2253, paras 7 and 12; Case T-167/94 *Nölle v Council and Commission* [1995] ECR II-2589, para 53) administration have been referred to by the Union judge since its very first decisions in administrative matters.

For part of the legal doctrine, the declaration of the right to good administration in Article 41 of the Charter of Fundamental Rights of the European Union (hereafter the "CFR" or the "Charter") constitutes in reality the culmination of an evolutionary process which dates back several decades (See e.g. Theodore Fortsakis, 'Principles Governing Good Administration' (2005) 11 European Public law, pp. 207-217, at p. 211 and Jean Paul Jacqué, 'Le Droit à une Bonne Administration dans la Charte des Droits Fondamentaux de l'Union Européenne' (2011) 137-138 Revue Française d'Administration Publique, pp. 79-83, at pp.79-80).

9

## 3. Praetorial development of the principle of good administration

Although the principle of good administration has been present in the discours of the Court of Justice of the EU since its very early case-law in administrative proceedings *(the very first reference to this principle was made by the Court of Justice already in 1957 in Case Société des usines à tubes de la Sarre (Joined Cases 1-57; ECR 105, para 113)*, it has not acquired so easily the dignity of a General Principle of EU Law status.

- Initial praetorian reluctance as regards the legal strength of the principle of good administration :

- See e.g. the *Kuhner* Case, where the CJ dismounted the relevance of this principle in relation with the rights of the defence, by asserting that: "this case cannot be said to concern the rights of the defense but *only* a general principle of good administration" (Joined cases 33/79 and 75/79*, Kuhner/Commission* [1980] ECR 1677, para 25; a similar assertion was made by the CJ in Case 125/80 *Arning v Commission* [1981] ECR 2539, paras 16-17).

10

# 3. Praetorial development of the principle of good administration

- To this adds the terminological fluctuation in relation to Good Administration :

Disparate references have been made by the EU Courts to the notion of Good Administrations as:

- an "obligation" (see e.g. Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, paras 245 and 279)
- a "duty" (see e.g. Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, para 281; Case T-36/06 *Bundesverband deutscher Banken v Commission* [2010] ECR II-537, para 126; Case T-30/03 RENV. *3F v Commission* (GC, 27 Septembre 2011), paras 53 and 54)
- a "rule" (see e.g. Case 13-69 *van Eick v Commission* [1970] ECR 3, para 4; Case C-213/99 *de Andrade v Director da Alfândega de Leixões* [2000] ECR I-11083, Opinion of AG Fennelly, para 34; Case F-5/14 R *CX v Commission* (CST, 13 February 2014), para 36)
- a "requirement" (see e.g. Case C-266/97 P *VBA v VGB and Others* [2000] ECR I-2135, para 71; Case C-362/09 P *AthinaïkiTechniki v Commission* (CJEU, 16 December 2010), para 70; Case F-42/10 *Skareby v Commission* (CST, 16 May 2012), para 45)
- a "reason" (see e.g. Case C-39/97 *Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* [1998] ECR I-5507, para 21; Case F-91/10 *AK v Commission* (CST, 13 March 2013), para 49)
- a "measure" (see e.g. Case C-354/87 *Weddel & Co. BV v Commission* [1990] ECR I-3847, para 2 of the Summary)
- a "guarantee" (see e.g. Case T-436/09 *Dufour v ECB* (GC, 26 October 2011), para 30. See also Case T-326/07 *Cheminova and Others v Commission* [2009] ECR II-2685, para 224)
- an "interest" (see e.g. Case T-60/05 *UFEX and Others v Commission* [2007] ECR II-3397, paras 66-67 and 78; in various instances, the EU Courts employed the expression "in the interests of sound administration of the fundamental rules of the Treaty" – See e.g. Case C-367/95 P *Commission v Sytraval* [1998] ECR I-1719, para 62; Joined Cases T-254/00, T-270/00 and T/277/00 *Hotel Cipriani and Others v Commission* [2008] ECR II-3269, para 210; Case C-290/07 P *Commission v Scott* [2010] ECR I-7763, para 90 and Joined Cases T-29/10 and T-33/10 *Netherlands and ING Groep v Commission* (GC, 2 March 2012) , para 108)
- a "principle" (see e.g. Case T-83/91 *Tetra Pak International v Commission* [1994] ECR II-755, paras 24-31).

11

# 3. Praetorial development of the principle of good administration

Various steps have been taken by the EU Courts in the direction of elevating Good Administration to the GPL status :

- Joint praetorian references to Good Administration in relation to other clear-cut GPL, such as:

- the principle of "legality" (See e.g. Case T-73/95 *Oliveira SA v Commission* [1997] ECR II-0381, para 32)
- the principle of "legal certainty" (See e.g. Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health* [20050] ECR I-6451, para 72; Joined Cases C-474/09 P to C-476/09 P *Diputación Foralde de Vizcaya and Others v Commission* [2011] ECR I-113)
- the "equality of treatment" requirement (See e.g. Case T-26/91 *Kupka-Floridi v Economic and Social Committee* [1992] ECR II-1615, para 44; Case C-51/10 P *Agencja Wydawnicza Technopol v OHMI* [2011] ECR I-1541, para 73)
- the principle of "loyal cooperation" *(See e.g.* Case T-226/04 *Italy v Commission* [2006] ECR II-29, paras 35-40; Case T-121/08 *PC-Ware Information Technologies v Commission* [2010] ECR II-1541; T-63/06 *Evropaïki Dynamiki v Commission* [2010] ECR II-177)
- the principle of "proportionality" *(See e.g.* Joined Cases T-125/96 and T-152/96 *Boehringer v Council and Commission* [1999] ECR II-3427)
- the principle of "transparency" *(*See e.g. Case T-481/08 *Alisei v Commission* [2010] ECR II-117, paras 93-96; Case T-340/07 *Evropaïki Dynamiki v Commission* [2010] ECR II-16, para 124)
- the principle of an "effective remedy" *(See e.g.* Case C-362/09 P *AthinaïkiTechniki v Commission* (CJEU, 16 December 2010), para 68)
- the principles of "fair legal process and the rule of law" *(*See e.g. Joined Cases C-361/02 and C-362/02 *Tsapalos and Diamantakis* [2004] ECR I-6405, Opinion of AG Kokott, para 30).

12

## 3. Praetorial development of the principle of good administration

- The GPL status of Good Administration may implicitely stem from the wide-reaching consequences that had been triggered by the Union judge from the violation of this principle :

Although the predominant rule implies that the breach of the principle of good administration gives rise to damages (see e.g. Case 179/82 *Lucchini v Commission* [1983] ECR 3083, para 27), it remains nonetheless that, in some instances, its violation was interpreted by the Union judge as an independent source of invalidity of an EU legislative act (See e.g. *GLS* case, where the Court of Justice declared the contested Regulation invalid for breach of the principle of care – Case C-338/10 *GLS* (CJEU 22 March 2012), paras 34-36; see also *Timex v Council and Commission* case, where the Court annulled an anti-dumping Regulation for breach of an essential procedural requirement, insofar as the complainant's access to information had not been duly provided for - Case 264/82 *Timex v Council and Commission* [1985] ECR 849), or as the legal basis for the annulment of a decision (See e.g. *Toth v Commission* case, where the Civil Service Tribunal annulled the contested Commission's decision on the sole ground of the violation of the principle of good administration - Case F-107/05 *Toth v Commission* (CST, 30 September 2010). Similarly, in *Estonia v Commission*, the General Court annulled the contested decision as the result of the Commission's infringement of the principle of sound administration – Case T-263/07 *Estonia v Commission* [2009] ECR II-3463, paras 111-113).

13

## 3. Praetorial development of the principle of good administration

- Explicit praetorian references to the GPL status of Good Administration:

Some early references to this status made by the Advocates General – see e.g. the Opinion of AG Van Gerven in *Fediol v Commission,* where he referred to "the general principles of law, in particular principles of sound administration (…)" (Case C-70/87 *Fediol v Commission* [1989] ECR 1781, Opinion of AG Van Gerven, para 19).

Consistent references to the GPL status of good administration in recent case-law and AG Opinions – see e.g. Case C-290/07 P *Commission v Scott* [2010] ECR I-7763, Opinion of AG Mengozzi, para 60; Case T-481/08 *Alisei v Commission* [2010] ECR II-117, para 95; Case T-179/06 *Commission v Onderzoek en Advies* [2009] ECR II-64, para 118; Case C-277/11 *MM* (CJEU, 26 April 2012), paras 81-82; Case C-604/12 *H.N.* (CJEU, 8 May 2014), paras 49-50; Joined Cases C-141/12 and C-372/12 *YS and M & S* (CJEU, 17 July 2014), para 68.

Consequently, there is no doubt remaining that the principle of sound administration has been acknowledged as "one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States" - See e.g. Case T-198/01 R *Technische Glaswerke Ilmenau* v *Commission* [2002] ECR II-2153, para 85; Joined Cases T-254/00, T-270/00 and T/277/00 *Hotel Cipriani and Others v Commission* [2008] ECR II-3269, para 210; Case T-54/99 *max.mobil* [2002] ECR II-313, para 48; Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Others v Commission* [2003] ECR II-435, para 167.

14

## 4. Good administration as a fundamental right provided for in Article 41 CFR

**Article 41 CFR - entitled "Right to good administration"** - reads as follows:

"1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

c) the obligation of the administration to give reasons for its decisions.

3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language".

15

## 5. Content of the right to good administration

Good administration is not an autonomous notion; it does not have an independent judicial life on its own, but merely exists via its sub-components.

The only possible way to "define" the right to good administration in the EU legal order is to refer to its content, which is to say the list of its constituting elements that are now listed in Article 41 CFR. Thereby, the right to good administration is a "framework concept" – a kind of "collective term for some or all the principles of administrative law" (See in this regard Case C-308/07 P *Gorostiaga Atxalandabaso v Parliament* [2009] ECR I-1059, Opinion of AG Trstenjak, para 89).

Individuals do not have a right to good administration which is capable of being judicially enforceable *per se.* Indeed, good administration is in itself too abstract and too large for practical use.

16

## 5. Content of the right to good administration

Good administration reaches significance and becomes enforceable in legal proceedings only when it is associated with at least one of its sub-components.

See e.g. Case of 16 December 2015, Chart/SEAE, T-138/14, EU:T:2015:981, point 113, which states as follows : “The principle of sound administration, where it constitutes the expression of a specific right such as the right to have one’s affairs handled impartially, fairly and within a reasonable time, as provided for in Article 41 of the Charter of Fundamental Rights, must be regarded as a rule of EU law whose purpose is to confer rights on individuals”.

In other words, for it to be of use, i.e. capable of serving as a legal basis that would enable users to obtain effective judicial protection, any reference to this general principle needs to be specific, indicating the precise rule derived from itself that has been infringed in a given case.

17

## 5. Content of the right to good administration

**Obs**: by stating that the right to good administration “includes” the specific rights inserted therein, Article 41 CFR enumerates those rights in a non-exhaustive manner, implying that other procedural guarantees may be added under the “umbrella” of good administration. Nevertheless, in spite of this possible broad interpretation implied by the wording of the Charter, the EU Courts took a more restrictive approach, by limiting the content of the principle of good administration only to the rights which are explicitly listed in Article 41 CFR.

A median solution was reached in the benchmark *Tillack* decision, where the General Court solemnly argued that: “the principle of sound administration (…) does not, in itself, confer rights upon individuals (…), except where it constitutes the expression of specific rights such as the right to have affairs handled impartially, fairly and within a reasonable time, the right to be heard, the right to have access to files, or the obligation to give reasons for decisions, for the purposes of Article 41 of the Charter (…)” (Case T-193/04 *Hans-Martin Tillack v Commission* [2006] ECR II-3995, para 127).

18

## 5. Content of the right to good administration

Such a restrictive interpretation may be justified by the fact that the vast potential of good administration stemming from its "catch-all" nature encounters the risk of becoming the victim of its own success. An overuse of this "multifunctional weapon" and potential strategic tool of litigants in administrative proceedings may lead to it finally being used simply as an empty slogan, applicable everywhere and nowhere. Moreover, this limitation may also be due to the fact that too long a list of rights encompassed by the right to good administration would be uneasily understood and dealt with by EU citizens; good administration would thereby run the risk of losing all practical meaning.

19

## 6. The scope of protection of good administration as a GPL and as a CFR right

Good administration, as it stands today, is both a GPL and a CFR right.

**Obs**: The test case of good administration highlights that, even in relation to what might appear to be the same right, there are considerable differences as regards the "personal", "material" and "institutional" scopes of protection, according to whether it is interpreted as a GPL or as a Charter's right. The scope of protection of the right to good administration, such as it is provided for in Article 41 of the Charter is far more limited than the protection which has commonly been provided by the EU Courts under the GPL status of the notion. This is very problematic from the viewpoint of the rule of law in that, the eventual prevalence of the Charter over the GPL vector of protection implies an encroachment upon the jurisprudential "acquis", leading therefore to a regression within the protection of fundamental rights in the EU. Moreover, the unclear coexistence of these two sources is, to a certain extent, in breach of the principle of legal certainty. Vastly different outcomes are likely to arise, according to whether good administration is interpreted as a Charter's right or as a GPL, the protection of individuals being therefore dependent on the content and scope of protection of the source which is held to prevail in a given case. There is therefore an imperative need of a continuing reliance on the GPL vector of protection.

20

## a. The « personal » scope of protection of good administration as a GPL and as a CFR right

The personal scope of protection of the right to good administration differs considerably according to whether it is interpreted as a fundamental right codified in the Charter or as a fundamental right protected via the vector of GPL.

The jurisprudence highlights that as a general principle of EU law, good administration confers a greater personal protection than the overwhelming majority of other fundamental rights in the EU legal order and that in two respects. First, the EU Courts have commonly assessed the principle of good administration in a broad way, as being addressed to "every person" - regardless of any nationality or residence criterion. Second, they have sometimes interpreted this principle as a privileged tool for the protection of interested third parties in administrative proceedings (See e.g. Case C-83/09 *Commission v Kronoply and Kronotex* [2011] ECR I-4441).

The personal scope of good administration as a Charter right is likely to be interpreted as being more limited in both these particular respects. This is mainly due to the "individualistic" formulation of Article 41 CFR - which provides for an "individual measure", "which would affect him or her adversely", "access to his or her file"; these expressions imply that the right to good administration for the purposes of Article 41 CFR is limited to the direct addressees of administrative measures.

21

## b. The « material » scope of protection of good administration as a GPL and as a CFR right

The material scope of protection of good administration is considerably different according to whether one analyses it in the perspective of the right to good administration for the purposes of Article 41 CFR or whether it is looked at from the standpoint of its protection as provided by the EU Courts under the GPL status.

On the one hand, the wording of Article 41 CFR indicates that the material scope of good administration is intended to cover single case decision-making, implicitly excluding the general measures from its field of application. This assumption specifically arises from the examples given in Article 41(2) CFR which refer to the requirements of an "individual measure", "which would affect him or her adversely", the right of access to "his or her file" and the obligation to give reasons for "administrative decisions". These restrictive formulations – which imply that the Charter's right to good administration is confined to single-case administrative procedures – have led the Court of Justice to explicitly acknowledge that: "Article 41 of the Charter (…) does not cover the process of enacting measures of general application" (See e.g. Case C-221/09 *AJD Tuna* [2011] ECR I-1655, para 49; Case from 12 Juin 2015, Health Food Manufacturers' Association e.a./Commission, T-296/12, EU:T:2015:375, points 97-99).

On the other hand, the material scope of good administration understood as a GPL, does not appear to be limited to single case decision-making. The EU Courts have acknowledged the applicability of the general principle of good administration in the context of executive measures of general application (See e.g. Case C-248/99 P *Monsanto* [2002] ECR I-1, paras 91-93; Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health* [20050] ECR I-6451, para 82).

22

## c. The « institutional » scope of protection of good administration as a GPL and as a CFR right

A comparative view of the "institutional" scope of good administration at the confluence of its various sources of protection, highlights that vastly different outcomes are likely to arise according to whether it is interpreted as a Charter right or as a GPL.

Whilst the general principle of good administration has been addressed by the EU Courts to the administrative authorities of the Union and to the Member States when acting within the scope of EU law, its codification in the Charter has led to the limitation of its outreach merely to the "institutions, bodies, offices and agencies of the Union", no reference whatsoever having been made to the EU Member States. Even more limited are the formulations regarding damages and language rights (Article 41(3) and (4) CFR) which merely mention the "institutions" of the Union.

23

## c. The « institutional » scope of protection of good administration as a GPL and as a CFR right

**The absence of the EU Member States from the institutional scope of application of Article 41 CFR and the more extensive protection provided under the GPL status of the notion** :

No explicit reference is made in Article 41 CFR to the EU Member States, not even when they are "implementing Union law" for the purposes of Article 51(1) CFR. The former disposition appears therefore to stay below the threshold set up by the latter, being likely to be interpreted as a *lex specialis* of the otherwise horizontal provision stated for in Article 51 CFR.

**Obs**: This far-reaching limitation of the institutional scope of Article 41 CFR is problematic if one has in view that by far the greatest part of EU law is implemented by the public authorities of the Member States. This is all the more problematic in the real-life context of the ever developing EU "integrated"/"composite"/"multi-level" administrative system, where the national and EU ad ministrative systems are nested in a way which generates a complex "spider web".

24

## c. The « institutional » scope of protection of good administration as a GPL and as a CFR right

Nonetheless, this restrictive interpretation is not the result of a mere oblivion of the authors of the Charter ; it is confirmed by the drafting process of Article 41 CFR (the drafting process of the Charter reveals a general preference of the EU Member States to keep the human rights role of the EU within certain limits) and it may also be backed up by an overall reading of the EU Treaties' relevant dispositions in administrative matters (see Article 298 TFEU which provides for a legal basis for the adoption of an administrative law which "must be binding on the EU institutions, bodies, offices and agencies". Reference to the EU Member States is also lacking in Article 228 TFEU, empowering the European Ombudsman to receive complaints concerning instances of maladministration in the activities of the Union).

25

## c. The « institutional » scope of protection of good administration as a GPL and as a CFR right

**The jurisprudential approach as regards the « institutional » scope of protection of good administration:**

Being aware of the national skepticisms and political oppositions as regards the codification of the right to good administration in the Charter, the EU Courts did not seek to overstretch the institutional scope of Article 41 CFR. They have held, on a consistent basis, that : "Article 41 CFR is addressed, according to its wording, "not to the Member States but solely to the EU institutions and bodies" (see e.g. Case C-482/10 Cicala [2011] ECR I-14139, paras 28-29; Joined Cases C-141/12 and C-372/12 YS and M & S (CJEU, 17 July 2014), para 67; Case C-166/13 Mukarubega (CJEU, 5 November 2014), para 44; Case C-249/13 Boudjlida (CJEU, 11/12/2014), para 32. See also Case C-276/12 Sabou (CJEU, 22 October 2013), Opinion of AG Kokott, para 32; Joined Cases C-141/12 and C-372/12 YS and M & S (CJEU, 17 July 2014) , Opinion of AG Sharpston, para 89; Case C-166/13 *Mukarubega* (CJEU, 5 November 2014), Opinion of AG Wathelet, para 55; Case C-249/13 *Boudjlida* (CJEU, 11 December 2014), Opinion of AG Wathelet, para 46).

26

## c. The « institutional » scope of protection of good administration as a GPL and as a CFR right

Nevertheless, in order to ensure a consistent application of good administration with the one provided under the GPL status of the notion (as a GPL, good administration was also addressed to the Member States when acting within the scope of EU law – see e.g. Case C-428/05 *Laub* [2007] ECR I5069, para 25; Case C392/08 *Commission v Spain* [2010] ECR I2537, Opinion of AG Kokott, para 16; Case C-310/04 *Spain v Council* [2006] ECR I-7285, Opinion of AG Sharpston, para 78), the Court of Justice has stressed that the right to good administration enshrined in Article 41 of the Charter "reflects a general principle of EU law. Accordingly, where in the main proceedings, a Member State implements EU law, the requirements pertaining to the right to good administration (…) are applicable in a procedure (…) which is conducted by the competent national authorities" (See e.g. Case C-604/12 *H.N.* (CJEU, 8 May 2014), paras 49-50; Joined Cases C-141/12 and C-372/12 *YS and M & S* (CJEU, 17 July 2014), para 68).

See also the Opinion of Advocate General Bot in *MM,* where he stressed that: "Observance of that right [right to good administration in its "right to be heard" aspect] is required not only of the EU institutions, by virtue of Article 41(2)(a) of the Charter, but also – because it constitutes a general principle of EU law – of the authorities of each of the Member States when they adopt decisions falling within the scope of EU law, even when the applicable legislation does not expressly provide for such a procedural requirement" (Case C277/11 *MM* (CJEU, 26 April 2012), Opinion of AG Bot, para 32.).

27

## c. The « institutional » scope of protection of good administration as a GPL and as a CFR right

**The inconsistent application of the « institutional » scope of protection of good administration in the Romanian legal order** :

On the one hand, certain national courts, among which the Romanian Constitutional Court, have consistently found inadmissible the applicants' pleas relying on Article 41 CFR, by stressing that this Charter disposition is merely addressed, according to its wording, not to the Member States, but solely to the institutions, bodies, offices and agencies of the Union (in this regard, see e.g. the Romanian Constitutional Court's decision nr. 12/2013; decision nr 394/2013; see also the Constitutional Court's decision nr 80/2014).

On the other hand, the Supreme Court of Romania ( "Inalta Curte de Casatie si Justitie") and the overwhelming majority of the other domestic courts have interpreted the institutional scope of Article 41 CFR in a broader fashion, by also addressing this disposition to the Member States when they are implementing EU law for the purposes of Article 51(1) CFR and more broadly when they are acting within the scope of EU law (see e.g. the Romanian Supreme Court's decisions nr 1754/2010; 4681/2010; 2830/2012; 772/2013 – to name but a few examples). In the same line of reasoning, see e.g. the approach taken by the Court of Appeal Timisoara in the recent decision nr 72, from 12 January 2016 and decision nr 52 of the Tribunal of Iasi, from 2 February 2016.

28

## 7. Various functions of the right to good administration

**a. To ensure the « judicialisation » of the administration** :

A parallel reading of the right to good administration as provided for in the Charter and of the dispositions governing the right to effective judicial protection (Article 47 CFR, Articles 6 and 13 ECHR) highlights the fact that the content of the former principle mirrors the sub-elements of the latter. This led Lord Millet to argue that: "the right to good administration is analogous to the right to a fair trial guaranteed by Art 6 ECHR in providing an umbrella for a non-exhaustive list of procedural guarantees" (Lord Millett, 'The Right to Good Administration in European law' (2002) Public Law, pp. 309-322, at p. 318).

It appears thereby that the right to good administration tends to assimilate individuals' guarantees during the administrative procedures to those enjoyed in judicial proceedings, leading to a sort of "judicialisation" of the administration. Such an approach is consistent with the reality of the EU Administration, where various administrative authorities more than often exercise powers which are clearly related to those carried out by courts (It is common knowledge that the Commission concentrates prosecution, case-handling and decision-making powers. Furthermore, some Agencies of the EU have genuine decision-making powers. E.g. the Office for Harmonisation in the Internal Market (OHIM) has been set up to decide on applications for the registration of EU trade marks and EU designs. OHIM trade mark cases are entirely decided by the Agency, although they can further be reviewed by the General Court and the Court of Justice under appeal. Similarly, the European Medicines Agency was given the task of delivering scientific opinions on applications for the authorization of pharmaceuticals. The final decision is taken by the Commission. The Agency's opinion is not binding, but if the Commission wants to deviate from a scientifically reason decision delivered by the Agency, it needs sufficient scientific expertise to argue for that -See e.g. Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3305).

29

## 7. Various functions of the right to good administration

**b. Good administration as a counterweight to the discretionary powers of the administration: administrative efficiency versus individual's procedural protection:**

Good administration has a dual purpose which should ideally be concomitantly complied with, namely to protect individuals' procedural rights in administrative proceedings and to ensure the effectiveness of the administration. The latter objective is to be fulfilled by the EU administrative authorities - most often the Commission - which, wherever faced with complex economic or technical assessments, dispose of large discretionary powers in the decision-making process.

30

## 7. Various functions of the right to good administration

A balance between these two rationales of good administration appears to have been reached in the benchmark *TUM* ruling, where the Court of Justice solemnly argued that: "since an administrative procedure entailing complex technical evaluations is involved, the Commission must have a power of appraisal in order to be able to fulfil its tasks. However, where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present" (Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] ECR I-5469, paras 13 and 14. For further applications of this *TUM* rationale, see Case T-285/03 *Agraz and Others v Commission* [2008] ECR II-285, paras 49 and 61; Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589, para 73 et seq).

This formulation clearly indicates that the principle of good administration represents a counterweight to the discretionary powers of the Commission.

31

## 7. Various functions of the right to good administration

**c. Good administration as a « ticket » for individuals' procedural protection in "composite" administrative proceedings :**

The "composite" nature of the right to good administration - by the strength stemming from the interaction of its sub-elements - renders this "umbrella" right capable of ensuring the protection of individuals' procedural rights within the "integrated" administrative system - where decisions are taken with input from various interlocutors from both national and EU levels, each using different procedural rules.

32

# 8. Conclusions

Imperative need of a continuing reliance on the General Principle of Good Administration in spite of the explicit codification of this right in the Charter of Fundamental Rights of the EU - which is commonly considered as the "Bill of rights" of the EU.

The particular importance and vast potential of the right to good administration for the protection of individuals in administrative matters and more particularly in "composite" administrative proceedings leads to its legitimate qualification as "the cornerstone of modern administrative law" and the main "pillar of the EU integrated administrative system".

33

## 9. Some bibliographic references on the protection of the right to good administration in the EU legal order

**Books**:


- Emilie Chevalier, *Bonne Administration et Union Européenne* (Administrative Law Collection 16, Bruxelles, Bruylant 2014), (also PhD thesis – University Limoges, 2010), pp. 1-536;
- Bucura C. Mihaescu-Evans, "The right to good administration at the crossroads of the various sources of fundamental rights in the EU integrated administrative system", Nomos Publishing, October 2015, pp. 1-573 ;
- Hanns Peter Nehl*, Principles of Administrative Procedure in EC Law* (Oxford, Hart Publishing 1999), pp. 1-214;
- Jill Wakefield, *The Right to Good Administration* (Alphen aan den Rijn, Kluwer Law International ed., European Monographs 2007), pp.1-285.


34

## 9. Some bibliographic references on the protection of the right to good administration in the EU legal order

**Articles:**


- 'Paul Craig, 'Article 41' in (Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward eds) *The EU Charter of Fundamental Rights: A Commentary* (Oxford and Portland, Oregon, Hart Publishing 2014), pp. 1069-1098;
- Theodore Fortsakis, 'Principles Governing Good Administration' (2005) 11 European Public law, pp. 207-217, at p. 207;
- Bucura C. Mihaescu-Evans and Herwig Hofmann, "The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of Law – Good Administration as the Test-Case", European Constitutional Law Review - Cambridge Journals Online, April 2013, pp. 73-101 ;
- Hanns Peter Nehl, 'Good Administration as Procedural Right and/or General Principle?' in H.C.H Hofmann and A. H. Türk (eds), *Legal Challenges in EU Administrative Law* (Cheltenham, Edward Elgar Publishing 2009), pp. 322-351;
- Denys Simon, 'Le Principe de « Bonne Administration » ou la « Bonne Gouvernance » Concrète' in Apogée (eds), *Le Droit de l'Union Européenne en Principes: Liber Amicorum en l'Honneur de Jean Raux* (Rennes 2006), pp.155-176;
- Jacques Ziller, 'Droit à une Bonne Administration' (2007) Jurisclasseur Libertés, Fasc. 1040, pp. 1-28


35

## Thank you very much for your attention!

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36

# Case study on the right to good administration

**C-199/17 M.X. *v* Minister for Justice, Bulgaria**

(Request for a preliminary ruling — Visas, asylum, immigration and other policies related to free movement of persons — Directive 2008/115/EC – Minimum standards on procedures in Member States for granting or withdrawing refugee status – Procedural autonomy of the Member States – Principle of respect for the rights of the defence — Right of a third-country national to be heard before the adoption of a decision liable to affect her interests – Right to good administration — Charter of Fundamental Rights of the European Union — Article 41 – General Principle of Good Administration)

**The dispute in the main proceedings and the question referred for a preliminary ruling:**

M. X. is a Somalian national who entered the Bulgarian territory with a study visa on 1st October 2013, where he carried out research work, within a PhD program, on the topic "Death penalty on ground of sexual orientation in countries with anti-homosexual laws". During his university career in Bulgaria, he got integrated and had very good relations with his colleagues.

A short time after the expiry of his visa, in January 2017, M. X. applied for asylum in Bulgaria, by submitting an application to the Bulgarian Refugee Applications Office (here-after 'BRAF') – Office in charge of submitting recommendations to the Minister of Justice as to whether a refugee applicant should or should not be granted refugee status.

In support of his application, M. X. submits that, if he were to return to his country of origin, he would run the risk of being prosecuted before a military court for having previously made public propaganda on homosexuality. He also mentions that since he left the Somalian territory, some of his friends who were also involved in that propaganda were convicted with the death penalty. Moreover, M. X provided BRAF with some documents attesting that he was involved in such propaganda in his country of origin.

On 30 March 2017, his application for asylum was rejected by the Bulgarian Minister of Justice, following the recommendation submitted by BRAF on 19 March 2017, on the ground that his claims relating to his prosecution in Somalia were found not to be credible.

M. X. lodged an application for annulment of the Minister's negative decision before the Bulgarian Refugees Appeal Tribunal. He claimed that the procedure leading to that decision was unlawful because he had not, in the course of that procedure, been given the right properly to be heard – in breach of Article 41 of the Charter of Fundamental Rights of the European Union (here-after 'CFR'). The applicant also contests the fact that he was not given access to his file, access that he had requested in order to find out the motivation for refusal provided by BRAF, on the basis of which the Minister of Justice adopted the contested decision.

Being aware of the fact that Article 41 CFR only applies to the institutions, bodies and offices of the European Union and not to the Member States, the Bulgarian Refugees Appeal Tribunal initially sought to reject the application of M. X.

However, the Bulgarian Refugees Appeal Tribunal states that it appears from a decision given in 2014 by the Irish Court of Appeal that, in Ireland, when the competent authority intends to reject an asylum application, the applicant is informed of that before the final decision is adopted. Moreover, he is notified the reasons for the rejection and has an opportunity to make known his views on that motivation.

In those circumstances, the Bulgarian Refugees Appeal Tribunal decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

"In a case where an applicant seeks asylum protection, does Article 41 CFR impose an obligation upon the administrative authorities of the EU Member States to ensure a minimum level of procedural protection of the applicant?"

# FREEDOM OF MOVEMENT AND RESIDENCE

Raluca Dimitriu

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## EU free movement system

- Art. 20, 21 TFEU
- Art. 45 TFEU (workers)
- Charter of Fundamental Rights of the European Union - art. 45
- Directive 38/2004 (The EU citizens ' Directive)

The free movement system: EU nationals + their family members who fulfill the conditions within EU law can move and reside freely within the EU

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# EU free movement system

**Member States cannot:**

- add additional conditions,
- impose quotas,
- apply the rules on free movement discriminatory

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# The freedom of movement and residence

- belongs to the socio-political rights
- It is the only right that refers exclusively to citizens …

… but with a possible extension:

" Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State" - Art. 45 (2) - EU Charter of Fundamental Rights

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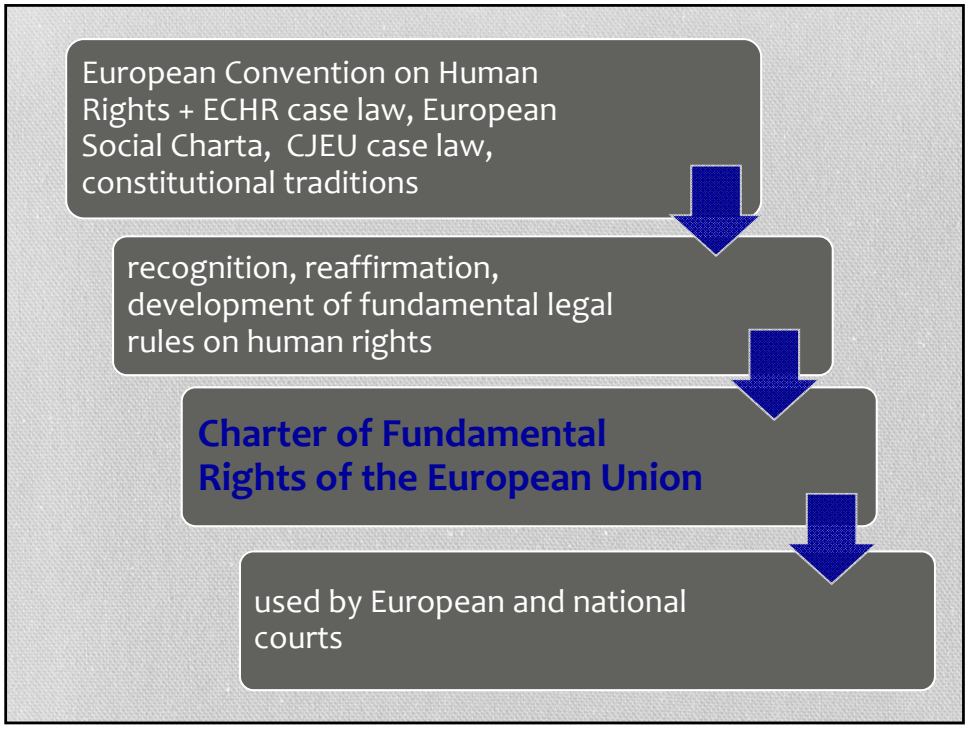


## Who can exercise the freedom of movement?

Directive 2004/38:

- workers,
- family members of workers self-sufficient,
- students (who must declare self-sufficiency)
- jobseekers (but only limited rights)

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## Who can exercise the freedom of movement?

- Union citizens who move to or reside in a MS other than that of which they are a national, and to their family members who accompany or join them.
- The concept of '**family members**' is defined by the Directive. It may also include the registered partner.
- 'The directive is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a MS of which he is a national and who is also a national of another MS' (*Shirley McCarty v. Secretary of State for the Home Department Case - C-434/09*)

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## Who cannot exercise the freedom of movement?

**Limits:**

(1) The Treaty allows restrictions to be placed on the right of free movement and residence on grounds of:
- public policy,
- public security or
- public health.

These grounds shall not be invoked to serve **economic ends**.

The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

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## Who cannot exercise the freedom of movement?

**The principle of proportionality -** to take account of the degree of integration of the persons concerned, the length of their residence in the host MS, their age, state of health, family and economic situation and the links with their country of origin.

**(2)** Free movement provisions shall not apply to employment in the public service (Art. 45 (4) din TFEU) – 'nationally sensitive'

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## Who cannot exercise the freedom of movement?

Directive 2004/38 (Art. 35): **Abuse of rights**:

MS may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud. E.g.: marriages of convenience ('sham marriage').

Any such measure shall be proportionate and subject to notification of decisions and procedural safeguards

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## Free movement rights are not absolute ➔ guiding principles CJEU case law to prevent abuse

- *Dano Case* (C -333/13): Someone who moved for the only purpose of claiming benefits would not have a right to reside in a member state under EU law
- *Alimanovic Case* (C-67/14): EU nationals do not have entitlement to certain 'special non-contributory cash benefits', which also constitute 'social assistance' during their first three months of residence in a host MS although those benefits are granted to nationals of the MS concerned who are in the same situation.

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## Free movement rights are not absolute ➔ guiding principles CJEU case law to prevent abuse

- *Commission v UK Case* (C-308/14): "it is clear from the Court's case-law that the need to protect the finances of the host MS justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted in particular to persons from other MS who are **not economically active**, as such grant could have consequences for the overall level of assistance which may be accorded by that State".

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## Non-discrimination

- All Union citizens and their family members residing in a MS enjoy equal treatment with nationals in areas covered by the Treaty.
- Exemption: the host MS may not confer entitlement to social assistance during the first three months of residence
- Exemption: the host MS may not grant, prior to acquisition of the right of permanent residence, maintenance aid for studies, to persons other than workers, self-employed persons, persons who retain such status and members of their families.

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## Protection against expulsion - Directive 2004/38

- As long as the beneficiaries of the right of residence do not become an **unreasonable burden** on the social assistance system of the host MS they should not be expelled. An expulsion measure should not be the automatic consequence of recourse to the social assistance system.
- The host MS should examine whether it is a case of temporary difficulties and take into account:
  - the duration of residence,
  - the personal circumstances and
  - the amount of aid granted.
- In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers.

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## Protection against expulsion - Directive 2004/38

- Art. 28 (2) : The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious **grounds of public policy or public security**.
- Art. 28 (3): An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they have resided in the host Member State for **the previous ten years** or are a minor, except if the expulsion is necessary for the best interests of the child.

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## Protection against expulsion - CJEU

**Land Baden-Württemberg v Panagiotis Tsakouridis Case (C-145/09):**

- In order to determine whether a Union citizen has resided in the host MS for the 10 years preceding the expulsion decision, all the relevant factors must be taken into account in each individual case, e.g. the duration of each period of absence from the host Member State, the cumulative duration and the frequency of those absences, and the reasons why the person concerned left the host Member State.

- Art. 28(2) of Directive 2004/38 must be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is covered by the concept of 'serious grounds of public policy or public security.

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# Final thoughts

- EU = a space where national borders have increasingly lost their significance
- European citizens are and should be able to move freely as they would within the borders of a single country
- However, certain limits have been imposed by European legislation and crystalized in time by CJEU case law


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## I. The scope of Directive 2004/38

Article 7 – Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States:

*1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:*

*(a) are **workers** or self-employed persons in the host Member State; or*

*(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or*

*(c)*

- *are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and*
- *have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or*

*(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).*

*2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph l(a), (b) or (c).*

*3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:*

*(a) he/she is temporarily unable to work as the result of an illness or accident;*

*(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;*

*(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;*

*(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.*

*4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.*

**Question**

Please, comment on the scope of Article 7. Especially, look at what the concept of worker, showing if it should include:

| | | Yes/No |
|---|---|---|
| 1. | job seekers | |
| 2. | a women who have ceased employment on becoming pregnant but who intend to resume work at some point after the birth[1] | |
| 3. | those undergoing training in their own field[2] | |
| 4. | sick or injured workers; former workers, now unable to work for medical reasons | |
| 5. | a person whose remuneration does not cover his or her living needs (a person who obtains a remuneration lower than the minimum guaranteed in this sector)[3] | |
| 6. | a former worker who resigned | |
| 7. | a person employed on a fixed-term contract | |
| 8. | a part-time worker | |
| 9. | a trainee teacher who, under the direction and supervision of the school authorities, is undergoing a period of service in preparation for the teaching profession during which he provides services by giving lessons and receives remuneration[4] | |
| 10. | a person performing casual, pure marginal and ancillary activities[5] | |
| 11. | a person who entered the territory of the host Member State with the principal intention of pursuing a course of study, but who eventually performed a remunerated activity[6] | |
| 12. | a researcher preparing a doctoral thesis on the basis of a grant contract, performing his/her activities for a certain period of time under the direction of the public institute and receiving remuneration, in return for those activities[7] | |
| 13. | a person performing services for a given period of time for the benefit and under the direction of another person in return for which he receives a low remuneration, due to the low productivity and the small number of hours worked per week[8] | |

[1] https://eumovement.wordpress.com/2011/12/23/who-is-a-worker/
[2] https://eumovement.wordpress.com/2011/12/23/who-is-a-worker/
[3] D.M. Levin v Staatssecretaris van Justitie. C 53/81
[4] Lawrie-Blum v Land Baden-Württemberg. - C 66/85
[5] M.J.E. Bernini v Minister van Onderwijs en Wetenschappen, C-3/90
[6] L.N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte, C-46/12
[7] Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV., C-94/07
[8] M.J.E. Bernini v Minister van Onderwijs en Wetenschappen, C-3/90

**II. For workers, the freedom of movement is laid down in Article 45 TFEU and it entails:**

- the right to look for a job in another Member State;
- the right to work in another Member State;
- the right to reside there for that purpose;
- the right to remain there;
- the right to equal treatment in respect of access to employment, working conditions and all other advantages which could help to facilitate the worker's integration in the host Member State.

**Questions:**

1. Is there a risk of "brain drain" in certain countries – as a result of free movement of labour? Imagine one or two possible solutions.
2. Is there a risk of "social benefit tourism" – as a result of free movement of labour?
3. One of the arguments used in the Vote Brexit campaign: "Ending free movement means we'll be able to have 'only the [high-skilled] immigrants we want/need"[9]. What do you think about this argument?

**III. According to European Commission[10], examples of discriminatory practices and obstacles to free movement of workers - include:**

- different recruitment conditions for EU nationals
- nationality conditions to access certain posts
- nationality quotas for EU citizens (e.g. in the field of professional sport)
- different working conditions in practice (remuneration, career prospects, grade, etc.)
- access to social advantages (such as study grants) subject to conditions which are more easily met by nationals than by EU citizens (e.g. a residence condition)
- professional experience acquired in other Member States (in particular in the public sector) not properly taken into account
- professional qualifications acquired in other Member States not taken into account or taken into account in a different way.

**Question**

Please, mention if, as a result of your professional experience, you are aware of litigation in your country in respect of one or more of the situations listed above (or other situations of the same kind) and what was the solution.

[9] http://www.independent.co.uk/news/business/news/brexit-immigration-uk-freedom-movement-myths-eu-referendum-theresa-may-amber-rudd-a7393136.html

[10] http://europa.eu/rapid/press-release_MEMO-14-187_en.htm

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16 May 2017

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# Family life and freedom of movement and residence: focus on LGBT rights

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04 May 2017

## Content

- Who is a family member
- Entry and residence of spouses, registered and de factor partners
- The status of non-EU family members
- Family reunification and children of same-sex couples
- Relevant CJEU and ECtHR case law

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## Main Legislation

- Treaty on the Functioning of the EU
  - Article 18: no nationality discrimination
  - Article 21: move and reside freely in the territory of the Member States
  - Article 45 TFEU: free movement of workers
- Citizenship Directive 2004/38/EC
- Family Reunification Directive 2003/86/EC



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## Why are family members covered under the scope of free movement law

- Free movement right of EU citizen, Article 3(1)
  - Internal situation (*Uecker and Jacquet* C-64/96)
  - Returnees (*Surinder Singh* C-370/90, *Eind* C-291/05)
  - Period and Nature of move: (*O&B* C-456/12)
- 2004/38/EC applies to citizen who move
- Article 21(1) TFEU and 2004/38/EC by analogy applies to returners

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## What rights do EU citizens have, including their family members (2004/38/EC)…

- Enter & reside (Art. 4-7) perm. Residency (16(2))
- Retention in case of death or divorce (11 & 12)
- Right to work Art. 23
- Equal Treatment, incl. social assistance, Art. 24

## Other rights outside the scope of 2004/38/EC

- E.g., same social and tax advantages as a national workers (Article 7 Regulation 492/2011)



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## Who is a family member under 2004/38/EC

- Art 2(2)(a): spouse
- Art 2(2)(b): registered partnership, if host MS treats registered partnerships as equivalent to marriage
- Art 2(2)(c): descendants under the age of 21 or dependant (incl. those of the spouse or partner)
- Art 2(2)(d): dependent direct relatives in the ascending line (incl. those of the spouse or partner)

## Other family members, 2004/38/EC

Art. 3(2): MS *shall facilitate* entry and residence of

- (a) other family members who are dependant or members of the household of the EU citizen or where serious health grounds strictly require the personal care of the family member by the EU citizen
- (b) partners with whom the Unions citizen has a durable relationship, duly attested

*Rahman and others* C-83/11





## Who is a family member, continued

- Dependent
  - *Marie-Christine Lebon* 316/85: member of the family who is supported by the worker (factual situation)
  - *Rahman* C-83/11: moment of dependence
- *Metock* C-127/08 (*marriage is marriage?*)
  - All 3rd country nationals, lawfully residence or not
  - To 'lead a normal family life in the host MS' (para 62)
  - Time/Place of marriage irrelevant, but consider *O&B* C-456/12

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## (3rd country national) partners in a same-sex relationship with an EU citizen have the right to

Exist, Entry and reside (Art. 4-7) as

- Spouse (see also Article 4 2003/86/EC)
- Registered partner (MS has choice of law)
- Partner in durable relationship (facilitate only)

Equal treatment (*Reed* C-59/85, *Singh* C-370/90)

- Art. 18 TFEU, Art. 24 2004/38, Art.7 Reg. 492/11



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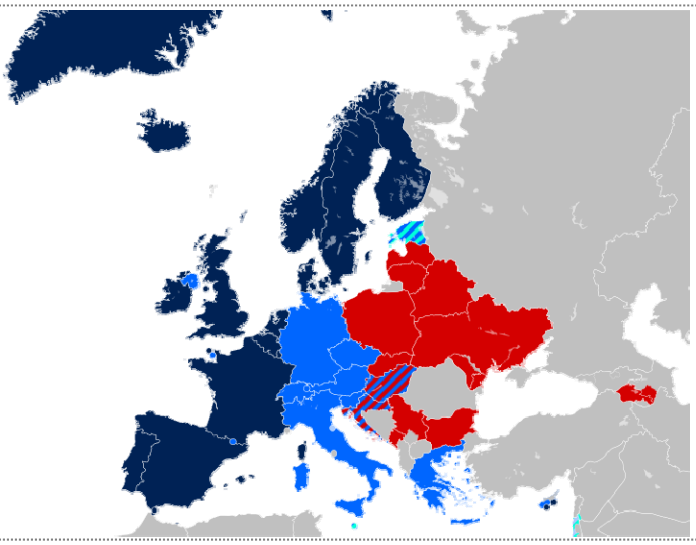

## Member States' solution to the dilemma some examples

- Italy - *Trib. di Reggio Emilia*, ord. 1401/2011, 13 Feb 2012: limiting marriage to a man and a woman goes against both the interpretation of the term 'spouse' found in the EU Directive and the broad meaning given to the rights to marry and to found a family mentioned in Article 9 EU Charter
- Cyprus - *Thadd Correia v The Republic of Cyprus* 2010 : Court refused to recognize marriages between same-sex couples
- Germany - *VG Karlsruhe, 9.9.2004, 2 K 1420/03*: same sex spouse not spouse within the meaning of EU law (now reg. partnership)





## The meaning of spouse

- Textual/Systematic analysis
  - Gender neutral provision
  - Distinction between spouse/registered partnership
  - 2003/86/EC: refers to type of spouses (polygamy) which are not legal
  - EU competence (Article 81 TFEU)
- Historical Analysis
- Teleological analysis
  - Free movement of persons: mutual recognition/choice of law
  - Derogation: Public policy (e.g. national identity, Art 4(2) TEU), justification must not violate fundamental rights (*Carpenter* C-60/00)

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## EU free movement law influences private international law: name cases

- Choice of law: Disadvantage to have different name in home or host state
  - *Garcia Avello* C-148/02
  - *Grunkin and Paul* C- 353/06
- National Identity
  - *Sayn –Wittgenstein* C-208/09 (to achieve equality)
  - *Runevic Vardyn* C-391/09 (minority rights?)



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## Implications of Fundamental Rights

- Article 52(3) EU Charter: meaning and scope of rights
- Equality and Non-discrimination
  - Art 20 and 21 EU Charter, General Principle of EU law, 2000/78/EC on employment discrimination
  - Article 14 (in conjunction with Article 8) ECHR
- Resect for private and family life
  - Article 7 EU-Charter
  - Article 8 ECHR
- Right to Marry
  - Article 9 EU Charter (lack of EU competence, Art 81)
  - Article 12 ECHR (man/woman)

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## CJEU: Equal treatment of same-sex couples

- *Grant* (C-249/96) sex and sexual orientation
- *D & Sweden* (C-249/96) and *W* (F-86/09); civil status and marriage, sexuality disc. (general principle)

## Directive 2000/78/EC:

- *Maruko* (C-267/12) & *Römer* (C-147/08): direct discrimination if sufficient similar situation
- *Hay* (C-267/12): PAC also available to opp.-sex couples
- *Parris* C-443/115: civil status is competence of MS



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## ECHR: discrimination based on sexuality

- ECHR: Decisions (in family matters) based on sexual orientation requires justification of particular "convincing and weighty reasons"
  - Custody decisions
  - Individual adoption

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## ECHR: Recognition of Family life

- *Schalk and Kopf* v Austria (para 94)

*In view of this evolution, the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.*

- *Pajic v Croatia: Cohabitation is not a precondition for family life (para 73)*



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## ECHR: Equal Treatment of unmarried same-sex and opposite-sex couples

- Application of the *Karner* principle (app. no. 40016/98) – equal treatment of same-sex and opp.-sex unmarried couples
  - Gar and Dobois: second parent adoption only possible if couple legally married
  - X and others v Austria : second parent adoption possible for unmarried opp.-sex couples
  - *Pajic v Croatia:* Same immigration conditions for opp. and same-sex unmarried couples

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## ECHR: Positive right to legal recognition?

- Hämäläinen : no right to same-sex marriage
- Vallianatos: civil unions only for opp.-sex couples

Application of *Karner* principle

Para 90 *"same-sex couples would have a particular interest in entering into a civil union since it would afford them, unlike different-sex couples, the sole basis in Greek law on which to have their relationship legally recognized"*



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## ECHR: Positive right to legal recognition? (continued…)

- Oliari: consideration of Article 8 (meaning of 'respect')

Para 185. *"In conclusion, in the absence of a prevailing…interest…, against which to balance the applicants' momentous interests as identified above, and in the light of domestic courts' conclusions on the matter which remained unheeded, the Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions"*

# ECHR: Positive duty to recognition the position of same-sex couples within immigration policies?

- *Pajic v Croatia*

Para 80: *Article 8 does not include a right to settle in a particular country or a right to obtain a residence permit, the State must nevertheless exercise its immigration policies in a manner which is compatible with a foreign national's human rights* (e.g. family life and discrimination)

- *Taddeucci and McCall*: discrimination may also consist of a failure to treat differently persons whose situations are significantly different

*'[…] does nothing more than require Italy to take due account of the existence of a serious and stable same-sex relationship in the specific context of immigration proceedings.'*

# Case Study

Jule Mulder, 16 May 2017, ERA Bucharest

**CASE 1**

Member State A (MS-A) does not provide any legal recognition for same-sex couples and a proposal introducing such a law has recently been rejected by a large majority in parliament. Additionally, the MS-A 's Civil Code prohibits the recognition of same-sex marriages and registered partnerships entered into abroad. The 'traditional understanding' of marriage as being between a man and a woman is not protected by the MS-A's constitution. However a recent petition supported by the Orthodox and Catholic Church and signed by more than 3 Million citizens is calling for a constitutional referendum to introduce such a protection in the constitution.

The claimant (C) is a citizen of MS-A. He married his partner, a US Citizen, in Belgium in 2010. The couple lived in Belgium for one year. They currently live in the USA. C likes to return with his partner to MS-A as he has an exciting job opportunity there. C asked MS-A's immigration authorities for information on the requirements for obtaining a residence permit for his spouse but was told that such a permit would be refused on the ground that the couple's same-sex marriage is not recognised in MS-A and the civil code bans the recognition of same-sex marriages performed abroad. C now considers challenging this in court.

1. Please review the situation under EU law.
2. Variation: Would it make a difference if C and his partner only stayed in Belgium for one month and only to perform the marriage?
3. Variation: Would it make a difference if C and his partner have adopted a child while they lived in the USA. Would the child be allowed to accompany him?

**CASE 2**

Member State-B (MS-B) introduced a new non-martial civil status for opposite-sex and same-sex couples. The registered partnership provides the same duties and rights regarding mutual trust and care similar to marriage. However, registered partners do not have the same pension or inherence rights than married couples and they do not have the right to adopt. Claimant (D) is a citizen of MS-B and entered in a registered partnership with her Canadian female partner.

The couple wants to move from MS-B to Member State-C (MS-C). MS-C also has introduced a registered partnership. The register partnership is only available for same-sex couples and imposes the same rights and duties than marriage, including pension rights, inheritance rights and adoption rights.

1. Does EU require MS-C to recognise D's registered partnership?
2. Variation 1: Would it make a difference if D was indeed in an opposite-sex registered partnership.
3. Variation 2: Would it make a difference if MS-C's registered partnership was only available for opposite-sex couples.