Documentation

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APPLYING THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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Table of contents

Protecting Fundamental Rights: An overview

URÍA MENÉNDEZ

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Dublin, 13 March 2017

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URÍA MENÉNDEZ

1 Fundamental Rights in the EU, a brief history

Fundamental Rights in the EU, a brief history

URÍA MENÉNDEZ

1. PRIMACY AND FUNDAMENTAL RIGHTS: THE 1970's
2. TWO LEVELS: EU INSTITUTIONS / MEMBER STATES
3. THE LEGAL CATEGORY ➡ GENERAL PRINCIPLES OF LAW
    1. Dignity (Omega, C-36/02)
    2. Freedom of expression (ERT, C-260/89)
    3. Freedom of religion (Prais/Council, 130/75)
    4. Property (Nold, 4/73)
    5. Effective remedy (Eridiana, 230/78)

URÍA MENÉNDEZ

2 The pre-charter Union and other sources of fundamental rights

The pre-charter union and other sources of fundamental rights

URÍA MENÉNDEZ

1. THE ECHR AS A RELEVANT REFERENCE
2. A FAILED ACCESION ATTEMPT (OPINION 2/94)
3. BOSPHORUS VS. IRELAND
4. NEVERTHELESS, TENSIONS PERSIST
    1. Kress vs. France
    2. Refusal to make references
    3. EFSP and EHJA

The pre-charter union and other sources of fundamental rights

URÍA MENÉNDEZ

5. THE CONSTITUTIONAL TRADITIONS OF MEMBER STATES
    1. Individual, collective or consensual influence?
    2. Scope of “tradition”
    3. Scope of what is “constitutional”

URÍA MENÉNDEZ

3 Making the charter

Making the charter

URÍA MENÉNDEZ

1. THE FIRST CONVENTION
    1. A fourth-generation Charter
    2. A subtle balance between liberal rights and socio-economic rights
    3. The explanations
2. THE NICE IGC ➡ The 2001 Inter-Institutional Declaration
3. THE SECOND CONVENTION
4. THE LISBON TREATY

URÍA MENÉNDEZ

4 The charter in action

The charter in action

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- SCOPE OF APPLICATION (art. 51.1)

  “The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union la”. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties”.

Making the charter

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The addresses:

- Institutions, bodies, offices and agencies
  i. Pringle and Ledra Advertising
  ii. Liivimaa Lihaveis
  iii. Schrems, Digital Rights Irleand
- Member States
  i. Akerberg Fransson
  ii. Delvigne
  iii. Marcos Torralbo

The charter in action

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- LEVEL OF PROTECTION

  “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”.

The charter in action

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- Situation determined by EU law
  - Charter trumps national law
- Situation not determined by EU law
  - National court chooses applicable law
  - Except:
    - Charter more protective than EU Law
    - National law does not compromise “the primacy, unity and effectiveness of EU law”

The charter in action

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- RIGHTS AND PRINCIPLES

  Art. 51.1:

  "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties".

The charter in action

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Art. 53.5:

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

The charter in action

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- The distinction and direct effect
  - A relevant precedent: Mangold and Kükücdeveci
  - Directives that “concretize” general principles of law and Directives that “concretize” Charter rights
    - Association de Médiation Sociale
    - Glatzel
    - Grupo Norte (pending)

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5 Conclusion

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Case Study n. 1

Korota has been subject to court-supervised administration proceedings since 16 June 2008.

On 16 June 2010, the Juzgado de lo Mercantil No 4 de Barcelona (Commercial Court 4, Barcelona), issued a judgment, the operative part of which states:

> 'The court endorses the arrangement proposed by Korota on 9 April 2010 and accepted by the creditors, and requires Korota to report to the court every six months concerning the company's compliance with this arrangement. The insolvency administration shall be discontinued as from the date of the judgment.'

A conciliation settlement between Mr Torralbo Marcos and Korota, confirmed by the Registry of the referring court on 25 June 2012 ('the conciliation settlement') states:

> '1. [Korota] reaffirms the reasons for the dismissal and, for the purposes of reaching a settlement only, acknowledges that the dismissal was unfair and offers the sum of EUR 14 090 as compensation, together with EUR 992.66 in lieu of notice, together with EUR 6 563 as net amounts claimed in this litigation.
>
> 2. [Mr Torralbo Marcos accepts those sums and the parties agree that the employment contract between them shall be deemed to have been terminated with effect from 27 February 2012.'
>
> …'

On 3 October 2012, Mr Torralbo Marcos applied to the referring court for enforcement of the conciliation settlement on the ground that Korota had failed to meet its obligations with its terms.

On 13 November 2012 the referring court ordered the enforcement of the conciliation settlement against Korota. On the same day, however, it stayed the enforcement proceedings on the ground that Korota was insolvent and no assets belonging to it had been seized before the insolvency procedure.

By a decision of the same date of the Registry of the referring court, Mr Torralbo Marcos was informed that he could appear before the competent Juzgado de lo Mercantil to enforce his rights against Korota.

Mr Torralbo Marcos lodged an appeal against that order on the grounds that, the Juzgado de lo Mercantil No 4 de Barcelona having endorsed the arrangement with creditors and ordered that the insolvency administration be discontinued, enforcement must proceed in accordance with Article 239 of the Law governing employment courts (Ley Reguladora de la Jurisdicción Social).

By order of 3 January 2013, the referring court dismissed the appeal, holding that the order of 13 November 2012 remained effective in the absence of any order bringing the insolvency proceedings to an end.

Mr Torralbo Marcos indicated his intention of lodging an appeal (recurso de suplicación) against the order of 3 January 2013 before the Tribunal Superior de Justicia de Cataluña (High Court of Justice, Catalonia).

Since he had not supplied a certificate from the tax administration to prove payment of the judicial fees required under Law 10/2012, Mr Torralbo Marcos was requested, by a decision of 13 March 2013, to produce that certificate within five days.

On 22 March 2013, Mr Torralbo Marcos lodged an appeal (recurso de reposición) against that decision, arguing, essentially, that he was not liable to pay the judicial fees because, firstly, he should be granted legal aid in his capacity as a worker and beneficiary of the social security scheme, in accordance with Article 2(d) of Law 1/1996 and, secondly, Law 10/2012 was incompatible with Article 47 of the Charter in that it constitutes a disproportionate obstacle, contrary to the fundamental right to an effective remedy guaranteed by that article.

Case Study n. 2

The accused are charged before the Tribunale di Cuneo with having formed and organised, during the fiscal years 2005 to 2009, a conspiracy to commit various offences in relation to VAT. They are alleged to have put in place fraudulent 'VAT carousel' legal arrangements, involving, inter alia, the creation of shell companies and the use of false documents, by means of which they were able to acquire goods — in this case, bottles of champagne — VAT free. This allowed Planet Srl ('Planet') to procure products at costs below the market price, which it could then sell to its customers, thereby distorting the market.

Planet is alleged to have taken receipt of invoices issued by shell companies for non-existent transactions. Those companies did not submit any annual VAT returns or, where they did submit returns, did not actually pay the corresponding VAT. Planet, on the other hand, entered the invoices issued by those shell companies in its accounts, wrongly deducting the VAT recorded in each of them, and, consequently, submitted fraudulent annual VAT returns.

It can be seen from the order for reference that various procedural matters have arisen in the case before the referring court and it has rejected numerous objections raised by the accused at the preliminary hearing held before it. At this stage, the referring court must, first, deliver a judgment dismissing the charges in respect of one of the accused, Mr Anakiev, since the offences in question are time-barred as regards him and, secondly, it must commit the other accused persons for trial, and fix a hearing before the trial court.

The referring court indicates that the offences which the accused are alleged to have committed are punishable, under Articles 2 and 8 of Legislative Decree No 74/2000, by a term of imprisonment of up to six years. However, the offence of conspiracy, laid down in Article 416 of the Penal Code, of which the accused could also be found guilty, is punishable by a term of imprisonment of up to seven years for those instigating the conspiracy and up to five years for those merely taking part. It follows that, for those instigating the conspiracy, the limitation period is seven years, whereas it is six year for the others. The last event interrupting the limitation period was the order fixing the preliminary hearing.

Despite the interruption of the limitation period, that period cannot be extended, pursuant to the last subparagraph of Article 160 of the Penal Code, read in conjunction with Article 161 of that Code ('the national provisions at issue'), beyond seven years and six months or, as regards those instigating the conspiracy, eight years and nine months from the date on which the offences were committed. According to the referring court, it is certain that all the offences — in so far as they are not already time-barred — will be time-barred by 8 February 2018 at the latest, before a final judgment can be delivered as regards the accused. As a result, the accused, who are alleged to have committed VAT evasion amounting to several million euros, may enjoy de facto impunity as a result of the expiration of the limitation period.

According to the referring court, that result was none the less foreseeable, because of the rule laid down in the last subparagraph of Article 160 of the Penal Code, read in conjunction with the second subparagraph of Article 161 of that code, which, by allowing the limitation period

to be extended, following an interruption, by only a quarter of its initial duration, is tantamount to not interrupting the limitation period in most criminal proceedings.

Criminal proceedings in relation to tax evasion, such as that which the accused are alleged to have committed, usually involve very complex investigations, with the result that the proceedings already take a considerable amount of time at the preliminary investigation stage. The duration of the entire proceedings is such that in Italy, in that type of case, de facto impunity is a normal, rather than exceptional, occurrence. Furthermore, it is often impossible for the Italian tax authorities to recover the amount of the taxes evaded through the offence in question.

In that context, the referring court takes the view that the national provisions at issue indirectly authorise unfair competition by some economic operators established in Italy in relation to undertakings established in other Member States, thus infringing Article 101 TFEU. Moreover, those provisions are liable to favour certain undertakings, in breach of Article 107 TFEU. In addition, those provisions create a de facto VAT exemption which is not laid down in Article 158(2) of Directive 2006/112. Lastly, the de facto impunity enjoyed by tax evaders infringes the guiding principle, laid down in Article 119 TFEU, that the Member States must ensure that their public finances are sound.

However, the referring court considers that, if it were able to disapply the national provisions at issue, it would be possible to ensure the effective application of EU law in Italy.

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The Charter and the ECHR: complementing or competing?

Dr Tobias Lock, ERA, Dublin, 13 March 2017

www.law.ed.ac.uk

Overview

1. The ECHR: an overview
2. Judicial remedies before the CJEU and the ECtHR
3. Relationship EU-ECHR
   a) Corresponding rights Article 52 (3) CFR
   b) Principle of equivalent protection
   c) The CJEU's opinion on EU accession to the ECHR

The ECHR - overview

- 47 parties from across Europe
  - All 28 EU Member States are parties to it
- Human rights protected in the 'original' ECHR:
  - Right to life
  - Prohibition of torture
  - Prohibition of slavery and forced labour
  - Right to liberty and security
  - Right to a fair trial
  - No punishment without law
  - Right to respect for private and family life
  - Freedom of thought, conscience and religion
  - Freedom of expression
  - Freedom of assembly and association
  - Right to marry
  - Right to an effective remedy
  - Prohibition of discrimination
- Plus (optional) Protocols

Judicial Remedies: CJEU v ECtHR

- European Court of Human Rights
  - Individual complaint
  - After exhaustion of domestic remedies
  - Respondent: a state
  - Declaratory judgment
  - Possibility to award 'just satisfaction'
- Court of Justice of the EU (for individuals)
  - Either preliminary reference (Art 267 TFEU) against EU **or** MS measure
  - Or direct action (Art 263 (4) TFEU) against EU measure

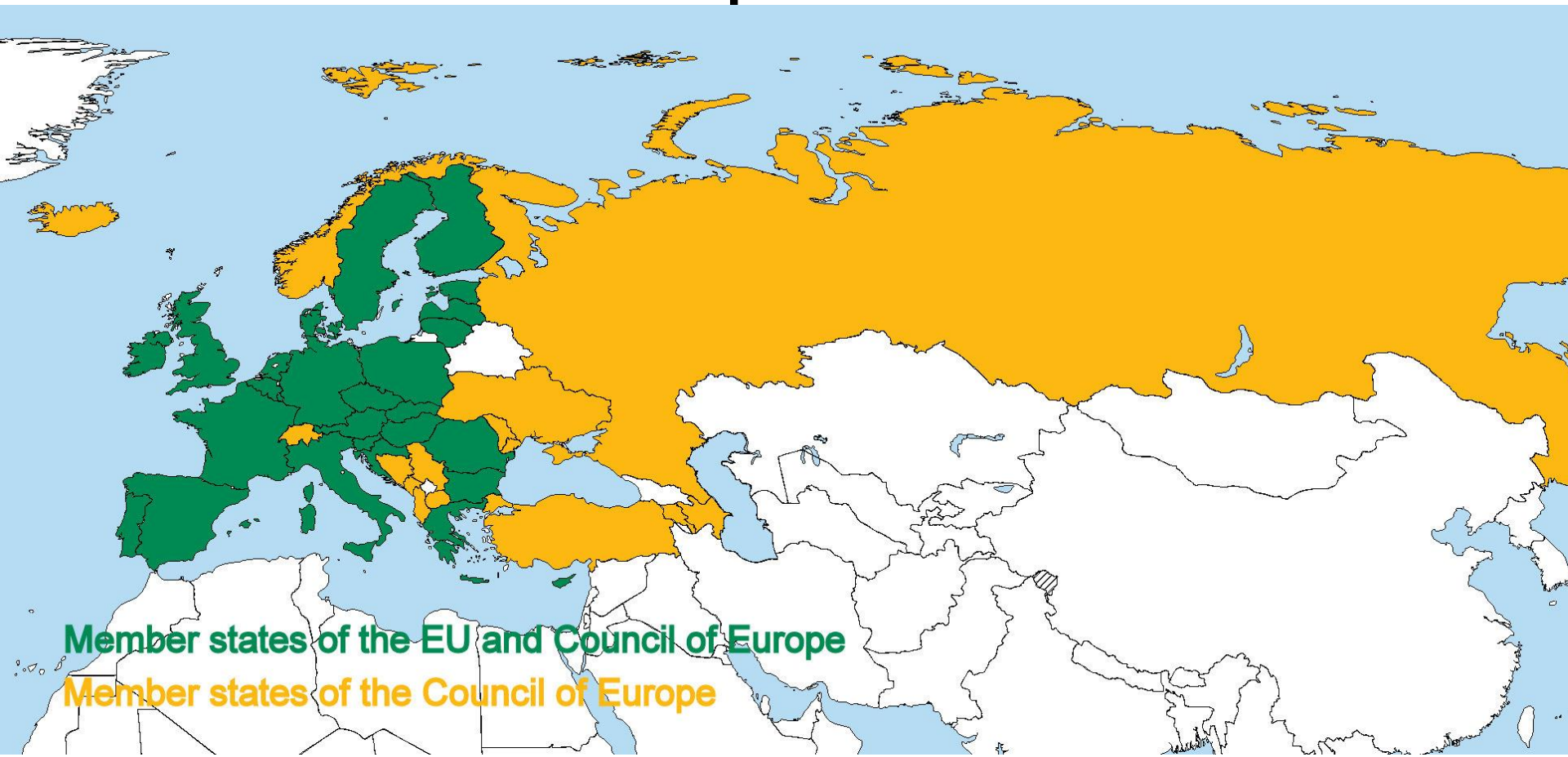
Judicial Remedies: CJEU v ECtHR

- Direct action (Art 263 (4) TFEU) against EU measure (e.g. Regulation)
  - Very much restricted: must show direct and individual concern – almost impossible to do, see Case 25/62 *Plaumann*; Case C-583/11 P *Inuit Tapiriit Kanatami and Others*
- Preliminary reference (Art 267 TFEU) against EU **or** MS measure
  - Reference originates in the national court
    - Must ask CJEU questions concerning the validity of an EU measure
    - Can ask CJEU for an interpretation of Charter rights where national measure is at stake (duty to ask only for highest courts)

Judicial Remedies: CJEU v ECtHR

- Effect of CJEU decisions (whether preliminary reference or direct action)
  - Has power to declare invalid EU measures
  - By contrast: ECtHR – declaratory judgment only
- Where MS measures are concerned
  - National courts under a duty to disapply them in so far as they contradict the Charter OR to interpret them in conformity with the Charter

Relationship EU and ECHR



Source: http://blog.justis.com/the-european-union-and-the-european-court-of-human-rights-dispelling-the-myths-from-the-facts

Relationship EU and ECHR

- All EU MS are parties to the ECHR
  - But EU is not (yet) a party – accession was negotiated, but agreement was dismissed by CJEU
- Nonetheless: Charter makes reference to ECHR in Article 52 (3)
- And: ECtHR holds MS responsible for (some) violations of the Convention originating in EU law

Corresponding rights

- Article 52 (3) of the Charter:
  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.
- Includes case law of the ECtHR (see explanations)
- But: not strictly binding; autonomous interpretation of Charter rights remains possible, see e.g. *J.N.* C-601/15 PPU, para 47

ECHR responsibility of the MS

- *Matthews v United Kingdom* (EU primary law)

  ECtHR: MS responsibility under the ECHR for EU acts.

  The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be 'secured'. Member States' responsibility therefore continues even after such a transfer.

ECHR responsibility of the MS

- *Bosphorus v Ireland* (EU secondary law)
  - ECtHR reaffirmed general responsibility of MS under *Matthews*
  - But introduced new rebuttable presumption:
    - EU offers protection of human rights which is equivalent to the ECHR;
    - If the MS had no discretion, the MS is presumed not to have violated the ECHR if it does nothing more than implement its obligations;
    - Presumption can be rebutted if in a particular case the protection was 'manifestly deficient'.

ECHR responsibility of the MS

- Mind the gap: *Connolly v 15 Member States of the EU*
  - Difference to *Matthews* and *Bosphorus*: no Member State had got involved
  - Purely EU-internal dispute
- Complaint was deemed inadmissible since act not attributable to MS for lack of involvement
- Thus there is a **gap in the protection** at present where no Member State was involved

EU Accession to the ECHR

- What would happen if the EU signed up to the ECHR?
  - Closure of the *Connolly* gap;
  - (possible) end to *Bosphorus* presumption;
  - Better accountability as the EU could be held directly responsible instead of the MS in its place.
- Main problem:
  - EU accession would have to be compatible with the EU legal order as understood (and policed) by the CJEU.

EU Accession to the ECHR

- ECHR Accession Agreement
  - Drawn up between 2010 and 2013
  - Key features:
    - MS to remain parties to the ECHR; EU to join as well;
    - How to divide up responsibility between EU and MS (*Bosphorus*-type scenario)?
      - Co-respondent mechanism – joint responsibility;
    - How to ensure CJEU involvement?
      - Prior involvement mechanism.

EU Accession to the ECHR

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      - Co-respondent mechanism – joint responsibility;
    - How to ensure CJEU involvement?
      - Prior involvement mechanism.
  - Agreement was sent to CJEU: Opinion 2/13

Opinion 2/13 – key issue

- The autonomy of the EU legal order
  - *Van Gend en Loos*: EU is a 'new legal order of international law'
  - This (also) means that EU cannot conclude international agreements that would undermine this legal order, in particular:
    - No other court but the CJEU may have jurisdiction to interpret EU law in a binding manner;
    - And no court may decide on the distribution of competences between the EU and the MS.

Opinion 2/13 – 7 key hurdles

- Co-respondent mechanism
- Prior involvement of the ECJ
- Article 344 TFEU and inter-party cases
- Coordination between Articles 53 CFR and 53 ECHR
- Protocol No 16
- Exclusion mutual trust/recognition cases
- Exclusion of jurisdiction over CFSP measures

Opinion 2/13 – how to overcome these hurdles?

- Safe option: changes to the accession agreement
  - Might not be possible as regards CFSP – only solution may be Treaty change to give CJEU jurisdiction;
  - And will need agreement by non-EU MS in the Council of Europe.

Was Opinion 2/13 a turning point in the EU/ECHR relationship?

- On EU side: new trend to pay less regard to ECHR?
  - Earlier Charter cases: *McB:* strong commitment to ECHR
  - But now:
    - e.g. *Delvigne* on prisoner voting: no mention of it.
    - *J.N.* case: clear that EU not bound by ECHR so that only Charter rights offer protection…
    - AG Bot in *Aranyosi*: strong defence of the immunity of mutual recognition to human rights

Time for discussion.

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Freedom of Movement and Residence of Persons within the EU

Dr Sonia Morano-Foadi

Content

EU CITIZENS

1. Who can benefit from the freedom of movement and residence?
2. Non-discrimination
3. Possible restrictions
4. CJEU case law on EU citizens

THIRD COUNTRIES' NATIONALS

5. Legally resident
6. Illegal immigrants
7. CJEU case law on TCNs

Key legal sources

EU CITIZENS

Primary legislation:

Article 45 TFEU – Free movement of workers

Articles 20 & 21 TFEU – EU Citizenship

EU Charter of Fundamental Rights (Arts 39 – 46), Art 45 Charter refers to free movement

Art 21 Charter non-discrimination

Secondary legislation:

Directive 2004/38 (Citizenship Rights Directive - CRD): formalities of entry and residence

Regulation 492/11 and Directive 2004/38:

A) Equal access to and conditions to employment

B) Equal treatment in matters of employment, remuneration and conditions of work for EU workers and members of their families

Commission Regulation 635/2006/EC repealing Council Regulation 1251/70/EEC : right to remain in the host Member State after being employed there with the status of permanent residence

THIRD COUNTRY NATIONALS

Primary legislation:

Article 67-80 TFEU

See in particular: Article 78 TFEU and Article 79 TFEU

Secondary legislation:
Long-Term Residence Directive 2003/109/EC
EU Blue Card Directive 2009/50/EC
Students and Researcher Directive 2016/801
Intra-Corporate Transfer Directive 2014/66/EU
Single Permit Directive 2011/98/EU
Qualification Directive 2004/83/EC and (Recast) Qualification Directive 2011/95/EC.
Family Reunification Directive 2003/86/EC.
Return Directive 2008/115/EC.

Selected case law on freedom of movement and residence

Case 34/09, Zambrano, 8 March 2011 (reference to Chen and Zhu case) (leading case)

Case C-434/09, Shirley McCarthy v Secretary of State for the Home Department, 5 May 2011 (covered)

Case C-256/11, Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduike, Dragica Stevic v Bundesministerium für Inneres, 15 November 2011 (covered)

Opinion of Advocate General, Case C-254/11, Szabolcs-Szatmár-Bereg Megyei Rendőrkapitányság Záhony Határrendészeti Kirendeltsége v Oskar Shomodi, 6 December 2012 (covered)

Case C-145/09, Land Baden-Württemberg v Panagiotis Tsakouridis, 23 November 2010 (mentioned)

Case 162/09, Secretary of State for Work and Pensions v Child Poverty Action Group, 7 October 2010 (just mentioned)

Case-86/12, Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration, 10 October 2013 (covered)

Case C‑165/14 Alfredo Rendón Marín ase C‑165/14 v Administración del Estado, 13 September 2016 (covered).

EU CITIZENS

1. WHO CAN BENEFIT FROM THE FREEDOM OF MOVEMENT AND RESIDENCE?

Free movement of workers - Article 45 TFEU –

Article 45 TFEU

1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
(a) to accept offers of employment actually made;
(b) to move freely within the territory of Member States for this purpose;
(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

Who is a worker? The concept of "worker" is a Union Law concept (Levin Case 53/61).

The CJEU has been generously construed by the Court of Justice (see CJEU case-law)

EU Citizens - Articles 20 & 21 TFEU -

Article 20 TFEU

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

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

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

Article 21 TFEU

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

EU Charter of Fundamental Rights (Free movement rights)

Article 45 Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

Who is covered by Directive 2004/38/EC?

- Citizens of an EU or EEA member state who visit, live, study or work in a different member state
- The EU citizen's direct family members, including their non-EU spouse/partner and the spouse/partner's direct family members (such as children)
- Other family members who are "beneficiaries", including common law partners, same sex partners, and dependent family members, members of the household, and sick family members

Family Members

Direct family members Article 2(2) Directive 2004/38/EC:

"Family member"	***Examples, notes and interpretation***
(a) the spouse;	*A partner in a legal same-sex marriage should also be considered a "spouse". See discussion on same-sex marriage.*
(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a [EU/EEA] Member	*This applies when the member state treats registered partnership "as equivalent to marriage". Where that is not true, the partner is not considered a "family member" in this definition, but still has a right of entry*

State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;	*as a beneficiary (see beneficiary below). This only covers registered partnerships done by an EU member state.*
(c) the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b);	*Children (or grandchildren!) under 21 or those who are older than 21 but still dependent (e.g. students supported by their parents). The child can be of the EU citizen or of the non-EU citizen. This would include a child from a previous relationship or from before the EU-citizen obtained their citizenship.*
(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);	*Dependent parents and dependent grandparents of either the EU citizen or of the non-EU spouse or partner. Dependent usually means financially dependent, though there may be other legally reasonable interpretations. For non-dependent parents, see beneficiary below.*

These are the people who have the easy-evidence route through the Directive. They can usually prove their relationship with a simple document, like a birth certificate or a marriage certificate, that legally documents the family link. These "*family members*" (as the Directive states) "*enjoy an automatic right of entry and residence in the host Member State*" when they are with their EU citizen relative.

There are other people who are also direct beneficiaries of Directive 2004/38/EC. These are people who do not fall into this explicit definition of "*family member*", but who are none the less "part of the family".

Other family members who are "beneficiaries", including common law partners, same sex partners (if not in a registered partnership), and dependent family members, members of the household, and sick family members.

Other beneficiaries

There are other people who are also direct beneficiaries of Directive 2004/38/EC. These are people who do not fall into the explicit definition of "*family member*", but who are none the less "part of the family".

For these beneficiaries, Directive 2004/38/EC says in the preamble:

In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.

Later, in the text of the Directive, it becomes a little more explicit about who these other beneficiaries are:

Article 3 Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

Who can be a beneficiary of Directive 2004/38/EC is worth breaking up and looking at in more detail, category by category:

"Other beneficiaries"	***Notes and interpretation***
2 (a) any other family members […] who, in the country from which they have come, are [either] dependants or members of the household of the Union citizen	This covers two separate groups, either: 1. other family members who are dependent on the EU citizen, or 2. other family members who live (or have lived recently) in the same household (even if they are not dependent). Another key phrase is "in the country <u>from which they have come</u> ". The phrase is quite open and covers a number of situations. For a Japanese person, it can include their original home country (e.g. Japan), a country they have recently lived in (e.g. USA) or where they currently live (e.g. France).
[2 (a) continued] or where serious health grounds strictly require the personal care of the family member by the Union citizen;	e.g. a non-EU parent who has been quite independent but who now needs intensive assistance because of a medical condition such as a stroke or Alzheimer's
2 (b) the partner with whom the Union citizen has a durable relationship, duly attested	This category covers all other long term "durable" partnerships, including both opposite-sex and same-sex relationships. There is no official definition of how long the relationship must have existed. Some countries expect to see two years of living together, but if you have a child with somebody and live with them it would clearly be incompatible with the Directive to require two years of relationship history. When a member-state does not recognize civil partnerships as equivalent to marriage, this is the category which is used for entry.

Family members (as outlined above) are also covered in situation where the EU citizen has worked in another member state and now wishes to return to his/her "home" country to work (Case C-370/90 *Surinder Singh*).

See Case C-83/11 - Rahman and Others – State's obligation to facilitate, in accordance with national legislation, entry and residence for 'any other family members' who are dependants of a Union citizen

Who is NOT covered by Directive 2004/38/EC?

- If a citizen is living in their home EU member state and has not worked in other EU member state, then this Directive does not apply. All movement of non-EU family members into the home state is governed by national law.
- Some old-EU member states have special "transitional" arrangements that curb the ability of citizens of new EU states (Bulgaria and Romania) to move freely for work. The curbs were maintained until 2017. Citizens of new EU member states can however travel without visas throughout Europe, and their non-EU family members can travel freely with them.
- Citizens of non-EEA countries who are not travelling with or joining family members who are EU/EEA citizen.

2. NON-DISCRIMINATION ON GROUNDS OF NATIONALITY

A. Free movement of workers: Article 45 and Directive 2004/38 and Regulation 492/11 gives a general right of non-discrimination on grounds of nationality in matters relating to employment, remuneration and other conditions of work and employment.

Art 45 (2) TFEU - Such freedom of movement shall entail the abolition of *any discrimination based on nationality* between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

Recital 20, Preamble to Directive 2004/38 "In accordance with the *prohibition of discrimination on grounds of nationality*, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law".

Regulation 492/11, Section 2 Employment and equality of treatment

Article 7

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.
2. He shall enjoy the same social and tax advantages as national workers.
3. He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.
4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.

Article 8

A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto, including the right to vote and to be eligible for the administration or management posts of a trade union. He may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by

public law. Furthermore, he shall have the right of eligibility for workers' representative bodies in the undertaking.
The first paragraph of this Article shall not affect laws or regulations in certain Member States which grant more extensive rights to workers coming from the other Member States.

Article 9
1. A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs.
2. A worker referred to in paragraph 1 may, with the same right as nationals, put his name down on the housing lists in the region in which he is employed, where such lists exist, and shall enjoy the resultant benefits and priorities.
If his family has remained in the country whence he came, they shall be considered for this purpose as residing in the said region, where national workers benefit from a similar presumption.

B. Access to social citizenship entitlements under the free movement provisions is based on the principle of non-discrimination and citizenship of the Union (art 18 TFEU) which supplements art 45 TFEU and its associated secondary legislation.

Article 18 (1) TFEU
1. Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Article 21 Charter (Equality Title III) - Non-discrimination -
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.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

3. POSSIBLE RESTRICTIONS

Art 45 (3) TFEU. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health […]

Article 27(1) Directive 2004/38).
[…] Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends."

Restrictions on the right of entry and the right of residence: Union citizens or members of their family may be expelled from the host Member State on grounds of *public policy, public security or public health*. Under no circumstances may an expulsion decision be taken on economic grounds. Measures affecting freedom of movement and residence must comply with the proportionality principle and be based exclusively on the personal conduct of the individual concerned. Such conduct must represent a sufficiently serious and present threat affecting the fundamental interests of the state. Previous criminal convictions do not automatically justify expulsion. The mere fact that the entry documents used by the individual concerned have expired does not constitute grounds for such a measure. Only in exceptional circumstances, for overriding considerations of public security, can expulsion orders be served on a Union

citizen if he/she has resided in the host country for ten years or if he/she is a minor. Lifelong exclusion orders may not be issued under any circumstances and persons concerned by exclusion orders may apply for a review after three years. They also have access to judicial review and, where relevant, administrative review in the host Member State.

Article 28 Directive 2004/38 - Protection against expulsion
1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
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.
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:
(a) have resided in the host Member State for the previous 10 years; or
(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

Finally, the directive enables Member States to adopt the necessary measures to refuse, terminate or withdraw any right conferred in the event of abuse of rights or fraud, such as marriages of convenience (**Article 35 Directive 2004/38**).

Moreover, the CJEU in the Case C-430/10 *Hristo Gaydarov v Director na Glavna direktsia 'Ohranitelna politsia' pri Ministerstvo na vatreshnite raboti* has stated that "Article 21 TFEU and Article 27 of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States do not preclude national legislation that permits the restriction of the right of a national of a Member State to travel to another Member State in particular on the ground that he has been convicted of a criminal offence of narcotic drug trafficking in another State, provided that (i) the personal conduct of that national constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, (ii) the restrictive measure envisaged is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it and (iii) that measure is subject to effective judicial review permitting a determination of its legality as regards matters of fact and law in the light of the requirements of European Union law".

In the Case C-145/09 *Land Baden-Württemberg v Panagiotis Tsakouridis*, the CJEU has stated that Article 28(3) of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States must be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is capable of being covered by the concept of 'imperative grounds of public security' which may justify a measure expelling a Union citizen who has resided in the host Member State for the preceding 10 years. Article 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'.

4. CASE-LAW on EU CITIZENSHIP PROVISIONS AND THE CHARTER

Is still intra-mobility the trigger for citizenship rights?

Case C-34/09 Zambrano [2011] ECR

- Case involved a family (Mr Zambrano, his wife and child) who arrived in Belgium on a visa and immediately applied for asylum, on the basis that they had faced persecution in Colombia. Application denied but appeal lasting 12 years. In the meantime, Mr Zambrano found stable employment and had two more children.
- Two children by virtue of Belgian law became Belgian citizens, corollary of EU citizenship.
- The Employment Tribunal in Brussels decided to refer three questions to the CJEU. Firstly, it asked whether Articles 18, 20 and 21TFEU taken together or separately could 'confer a right of residence upon a citizen of the Union in the territory of the Member State of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States?' Secondly, it asked whether these three articles of the TFEU, when put together with Articles 21, 24 and 34 of the EU Charter of Fundamental Rights meant that these rights must be protected on behalf of an infant-citizen, even where the infant citizen has not exercised free movement rights and is dependent for their enjoyment upon a third country national (TCN) parent.
  Finally it asked the CJEU whether, given this constellation of rights in EU law and the circumstances of a non-migratory infant-citizen, where the TCN parent 'fulfils the condition of sufficient resources and the possession of sickness insurance by virtue of paid employment making him subject to the social security system of that State', national law must grant the TCN parent an exemption from the requirement to hold a work permit.

- The Grand Chamber simplified the three questions into one: 'whether the provisions of the TFEU on European Union citizenship are to be interpreted as meaning that they confer on a relative in the ascending line who is a third country national, upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of which they are nationals and in which they reside, and also exempt him from having to obtain a work permit in that Member State.'

- Could Mr Zambrano could rely on the citizenship rights of his children to enjoy a derived right of residence, as had been the case in Chen? The difference here was that the children had remained in the member state of which they were nationals: would the absence of a cross-border element make this a 'wholly internal' situation?

- CJ: Test of 'genuine enjoyment of the substance' of citizenship rights in favour of Mr Zambrano: "Article 20 TFEU precludes a MS from refusing a TCN upon whom his minor children, who are EU citizens, are dependent, a right of residence and from refusing to grant a work permit to him, in so far as such decisions deprive those children of the genuine enjoyment of the substance of EU citizen rights".

- No application Citizenship Directive - Zambrano family not 'beneficiaries' Article 3(1) - they were not 'Union citizens who move to or reside in a Member State other than that of which they are a national.

Case C-434/09 McCarthy [2011] ECR

- Case involved a British/Irish national (Mrs McCarthy) who was born in the UK and always lived there. Following her marriage to a TCN applied for an Irish passport for the first time. Once obtained, as an Irish national, she asked for a residence permit to base her residence in the United Kingdom on rights associated with European citizenship.

Consequently, her husband applied for a residence document as the spouse of a Union citizen.

- Both applications refused: she had never exercised her right to move and reside in Member States other than the United Kingdom.

The Charter was briefly mentioned in McCarthy:

Para 27 As a preliminary point, it should be observed that citizenship of the Union confers on each Union citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaties and the measures adopted for their implementation, freedom of movement for persons being, moreover, one of the fundamental freedoms of the internal market, which was also reaffirmed in Article 45 of the Charter of Fundamental Rights of the European Union (Case C‑162/09 Lassal [2010] ECR I‑0000, paragraph 29).

- Test of 'genuine enjoyment of the substance' of citizenship rights (Zambrano test) to the fact = art 21 do not apply in this case. Mrs McCarthy was not deprived of the genuine enjoyment of Union citizen rights, or exercise of her right to move and reside freely within the territory of the Member States (para 49).

Case C-256/11 Dereci [2011] ECR

- 5 joint applications: TCNs married to Austrian citizens: residence permits rejected by the Austrian Authority.

- 4 of them subject to expulsion orders and individual removal orders. Austrian Authority refused to apply Directive 2004/38 family members of EU citizens: Union citizens concerned not exercised right of free movement.

- Re-assertion of the 'genuine enjoyment' test (Zambrano test) and its limitations: the Union citizen must be forced to leave not only home MS but also Union as a whole. (para 66). Decision left to the national court.

In Dereci, the Charter was mentioned when the Court looked at the issue of 'The right to respect for private and family life'.

Para 70 As a preliminary point, it must be observed that in so far as Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), concerning respect for private and family life, contains rights which correspond to rights guaranteed by Article 8(1) of the ECHR, the meaning and scope of Article 7 of the Charter are to be the same as those laid down by Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights (Case C‑400/10 PPU McB. [2010] ECR I-0000, paragraph 53).

Para 71 However, it must be borne in mind that the provisions of the Charter are, according to Article 51(1) thereof, addressed to the Member States only when they are implementing European Union law. Under Article 51(2), the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (McB., paragraph 51, see also Joined Cases C-483/09 and C-1/10 Gueye and Salmerón Sánchez [2011] ECR I‑0000, paragraph 69).

Para 72 Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR.

Case C-40/11 Yoshikazu Iida v Stadt Ulm (case decided on 8 November 2012)

- Case involved a Japanese national (Mr Iida), married in 1998 to a German national and separated but not divorced since 2008. Since 2005, Mr Iida lives and works (with a permanent job) in Germany. The wife moved to Vienna (Austria) with her daughter. The spouses jointly exercise parental responsibility for their daughter. Their daughter was born in 2004 in the US, and she has German, Japanese and American nationality.

- German authorities refused to grant residence card as a family member of an EU citizen on the basis of Directive 2004/381 on European citizenship. Mr Iida obtained a right of residence in Germany in connection with family reunion, extending his residence permit was a matter of discretion.

- CJ: application of the 'genuine enjoyment' test (Zambrano test): the refusal to grant him a right of residence derived from their status of EU citizen is not liable to deny his daughter or his spouse genuine enjoyment of the substance of rights.

- Mr Iida cannot base a right of residence directly on the TFEU by referring to the EU citizenship of his daughter or his spouse. He has always lived in Germany in accordance with national law and can be granted a right of residence in Germany on another legal basis.

- Finally, he cannot rely on the Charter of Fundamental Rights of the European Union, which lays down a right to respect for private life and certain rights of the child. Since Mr Iida does not satisfy the conditions of Directive 2004/38 and has not applied for a right of residence as a long-term resident within the meaning of Directive 2003/109, his situation shows no connection with EU law, so that the Charter of Fundamental Rights of the European Union does not apply.

The Charter was referred to extensively in Case C-40/11 Yoshikazu Iida:

Para 32 In that context, the Verwaltungsgerichtshof Baden-Württemberg decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. On Articles 2, 3 and 7 of [Directive 2004/38]:

(a) Does "family member" include, in particular in the light of Articles 7 and 24 of the [Charter of Fundamental Rights ("the Charter")] and Article 8 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, "the ECHR")], on an extended interpretation of Article 2(2)(d) of Directive 2004/38, a parent who is a third-country national, has parental responsibility for a child who is a Union citizen entitled to freedom of movement, and is not maintained by that child?

(b) If so, does Directive 2004/38 apply to that parent, in particular in the light of Articles 7 and 24 of the Charter and Article 8 of the ECHR, on an extended interpretation of Article 3(1) of the directive, even where there is no "accompanying" or "joining" with respect to the Member State of origin of the child who is a Union citizen and has moved away?

(c) If so, does it follow that that parent, in particular in the light of Articles 7 and 24 of the Charter and Article 8 of the ECHR, has a right of residence for more than three months in the Member State of origin of the child who is a Union citizen, on an extended interpretation of Article 7(2) of Directive 2004/38, at least as long as parental responsibility subsists and is actually exercised?

2. On Article 6(1) TEU in conjunction with the Charter:

(a) (i) Is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter simply where the subject-matter of the dispute depends on a national law (or part of a law) which inter alia – but not only – transposed directives?

(ii) If not, is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter simply because the claimant is possibly entitled to a right of residence under Union law and could accordingly, under the first sentence of Paragraph 5(2) of the FreizügG/EU, claim a residence card for a family member of a Union citizen which has its legal basis in the first sentence of Article 10(1) of [Directive 2004/38]?

(iii) If not, is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter, in accordance with the case-law deriving from Case C-260/89 ERT [1991] ECR I-2925, paragraphs 41 to 45, where a Member State restricts the right of residence of the father who is a third-country national with parental responsibility for a Union citizen who is a minor and resides predominantly with her mother in another Member State of the Union because of the mother's employment?

(b) (i) If the Charter is applicable, can a right of residence under European Union law for the father who is a third-country national be derived directly from Article 24(3) of the Charter, at least as long as he has and actually exercises parental responsibility for his child who is a Union citizen, even if the child resides predominantly in another Member State of the Union?

(ii) If not, does it follow from the freedom of movement of the child who is a Union citizen under Article 45(1) of the Charter, possibly in conjunction with Article 24(3) of the Charter, that the father who is a third-country national has a right of residence under European Union law, at least as long as he has and actually exercises parental responsibility for his child who is a Union citizen, so that in particular the freedom of movement of the child who is a Union citizen is not deprived of all practical effect?

3. On Article 6(3) TEU in conjunction with the general principles of European Union law:

(a) Can the "unwritten" fundamental rights of the European Union developed in the Court's case-law from Case 29/69 Stauder [1969] ECR 419, paragraph 7, up to, for example, Case C-144/04 Mangold [2005] ECR I-9981, paragraph 75, be applied in full even if the Charter is not applicable in the specific case; in other words, do the fundamental rights which continue to apply as general principles of Union law under Article 6(3) TEU stand autonomously and independently alongside the new fundamental rights laid down in the Charter in accordance with Article 6(1) TEU?

Para 78 As to the fundamental rights mentioned by the referring court, in particular the right to respect for private and family life and the rights of the child, laid down in Articles 7 and 24 of the Charter respectively, it must be borne in mind that, in accordance with Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing European Union law. Under Article 51(2) of the Charter, it does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the

Treaties. Accordingly, the Court is called on to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (see Dereci and Others, paragraph 71).

Para 79 To determine whether the German authorities' refusal to grant Mr Iida a 'residence card of a family member of a Union citizen' falls within the implementation of European Union law within the meaning of Article 51 of the Charter, it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it (see Case C‑309/96 Annibaldi [1997] ECR I‑7493, paragraphs 21 to 23).

Para 80 While Paragraph 5 of the FreizügG/EU, which provides for the issue of a 'residence card of a family member of a Union citizen', is indeed intended to implement European Union law, it is none the less the case that the situation of the claimant in the main proceedings is not governed by European Union law, since he does not satisfy the conditions for the grant of that card in accordance with Article 10 of Directive 2004/38. Moreover, in the absence of an application by him for the status of long-term resident in accordance with Directive 2003/109, his situation shows no connection with European Union law.

Para 81 In those circumstances, the German authorities' refusal to grant Mr Iida a 'residence card of a family member of a Union citizen' does not fall within the implementation of European Union law within the meaning of Article 51 of the Charter, so that its conformity with fundamental rights cannot be examined by reference to the rights established by the Charter.

Para 82 In the light of the foregoing, the answer to the referring court's question is that, outside the situations governed by Directive 2004/38 and where there is no other connection with the provisions on citizenship of European Union law, a third‑country national cannot claim a right of residence derived from a Union citizen.

Case C‑86/12 Adzo Domenyo Alokpa

- The case involves a Togolese national (Mrs Alopka) who was rejected asylum seeker application in Luxembourg but discretionary leave to remain was granted until 31 December 2008, as she had given birth to twins requiring care. Her French children acquired Union citizenship. Then, residence permit was rejected and she appealed, questions referred to the CJEU.

- Questions referred by the Administrative Court to the CJEU: 'Is Article 20 TFEU – if necessary, read in conjunction with Charter 'Is Article 20 TFEU – if necessary, read in conjunction with Articles 20, 21, 24, 33 and 34 of the Charter of Fundamental Rights [of the European Union], or with one or more of those provisions read separately or in conjunction – to be interpreted as precluding a Member State from refusing a third-country national, with sole responsibility for his or her minor children who are citizens of the European Union, residence in the Member State of residence of the children, where they have been living with that person since birth, without having that nationality, while refusing the third-country national a residence permit, or even a work permit?

In Case C‑86/12 Adzo Domenyo Alokpa, the Charter was only mentioned by the referring national court:

Para 19 In those circumstances, the Cour administrative decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 20 TFEU – if necessary, read in conjunction with Articles 20, 21, 24, 33 and 34 of the Charter of Fundamental Rights [of the European Union], or with one or more of those provisions read separately or in conjunction – to be interpreted as precluding a Member State from refusing a third-country national, with sole responsibility for his or her minor children who are citizens of the European Union, residence in the Member State of residence of the children, where they have been living with that person since birth, without having that nationality, while refusing the third-country national a residence permit, or even a work permit?

Are such decisions to be regarded as being in the nature of decisions depriving those children, in their country of residence, in which they have lived since birth, of effective enjoyment of the substance of the rights attaching to the status of citizen of the European Union also in the situation where their other direct ascendant, with whom they have never shared family life, is resident in another Member State of the European Union, of which that person is a national?'

- CJEU: Articles 20 TFEU and 21 TFEU do not preclude a MS from refusing to allow a TCN with sole responsibility of two EU minor children to reside in its territory… in so far as those Union citizens do not satisfy the conditions set out in CR Directive or such a refusal does not deprive those citizens of effective enjoyment of the substance of the rights … to be determined by the referring court.

- Therefore, if the referring court holds that Article 21 TFEU does not preclude Mrs Alokpa from being refused a right of residence in Luxembourg, that court must still determine whether such a right of residence may nevertheless be granted to her, exceptionally – if the effectiveness of the Union citizenship that her children enjoy is not to be undermined – in light of the fact that, as a consequence of such a refusal, those children would find themselves obliged in practice to leave the territory of the European Union altogether, thus denying them the genuine enjoyment of the substance of the rights conferred by virtue of that status.

- In that regard, as the Advocate-General stated in his Opinion, Mrs Alokpa, as the mother of Jarel and Eja Moudoulou and as sole carer of those children since their birth, could have the benefit of a derived right to reside in France. (points 55 and 56)

- It follows that, in principle, the refusal by the Luxembourg authorities to grant Mrs Alokpa a right of residence cannot result in her children being obliged to leave the territory of the European Union altogether. It is, however, for the referring court to determine whether, in the light of all of the facts of the main proceedings, that is in fact the case.

- Nearly 10 years ago, the CJEU in the case of Chen C‑200/02 ruled that self-sufficient Union national children have the right to be accompanied by their TCN parents, but Alokpa case relates to the interpretation of Article 20 TFEU.

- It was not undertaken in the light of fundamental rights, as it was primarily concerned with the satisfaction of the conditions laid down by CR Directive.

• Thus, the lack of human rights dimension in the judgement and the mere application of the test leaving the national court to decide is unsatisfactory as the referring Court in Alokpa asked to interpret art 20 TFEU in light of the Charter.

Case C‑165/14 Alfredo Rendón Marín

• Mr Rendón Marín, a Colombian national, is the father of two minor children born in Malaga (Spain), namely a boy of Spanish nationality and a girl of Polish nationality. The children have always resided in Spain. Mr Rendón Marín was granted sole care and custody of his children. The whereabouts of the children's mother, a Polish national, are unknown. The two children are receiving appropriate care and schooling.

• Mr Rendón Marín has a criminal record. In particular, he was sentenced in Spain to a term of nine months' imprisonment. However, he was granted a provisional two-year suspension of that sentence with effect from 13 February 2009. On the date of the order for reference, namely 20 March 2014, he was awaiting a decision on an application for mention of his criminal record to be removed from the register (cancelación).

On 18 February 2010, Mr Rendón Marín lodged an application with the Director-General of Immigration of the Ministry of Labour and Immigration for a temporary residence permit on the basis of exceptional circumstances, pursuant to paragraph 4 of the First Additional Provision of Royal Decree 2393/2004.

By decision of 13 July 2010, Mr Rendón Marín's application was rejected pursuant to Article 31(5) of Law 4/2000 because he had a criminal record.

Mr Rendón Marín's appeal against that decision was dismissed by judgment of the Audiencia Nacional (National High Court (Spain)) of 21 March 2012, whereupon he brought an appeal against that judgment before the Tribunal Supremo (Supreme Court, Spain).

Mr Rendón Marín based his appeal against the judgment on a single plea in law, alleging (i) misinterpretation of the judgments of 19 October 2004, Zhu and Chen (C‑200/02, EU:C:2004:639), and of 8 March 2011, Ruiz Zambrano (C‑34/09, EU:C:2011:124), since the case-law resulting from those judgments should, in his submission, have led to him being granted the residence permit sought, and (ii) infringement of Article 31(3) and (7) of Law 4/2000.

The referring court states that, leaving aside the specific circumstances of the main proceedings, in this case, as in the cases which gave rise to the judgments of 19 October 2004, Zhu and Chen (C‑200/02, EU:C:2004:639), and of 8 March 2011, Ruiz Zambrano (C‑34/09, EU:C:2011:124), the refusal in Spain to grant Mr Rendón Marín a residence permit would result in his removal from Spanish territory and, therefore, from the territory of the European Union, which the two minor children, his dependants, would leave as a consequence. That court observes, however, that, in contrast to the situations examined in the judgments of 19 October 2004, Zhu and Chen (C‑200/02, EU:C:2004:639), and of 8 March 2011, Ruiz Zambrano (C‑34/09, EU:C:2011:124), the applicable national legislation lays down a prohibition on the grant of a residence permit when the applicant has a criminal record in Spain.

Consequently, the referring court is uncertain whether national law, which prohibits, without any possibility of derogation, the grant of a residence permit when the applicant has a criminal record in the country where the permit is applied for, even though that has the unavoidable consequence of depriving a minor, a Union citizen who is a dependant of the applicant for a

residence permit, of his right to reside in the European Union, is consistent with the Court's case-law, relied on in the case, relating to Article 20 TFEU.

It was in those circumstances that the Tribunal Supremo (Supreme Court) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is national legislation which excludes the possibility of granting a residence permit to the parent of a Union citizen who is a minor and a dependant of that parent on the ground that the parent has a criminal record in the country in which the application is made consistent with Article 20 TFEU, interpreted in the light of the judgments of 19 October 2004, Zhu and Chen (C‑200/02, EU:C:2004:639), and of 8 March 2011, Ruiz Zambrano (C‑34/09, EU:C:2011:124), even if this results in the removal of the child from the territory of the European Union, inasmuch as the child will have to leave with its parent?'

In Case C‑165/14 Alfredo Rendón Marín, the Charter was referred to in the following two paragraphs:

Para 66 As regards, moreover, the possible expulsion of Mr Rendón Marín, it is necessary, first, to take account of the fundamental rights whose observance the Court ensures, in particular the right to respect for private and family life, as laid down in Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter') (see, to this effect, judgment of 23 November 2010, Tsakouridis, C‑145/09, EU:C:2010:708, paragraph 52) and, secondly, to observe the principle of proportionality. Article 7 of the Charter must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) thereof (see, to this effect, judgment of 23 December 2009, Detiček, C‑403/09 PPU, EU:C:2009:810, paragraphs 53 and 54).

The possibility of limiting a derived right of residence flowing from Article 20 TFEU

Para 81 Article 20 TFEU does not affect the possibility of Member States relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security. However, in so far as Mr Rendón Marin's situation falls within the scope of EU law, assessment of his situation must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter, an article which, as has been pointed out in paragraph 66 above, must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter.

CJEU: Article 21 TFEU and Directive 2004/38 must be interpreted as precluding national legislation which requires a third-country national to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record where he is the parent of a minor child who is a Union citizen and a national of a Member State other than the host Member State and who is his dependant and resides with him in the host Member State;

Left the decision to the national court – however told the national court to use art 20 TFEU
"In the event that the referring court, when reviewing the conditions laid down in Article 7(1) of Directive 2004/38, comes to the conclusion that those conditions are not fulfilled and, in any event, so far as concerns Mr Rendón Marín's son, a minor, who has always resided in the Member State of which he is a national, it should be examined whether a derived right of residence for Mr Rendón Marín may, where appropriate, be founded on Article 20 TFEU".

Article 20 TFEU must be interpreted as precluding the same national legislation which requires a third-country national who is a parent of minor children who are Union citizens in his sole care to be automatically refused the grant of a residence permit on the sole ground that he

has a criminal record, where that refusal has the consequence of requiring those children to leave the territory of the European Union.

THIRD COUNTRY NATIONALS

5. LEGALLY RESIDENT TCNs

The entry and residence status of TCNs in the host country determine the set of rights that each category enjoys. Some groups of third-country nationals enjoy free movement rights to varying extents as it is shown by a number of directives (see below).

Primary law

Article 78 TFEU
1.The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:
(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
(c) a common system of temporary protection for displaced persons in the event of a massive inflow;
(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.
3. In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the ember State(s) concerned. It shall act after consulting the European Parliament.

Article 79 TFEU
1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:
(a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;
(b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;

(c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;
(d) combating trafficking in persons, in particular women and children.
3. The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.
4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.

5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

Long-Term Residence Directive 2003/109/EC

This directive covers long-term resident TCNs – those who resided in one EU MS for at least 5 years. Allows rights of residence and movement to other EU Member States after obtaining permanent residence in the first Member State (which is after 5 years of legal continuous residence there). But subject to conditions, if residence over 3 months (Article 14).

Article 14(2):
"A long-term resident may reside in a second Member State on the following grounds:
(a) exercise of an economic activity in an employed or self-employed capacity (2nd MS can apply labour market test, give preference to EU citizens (art 14(3))
(b) pursuit of studies or vocational training;
(c) other purposes."

In the 2nd MS, a TCN must apply for residence permit (art 15(1))

2nd MS may require stable and regular resources (art 15 (2)(a), comprehensive sickness insurance (art 15 (2)(b)).

Family member can move too if constituted as a family in the 1st MS (art 16(1)).

EU Blue Card Directive 2009/50/EC

This directive covers TCNs, who are in highly qualified employees. A highly-qualified employee is defined as a person who

"in the Member State concerned, - is protected as an employee under national employment law and/or in accordance with national practice, irrespective of the legal relationship, for the purpose of exercising genuine and effective work for, or under the direction of, someone else,

- is paid, and,

- has the required adequate and specific competence, as proven by higher professional qualifications" (art 2(b)).

EU Blue Card Holders enjoy more favourable rules on obtaining permanent residence status and free movement compared to long-term residents:

- accumulation of 5 years of legal and continuous residence, even within several Member States (art 15(2))

- application for PR as an EU Blue Car holder maybe submitted already after 2 years of continuous legal residence (art 15(2)(b))
- opportunity to change employer after in highly skilled employment after 2 years (art 12)
- movement to 2nd MS possible after 18 months of continuous legal residence in 1st MS, for the purpose of high-skilled employment (art 18(1))
- within 1 month after entry TCN/employer must submit application for Blue Card in the 2nd MS
- family members can move too, if family constituted in the 1st MS (art 19)

The current EU Blue Card Directive has demonstrated intrinsic weaknesses such as restrictive admission conditions and very limited facilitation for intra-EU mobility. This, combined with many different sets of parallel rules, conditions and procedures for admitting the same category of highly skilled workers which apply across EU Member States, has limited the EU Blue Card's attractiveness and usage. This is neither efficient, as such fragmentation entails a burden for employers and individual applicants, nor effective, as shown by the very limited overall number of highly skilled permits issued.

Note: Proposal EU Blue Card Directive (Recast) because the original Directive considered ineffective (see http://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160607/directive_conditions_entry_residence_third-country_nationals_highly_skilled_employment_en.pdf)

Students and Researchers Directive 2016/801/EU (recast)

This Directive is not in force as yet. It will enter into force on 23rd May 2018.

It simplifies the rules on intra-EU mobility and transfer of skills and knowledge. More flexible rules will increase the possibility for researchers, students and remunerated trainees to move within the EU, which is particularly important for students and researchers enrolled in joint programmes. Family members of researchers will also be granted certain mobility rights.

The text of the Directive is available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2016_132_R_0002

Intra-Corporate Transfer Directive 2014/66/EU

It covers TCNs subject to intra-corporate transfer, which is defined as "the temporary secondment for occupational or training purposes of a third-country national who, at the time of application for an intra-corporate transferee permit, resides outside the territory of the Member States, from an undertaking established outside the territory of a Member State, and to which the third-country national is bound by a work contract prior to and during the transfer, to an entity belonging to the undertaking or to the same group of undertakings which is established in that Member State, and, where applicable, the mobility between host entities established in one or several second Member States" (art 3(a)).

Very limited chance to obtain permanent residence, max residence 3 years for managers and specialist and 1 year for trainee employees, then they need to leave the territory of the Member States unless they obtain a residence permit on another basis in accordance with Union or national law. (art 12(1))

MS may apply 6 months cooling of period (art 12(2))

No opportunity to change employer.

But have conditional intra-EU mobility rights (art 20)

Short-term mobility a period of up to 90 days in any 180-day period per Member State, based on the permit granted in the 1st MS, but 2nd MS may require notification of movement (art 21)

Long-term mobility a period of more than 90 days, 2nd MS may require notification or even application for permit (art 22).

Family member can move as well (art 19(1))

Seasonal Workers Directive 2014/36/EU

It covers a TCN "who retains his or her principal place of residence in a third country and stays legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between that third-country national and the employer established in that Member State;" (art 3(b))

There is a total maximum limit of between five and nine months per calendar year of residence for a seasonal worker; they must then return to a third country (art 14).

Within the maximum time limit, seasonal workers will be able, on one occasion, to change employers or to obtain an extension of their stay with their employer, if they still meet the criteria for admission, although the grounds for refusal will still apply. The preamble makes clear that this possibility is intended to avoid abuse, since the worker will not be tied to a single employer. Member States will have an option to allow further extensions or changes of employer.

The directive facilitates the re-entry of seasonal workers who were admitted at least once within the previous five years, if they complied with immigration law during their stay (art 16). This could include a simplified application process, an accelerated procedure, priority for previous seasonal workers, or the issue of several seasonal worker permits at the same time.

There are no intra-EU mobility rights.

Single Permit Directive 2011/98/EU

It covers TCNs admitted to the EU for the purpose of employment, who have not yet achieved long-term residence status (art 3(1)).

There are no intra-EU mobility rights.

The following table summarises the free movement rights:

Category of migrants	***Free movement rights***
EU citizens	This is a fundamental right, which is now not only guaranteed in the TFEU and the Citizenship Directive but also in the Charter of Fundamental Rights.
Legally residing TCNs	Article 45 (2) of the Charter states that freedom to move and reside in the Member States can also be granted to them. However, the facultative nature of this provision makes it difficult to consider this as a fundamental right.
Long-term residents, students, researchers and highly qualified workers	Subject to restrictions

Refugees, beneficiaries of subsidiary protection and non-EU family members of TCNs	Not entitled to free movement. Differential treatment compared to EU citizens. Refugees, beneficiaries of subsidiary protection acquisition of free movement when they acquire the status of long term residents.

Category of migrants	***Security of residence***
Long-Term Residents Directive (LRD)	Most legally residing TCNs become eligible for permanent resident status when they have stayed in a Member State for five years.
Legally residing TCNs	• Students are excluded from the scope of the LRD, not entitled to permanent residence. • ICT no right to permanent residency – max stay in the host country, 3 years. • Refugees and beneficiaries of subsidiary protection only recently included within the personal scope of application of the amended Long-Term Residents Directive (see also Recast Qualification Directive 2011/95/EU).
Citizenship Directive (2004/38)	Family members of EU citizens are, however, entitled to permanent residence after five years without any further conditions being imposed
Blue Card Directive	For highly qualified workers, the directive contains more favourable criteria by which the period of five years residence is calculated

European Parliament and Council Regulation No 1931/2006

This Regulation establishes a local border traffic regime at the external land borders of the Member States and introduces for that purpose a local border traffic permit. This Regulation authorises Member States to conclude or maintain bilateral Agreements with neighbouring third countries for the purpose of implementing the local border traffic regime established by this Regulation. The local border traffic regime constitutes a derogation from the general rules governing the border control of persons crossing the external borders of the Member States of the European Union which are set out in Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

6. ILLEGALLY RESIDENT TCNS

The **Return Directive 2008/115/EC** is the key legal instrument for returning TCNs. It provides guidelines for EU Member States and Schengen Countries to follow return and removal procedures.[1] The common standards and procedures cover areas such as the use of coercive force, return, removal, detention, and re-entry. The Directive also provides provisions on postponement of removal (art 9), specifying criteria for when a Member State shall and may postpone a removal, and on safeguards pending return (concerning rights to family unity, health care, access to education for minors and specific needs of vulnerable persons).

[1] Except Ireland and the UK who have decided not to opt into this area of Community law.

The Return Directive also takes into consideration the 'Twenty guidelines on forced return', adopted in May 2005 by the Committee of Ministers of the Council of Europe.[2] These twenty guidelines form a non-binding code of good conduct for expulsion procedures that Member States can bear in mind when developing national legislation and regulations on returning illegal TCNs. They are based on detailed research by bodies such as the European Court of Human Rights, as well as a questionnaire on forced return sent to the Member States. For the most part, the issues discussed under the twenty guidelines are included in the Return Directive.

According to the Return Directive, a Member State can issue a return decision to TCNs if they are staying illegally on the Member State's territory, although they may refrain from making the decision, for example if the Member State decides to grant the TCN a residence permit based on humanitarian reasons. Also, a Member State should not issue a return decision if the TCN is waiting for a renewal of their residence permit. With the exception of cases where there is cause for concern for national security or similar situations, the return decision should include a period ranging from seven to 30 days, depending on each individual case[3], for the TCN to return voluntarily. If the TCN does not return within the voluntary period, then the Member State can take the necessary measures to enforce return of the TCN.

The Return Directive provides that the return decision itself should be issued in writing, and if the TCN requests it, then also with a written or oral translation of the main elements, in a language that the TCN is believed to understand. The TCN should also be able to appeal against or seek review of the decision. In the case of detention, TCNs should be kept in detention for the shortest period possible, and for the most part only when there is a risk of absconding or the TCN avoids or hampers the preparation of return. If the use of coercive measures is required, as a last resort, then they shall not exceed reasonable force.

Special attention should be paid to vulnerable persons throughout the entire return process, particularly in relation to forced return. According to the Return Directive, vulnerable persons are defined as 'minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical, or sexual violence'. For example, in the case of minors, the best interests of the child must be considered, and minors should only be detained as a measure of last resort. This is also one of the goals of the Return Fund, which specifically states that it will provide assistance for the proper treatment of these vulnerable persons. For example, it will support the exchange of information of best practices for the return of vulnerable persons.[4]

This directive was interpreted in the *Case M.G., N.R. v Staatssecretaris van Veiligheid en Justitie.* The CJEU (Second Chamber) hereby ruled that: "Article 15(2) and (6) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, must be interpreted as meaning that, where the extension of a detention measure has been decided in an administrative procedure in breach of the right to be heard, the national court responsible for assessing the lawfulness of that extension decision may order the lifting of the detention measure only if it considers, in the light of all of the factual and legal circumstances of each case, that the infringement at issue actually deprived the party relying thereon".

[2] Council of Europe 'Twenty Guidelines on Forced Return', September 2005.

[3] According to Art. 7(4) of the Return Directive, Member States may in some cases refrain from granting a period for voluntary departure or may grant a period shorter than seven days, if there is a risk absconding, if an application for legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person poses a risk to public policy, public or national security.

[4] Decision No 575/2007/EC.

7. CASE-LAW ON FREE MOVEMENT OF TCNS

Case C‑254/11 Szabolcs-Szatmár-Bereg Megyei Rendőrkapitányság Záhony Határrendészeti Kirendeltsége v Oskar Shomodi

• Case concerned a Ukrainian national (Mr Shomodi) who is in possession of a valid local border traffic permit, issued pursuant to Regulation No 1931/2006, which authorises him to enter the border area of Hungary. On 2 February 2010 he requested entry into Hungary at the Záhony border crossing. The Hungarian border police established that he had stayed in Hungarian territory for 105 days during the period from 3 September 2009 to 2 February 2010, entering that territory almost daily for several hours. Since Mr Shomodi had thus stayed for more than three months in the Schengen area during a six-month period, the Hungarian border police refused him entry into Hungarian territory on the basis of Hungarian national law, interpreted in the light of the Convention implementing the Schengen Agreement.

• Mr Shomodi brought an action against the decision of the border police before the Hungarian courts. In the appeal proceedings on a point of law before it, the Hungarian Supreme Court, referred to the Court of Justice the question of whether the agreement at issue as interpreted by the Hungarian authorities, limits the total length of a stay of a cross-border worker in the border area of Hungary to three months over a six-month period is compatible with the local border traffic regulation.

The CJEU found:

1. First that the general rule in the Schengen acquis, which limits the stay of foreign nationals to three months over a six-month period, does not apply to local border traffic. The three-month limit laid down in the local border traffic regulation relates only to 'uninterrupted stays', whereas the limitation resulting from the Schengen acquis does not relate to such stays. In the Court's view, the fact that that limitation is, as in the Schengen acquis, limited to three months cannot cast doubt on its special nature in relation to the ordinary rules in place for third-country nationals who are not subject to visa requirements. It is not apparent from any provision of the regulation that those three months must fall within the same six-month period.
2. Second by adopting the regulation on local border traffic, the EU legislature intended to put rules in place for local border traffic which are independent of, and distinct from, those of the Schengen acquis. The purpose of those rules is to enable the residents of the border areas concerned to cross the external land borders of the EU for legitimate economic, social, cultural or family reasons, and to do so easily – that is to say, without excessive administrative constraints – and frequently, even regularly.
3. Third, in relation to the concerns expressed by certain Member States in relation to the alleged negative consequences of such an autonomous interpretation of the regulation, the Court responds that the easing of border crossing is intended for *bona fide* border residents with legitimate and duly substantiated reasons for frequently crossing an external land border. In addition, the Member States remain free to impose penalties on those who abuse or fraudulently use their local border traffic permit.

- Accordingly, the Court considered that the holder of a local border traffic permit must be able to move freely within the border area for a period of three months if his stay is uninterrupted and to have a new right to a three-month stay each time that his stay is interrupted.
- Finally, the Court stated that the stay of the holder of a local border traffic permit must be regarded as interrupted as soon as the person concerned crosses the border back into his State of residence in accordance with the conditions laid down in his permit, irrespective of the frequency of such crossings, even if they occur several times daily.

The Charter was not referred to in the judgment of Case C‑254/11 Oskar Shomodi.

However, it was mentioned rather extensively in the **Opinion of Advocate General CRUZ VILLALÓN.** The case is decided in the light of the scheme of the border crossing regime laid down by Regulation No 1931/2006 read in conjunction with Article 20 of the Convention implementing the Schengen Agreement, signed in Schengen on 19 June 1990. The suggestion of the Advocate General Villalon is to read Article 5 of Regulation No 1931/2006 in conjunction with the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

Compliance with the Charter and the ECHR

Para 65. In the light of the foregoing, the main question which is therefore submitted for the assessment of the Court is whether the regime established by the bilateral agreement concluded by Hungary, as interpreted and/or implemented by the competent Hungarian authorities, is compatible, in the first place, with the spirit of the local border traffic regime which I have just examined in detail, as interpreted in accordance with primary EU law, and, more specifically, with the relevant provisions of the Charter, or, if appropriate, of the ECHR and, in the second place and more widely, with all EU law, in accordance with Article 4(3) TEU.

Para 66. It should be noted, in that regard, that recital 13 in the preamble to Regulation No 1931/2006 states that the regulation respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter.

Para 67. Moreover, the conclusion of bilateral agreements such as the one at issue in the main proceedings falls within the scope of the implementation of the local border traffic regime, so that those agreements, which must be in accordance with the rules of Regulation No 1931/2006, must, more generally, be concluded in compliance with primary law and in particular with the provisions of the Charter, in accordance with Article 51(1) thereof or, failing that and as appropriate, the provisions of the ECHR, in accordance with Article 6(3) TEU.

Para 68. One may, very intuitively, be prompted to approach the question initially from the point of view of freedom of movement.

Para 69. However, it should be pointed out, putting aside the situation of 'persons enjoying the Community right of free movement' or equivalent rights, within the meaning of Article 3(4) of Regulation No 1931/2006, that Article 45(1) of the Charter, which establishes the right of every citizen of the European Union to move and reside freely within the territory of the Member States, does not apply ratione personae to the main proceedings, any more than Article 45(2) of the Charter, which provides that those same rights may be granted to third-country nationals legally resident in the territory of a Member State.

Para 70. However, and without the need to question whether the main proceedings fall, in any way at all, within the scope of Article 2 of Protocol No 4 to the ECHR, which enshrines the right to freedom of movement, it is clear that it is covered, in any event, owing to the scheme of the local border traffic regime, by Article 7 of the Charter, which guarantees respect for private and family life, a provision which, in accordance with Article 52(3) of the Charter, must be interpreted in the light of Article 8 ECHR.

Para 71. Third-country nationals who are not included within the definition of family members of a European Union citizen, within the meaning of the aforementioned Directive 2004/38 and who therefore do not enjoy an automatic right of entry and residence in the host Member State, but who fall within the scope of Regulation No 1931/2006, must, in my view, be able to have, in the implementation of the regulation, guarantees of the right to a private

and family life in the broad sense, as do, reciprocally, the border residents in the Member States.

Application of Article 7 of the Charter and Article 8 ECHR

Para 72. In the end, therefore, it is definitely in the light of the relevant provisions of the Charter and the ECHR and also the general principles of EU law, and in particular the principle of proportionality, that Regulation No 1931/2006 must be interpreted and that the application of the relevant provision of the bilateral agreement concluded by Hungary must be assessed.

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Freedom of Movement and Residence of Persons within the EU

Dr Sonia Morano-Foadi

Content

EU CITIZENS

1. Who can benefit from the freedom of movement and residence?
2. Non-discrimination
3. Possible restrictions
4. CJEU case law on EU citizens

THIRD COUNTRIES' NATIONALS

5. Legally resident
6. Illegal immigrants
7. CJEU case law on TCNs

Key legal sources

EU CITIZENS

Primary legislation:

Article 45 TFEU – Free movement of workers

Articles 20 & 21 TFEU – EU Citizenship

EU Charter of Fundamental Rights (Arts 39 – 46), Art 45 Charter refers to free movement

Art 21 Charter non-discrimination

Secondary legislation:

Directive 2004/38 (Citizenship Rights Directive - CRD): formalities of entry and residence

Regulation 492/11 and Directive 2004/38:

A) Equal access to and conditions to employment

B) Equal treatment in matters of employment, remuneration and conditions of work for EU workers and members of their families

Commission Regulation 635/2006/EC repealing Council Regulation 1251/70/EEC : right to remain in the host Member State after being employed there with the status of permanent residence

THIRD COUNTRY NATIONALS

Primary legislation:

Article 78 TFEU

Article 79 TFEU

Secondary legislation:
Long-Term Residence Directive 2003/109/EC
EU Blue Card Directive 2009/50/EC
Intra-Corporate Transfer Directive 2014/66/EU
Single Permit Directive 2011/98/EU
Qualification Directive 2004/83/EC and (Recast) Qualification Directive 2011/95/EC.
Return Directive 2008/115/EC

Selected case law on freedom of movement and residence

Case 34/09, Zambrano, 8 March 2011

Case C-434/09, Shirley McCarthy v Secretary of State for the Home Department, 5 May 2011

Case C-256/11, Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduike, Dragica Stevic v Bundesministerium für Inneres, 15 November 2011

Opinion of Advocate General, Case C-254/11, Szabolcs-Szatmár-Bereg Megyei Rendőrkapitányság Záhony Határrendészeti Kirendeltsége v Oskar Shomodi, 6 December 2012

Case C-145/09, Land Baden-Württemberg v Panagiotis Tsakouridis, 23 November 2010

Case 162/09, Secretary of State for Work and Pensions v Child Poverty Action Group, 7 October 2010

Case-86/12, Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration, 10 October 2013

EU CITIZENS

1. WHO CAN BENEFIT FROM THE FREEDOM OF MOVEMENT AND RESIDENCE?

Free movement of workers - Article 45 TFEU –

Article 45 TFEU

1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
(a) to accept offers of employment actually made;
(b) to move freely within the territory of Member States for this purpose;
(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

Who is a worker? The concept of “worker” is a Union Law concept (Levin Case 53/61).

The CJEU has been generously construed by the Court of Justice (see CJEU case-law)

EU Citizens - Articles 20 & 21 TFEU -

Article 20 TFEU

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

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

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

Article 21 TFEU

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

EU Charter of Fundamental Rights (Free movement rights)

Article 45 Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

Who is covered by Directive 2004/38/EC?

- Citizens of an EU or EEA member state who visit, live, study or work in a different member state
- The EU citizen's direct family members, including their non-EU spouse/partner and the spouse/partner's direct family members (such as children)
- Other family members who are "beneficiaries", including common law partners, same sex partners, and dependent family members, members of the household, and sick family members

Family Members

Direct family members Article 2(2) Directive 2004/38/EC:

"Family member"	***Examples, notes and interpretation***
(a) the spouse;	*A partner in a legal same-sex marriage should also be considered a "spouse". See discussion on same-sex marriage.*
(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a [EU/EEA] Member	*This applies when the member state treats registered partnership "as equivalent to marriage". Where that is not true, the partner is not considered a "family member" in this definition, but still has a right of entry*

State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;	*as a beneficiary (see beneficiary below). This only covers registered partnerships done by an EU member state.*
(c) the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b);	*Children (or grandchildren!) under 21 or those who are older than 21 but still dependent (e.g. students supported by their parents). The child can be of the EU citizen or of the non-EU citizen. This would include a child from a previous relationship or from before the EU-citizen obtained their citizenship.*
(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);	*Dependent parents and dependent grandparents of either the EU citizen or of the non-EU spouse or partner. Dependent usually means financially dependent, though there may be other legally reasonable interpretations. For non-dependent parents, see beneficiary below.*

These are the people who have the easy-evidence route through the Directive. They can usually prove their relationship with a simple document, like a birth certificate or a marriage certificate, that legally documents the family link. These "*family members*" (as the Directive states) "*enjoy an automatic right of entry and residence in the host Member State*" when they are with their EU citizen relative.

There are other people who are also direct beneficiaries of Directive 2004/38/EC. These are people who do not fall into this explicit definition of "*family member*", but who are none the less "part of the family".

Other family members who are "beneficiaries", including common law partners, same sex partners, and dependent family members, members of the household, and sick family members

Other beneficiaries

There are other people who are also direct beneficiaries of Directive 2004/38/EC. These are people who do not fall into the explicit definition of "*family member*", but who are none the less "part of the family".

For these beneficiaries, Directive 2004/38/EC says in the preamble:

In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.

Later, in the text of the Directive, it becomes a little more explicit about who these other beneficiaries are:

Article 3 Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

Who can be a beneficiary of Directive 2004/38/EC is worth breaking up and looking at in more detail, category by category:

"Other beneficiaries"	***Notes and interpretation***
2 (a) any other family members […] who, in the country from which they have come, are [either] dependants or members of the household of the Union citizen	This covers two separate groups, either: 1. other family members who are dependent on the EU citizen, or 2. other family members who live (or have lived recently) in the same household (even if they are not dependent). Another key phrase is "in the country <u>from which they have come</u> ". The phrase is quite open and covers a number of situations. For a Japanese person, it can include their original home country (e.g. Japan), a country they have recently lived in (e.g. USA) or where they currently live (e.g. France).
[2 (a) continued] or where serious health grounds strictly require the personal care of the family member by the Union citizen;	e.g. a non-EU parent who has been quite independent but who now needs intensive assistance because of a medical condition such as a stroke or Alzheimer's
2 (b) the partner with whom the Union citizen has a durable relationship, duly attested	This category covers all other long term "durable" partnerships, including both opposite-sex and same-sex relationships. There is no official definition of how long the relationship must have existed. Some countries expect to see two years of living together, but if you have a child with somebody and live with them it would clearly be incompatible with the Directive to require two years of relationship history. When a member-state does not recognize civil partnerships as equivalent to marriage, this is the category which is used for entry.

Family members (as outlined above), where the EU citizen has worked in another member state and now wishes to return to their "home" country to work (*Surinder Singh*).

See *Rahman and Others* - Obligation to facilitate, in accordance with national legislation, entry and residence for 'any other family members' who are dependants of a Union citizen

Who is NOT covered by Directive 2004/38/EC?

- If a citizen is living in their home EU member state and has not worked in other EU member state, then this Directive does not apply. All movement of non-EU family members into the home state is governed by national law.
- Some old-EU member states have special "transitional" arrangements that curb the ability of citizens of new EU states (Bulgaria and Romania) to move freely for work. The curbs were maintained until 2017. Citizens of new EU member states can however travel without visas throughout Europe, and their non-EU family members can travel freely with them.
- Citizens of non-EEA countries who are not travelling with or joining family members who are EU/EEA citizen.

2. NON-DISCRIMINATION ON GROUNDS OF NATIONALITY

A. Free movement of workers: Article 45 and Directive 2004/38 and Regulation 492/11 gives a general right of non-discrimination on grounds of nationality in matters relating to employment, remuneration and other conditions of work and employment.

Art 45 (2) TFEU - Such freedom of movement shall entail the abolition of *any discrimination based on nationality* between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

Recital 20, Preamble to Directive 2004/38 "In accordance with the *prohibition of discrimination on grounds of nationality*, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law".

Regulation 492/11, Section 2 Employment and equality of treatment
Article 7
1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.
2. He shall enjoy the same social and tax advantages as national workers.
3. He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.
4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.

Article 8
A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto, including the right to vote and to be eligible for the administration or management posts of a trade union. He may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by public law. Furthermore, he shall have the right of eligibility for workers' representative bodies in the undertaking.

The first paragraph of this Article shall not affect laws or regulations in certain Member States which grant more extensive rights to workers coming from the other Member States.

Article 9

1. A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs.
2. A worker referred to in paragraph 1 may, with the same right as nationals, put his name down on the housing lists in the region in which he is employed, where such lists exist, and shall enjoy the resultant benefits and priorities.

If his family has remained in the country whence he came, they shall be considered for this purpose as residing in the said region, where national workers benefit from a similar presumption.

B. Access to social citizenship entitlements under the free movement provisions is based on the principle of non-discrimination and citizenship of the Union (art 18 TFEU) which supplements art 45 TFEU and its associated secondary legislation.

Article 18 (1) TFEU

1. Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Article 21 Charter (Equality Title III) - Non-discrimination -

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.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

3. POSSIBLE RESTRICTIONS

Art 45 (3) TFEU. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health […]

Article 27(1) Directive 2004/38).

[…] Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends."

Restrictions on the right of entry and the right of residence: Union citizens or members of their family may be expelled from the host Member State on grounds of *public policy, public security or public health*. Under no circumstances may an expulsion decision be taken on economic grounds. Measures affecting freedom of movement and residence must comply with the proportionality principle and be based exclusively on the personal conduct of the individual concerned. Such conduct must represent a sufficiently serious and present threat affecting the fundamental interests of the state. Previous criminal convictions do not automatically justify expulsion. The mere fact that the entry documents used by the individual concerned have expired does not constitute grounds for such a measure. Only in exceptional circumstances, for overriding considerations of public security, can expulsion orders be served on a Union citizen if he/she has resided in the host country for ten years or if he/she is a minor. Lifelong exclusion orders may not be issued under any circumstances and persons concerned by

exclusion orders may apply for a review after three years. They also have access to judicial review and, where relevant, administrative review in the host Member State.

Article 28 Directive 2004/38 - Protection against expulsion
1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
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.
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:
(a) have resided in the host Member State for the previous 10 years; or
(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

Finally, the directive enables Member States to adopt the necessary measures to refuse, terminate or withdraw any right conferred in the event of abuse of rights or fraud, such as marriages of convenience (**Article 35 Directive 2004/38**).

Moreover, the CJEU in the Case C-430/10 *Hristo Gaydarov v Director na Glavna direktsia 'Ohranitelna politsia' pri Ministerstvo na vatreshnite raboti* has stated that "Article 21 TFEU and Article 27 of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States do not preclude national legislation that permits the restriction of the right of a national of a Member State to travel to another Member State in particular on the ground that he has been convicted of a criminal offence of narcotic drug trafficking in another State, provided that (i) the personal conduct of that national constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, (ii) the restrictive measure envisaged is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it and (iii) that measure is subject to effective judicial review permitting a determination of its legality as regards matters of fact and law in the light of the requirements of European Union law".

In the Case C-145/09 *Land Baden-Württemberg v Panagiotis Tsakouridis*, the CJEU has stated that Article 28(3) of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States must be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is capable of being covered by the concept of 'imperative grounds of public security' which may justify a measure expelling a Union citizen who has resided in the host Member State for the preceding 10 years. Article 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'.

4. CASE-LAW on EU CITIZENSHIP PROVISIONS AND THE CHARTER

Is still intra-mobility the trigger for citizenship rights?

Case C-34/09 Zambrano [2011] ECR

- Case involved a family (Mr Zambrano, his wife and child) who arrived in Belgium on a visa and immediately applied for asylum, on the basis that they had faced persecution in

Colombia. Application denied but appeal lasting 12 years. In the meantime, Mr Zambrano found stable employment and had two more children.

- Two children by virtue of Belgian law became Belgian citizens, corollary of EU citizenship.
- The Employment Tribunal in Brussels decided to refer three questions to the CJEU. Firstly, it asked whether Articles 18, 20 and 21TFEU taken together or separately could 'confer a right of residence upon a citizen of the Union in the territory of the Member State of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States?' Secondly, it asked whether these three articles of the TFEU, when put together with Articles 21, 24 and 34 of the EU Charter of Fundamental Rights meant that these rights must be protected on behalf of an infant-citizen, even where the infant citizen has not exercised free movement rights and is dependent for their enjoyment upon a third country national (TCN) parent.
  Finally it asked the CJEU whether, given this constellation of rights in EU law and the circumstances of a non-migratory infant-citizen, where the TCN parent 'fulfils the condition of sufficient resources and the possession of sickness insurance by virtue of paid employment making him subject to the social security system of that State', national law must grant the TCN parent an exemption from the requirement to hold a work permit.

- The Grand Chamber simplified the three questions into one: 'whether the provisions of the TFEU on European Union citizenship are to be interpreted as meaning that they confer on a relative in the ascending line who is a third country national, upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of which they are nationals and in which they reside, and also exempt him from having to obtain a work permit in that Member State.'

- Could Mr Zambrano could rely on the citizenship rights of his children to enjoy a derived right of residence, as had been the case in Chen? The difference here was that the children had remained in the member state of which they were nationals: would the absence of a cross-border element make this a 'wholly internal' situation?

- CJ: Test of 'genuine enjoyment of the substance' of citizenship rights in favour of Mr Zambrano: "Article 20 TFEU precludes a MS from refusing a TCN upon whom his minor children, who are EU citizens, are dependent, a right of residence and from refusing to grant a work permit to him, in so far as such decisions deprive those children of the genuine enjoyment of the substance of EU citizen rights".

- No application Citizenship Directive - Zambrano family not 'beneficiaries' Article 3(1) - they were not 'Union citizens who move to or reside in a Member State other than that of which they are a national.

Case C-434/09 McCarthy [2011] ECR

• Case involved a British/Irish national (Mrs McCarthy) who was born in the UK and always lived there. Following her marriage to a TCN applied for an Irish passport for the first time. Once obtained, as an Irish national, she asked for a residence permit to base her residence in the United Kingdom on rights associated with European citizenship. Consequently, her husband applied for a residence document as the spouse of a Union citizen.

- Both applications refused: she had never exercised her right to move and reside in Member States other than the United Kingdom.

The Charter was briefly mentioned in McCarthy:

Para 27 As a preliminary point, it should be observed that citizenship of the Union confers on each Union citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaties and the measures adopted for their implementation, freedom of movement for persons being, moreover, one of the fundamental freedoms of the internal market, which was also reaffirmed in Article 45 of the Charter of Fundamental Rights of the European Union (Case C‑162/09 Lassal [2010] ECR I‑0000, paragraph 29).

- Test of 'genuine enjoyment of the substance' of citizenship rights (Zambrano test) to the fact = art 21 do not apply in this case. Mrs McCarthy was not deprived of the genuine enjoyment of Union citizen rights, or exercise of her right to move and reside freely within the territory of the Member States (para 49).

Case C-256/11 Dereci [2011] ECR

- 5 joint applications: TCNs married to Austrian citizens: residence permits rejected by the Austrian Authority.

- 4 of them subject to expulsion orders and individual removal orders. Austrian Authority refused to apply Directive 2004/38 family members of EU citizens: Union citizens concerned not exercised right of free movement.

- Re-assertion of the 'genuine enjoyment' test (Zambrano test) and its limitations: the Union citizen must be forced to leave not only home MS but also Union as a whole. (para 66). Decision left to the national court.

In Dereci, the Charter was mentioned when the Court looked at the issue of 'The right to respect for private and family life'.

Para 70 As a preliminary point, it must be observed that in so far as Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), concerning respect for private and family life, contains rights which correspond to rights guaranteed by Article 8(1) of the ECHR, the meaning and scope of Article 7 of the Charter are to be the same as those laid down by Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights (Case C‑400/10 PPU McB. [2010] ECR I-0000, paragraph 53).

Para 71 However, it must be borne in mind that the provisions of the Charter are, according to Article 51(1) thereof, addressed to the Member States only when they are implementing European Union law. Under Article 51(2), the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (McB., paragraph 51, see also Joined Cases C-483/09 and C-1/10 Gueye and Salmerón Sánchez [2011] ECR I‑0000, paragraph 69).

Para 72 Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life

provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR.

Case C-40/11 Yoshikazu Iida v Stadt Ulm (case decided on 8 November 2012)

- Case involved a Japanese national (Mr Iida), married in 1998 to a German national and separated but not divorced since 2008. Since 2005, Mr Iida lives and works (with a permanent job) in Germany. The wife moved to Vienna (Austria) with her daughter. The spouses jointly exercise parental responsibility for their daughter. Their daughter was born in 2004 in the US, and she has German, Japanese and American nationality.

- German authorities refused to grant residence card as a family member of an EU citizen on the basis of Directive 2004/381 on European citizenship. Mr Iida obtained a right of residence in Germany in connection with family reunion, extending his residence permit was a matter of discretion.

- CJ: application of the 'genuine enjoyment' test (Zambrano test): the refusal to grant him a right of residence derived from their status of EU citizen is not liable to deny his daughter or his spouse genuine enjoyment of the substance of rights.

- Mr Iida cannot base a right of residence directly on the TFEU by referring to the EU citizenship of his daughter or his spouse. He has always lived in Germany in accordance with national law and can be granted a right of residence in Germany on another legal basis.

- Finally, he cannot rely on the Charter of Fundamental Rights of the European Union, which lays down a right to respect for private life and certain rights of the child. Since Mr Iida does not satisfy the conditions of Directive 2004/38 and has not applied for a right of residence as a long-term resident within the meaning of Directive 2003/109, his situation shows no connection with EU law, so that the Charter of Fundamental Rights of the European Union does not apply.

The Charter was referred to extensively in Case C-40/11 Yoshikazu Iida:

Para 32 In that context, the Verwaltungsgerichtshof Baden-Württemberg decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. On Articles 2, 3 and 7 of [Directive 2004/38]:

(a) Does "family member" include, in particular in the light of Articles 7 and 24 of the [Charter of Fundamental Rights ("the Charter")] and Article 8 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, "the ECHR")], on an extended interpretation of Article 2(2)(d) of Directive 2004/38, a parent who is a third-country national, has parental responsibility for a child who is a Union citizen entitled to freedom of movement, and is not maintained by that child?

(b) If so, does Directive 2004/38 apply to that parent, in particular in the light of Articles 7 and 24 of the Charter and Article 8 of the ECHR, on an extended interpretation of Article 3(1) of the directive, even where there is no "accompanying" or "joining" with respect to the Member State of origin of the child who is a Union citizen and has moved away?

(c) If so, does it follow that that parent, in particular in the light of Articles 7 and 24 of the Charter and Article 8 of the ECHR, has a right of residence for more than three months in the Member State of origin of the child who is a Union citizen, on an extended interpretation of Article 7(2) of Directive 2004/38, at least as long as parental responsibility subsists and is actually exercised?

2. On Article 6(1) TEU in conjunction with the Charter:

(a) (i) Is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter simply where the subject‑matter of the dispute depends on a national law (or part of a law) which inter alia – but not only – transposed directives?

(ii) If not, is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter simply because the claimant is possibly entitled to a right of residence under Union law and could accordingly, under the first sentence of Paragraph 5(2) of the FreizügG/EU, claim a residence card for a family member of a Union citizen which has its legal basis in the first sentence of Article 10(1) of [Directive 2004/38]?

(iii) If not, is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter, in accordance with the case‑law deriving from Case C‑260/89 ERT [1991] ECR I‑2925, paragraphs 41 to 45, where a Member State restricts the right of residence of the father who is a third-country national with parental responsibility for a Union citizen who is a minor and resides predominantly with her mother in another Member State of the Union because of the mother's employment?

(b) (i) If the Charter is applicable, can a right of residence under European Union law for the father who is a third-country national be derived directly from Article 24(3) of the Charter, at least as long as he has and actually exercises parental responsibility for his child who is a Union citizen, even if the child resides predominantly in another Member State of the Union?

(ii) If not, does it follow from the freedom of movement of the child who is a Union citizen under Article 45(1) of the Charter, possibly in conjunction with Article 24(3) of the Charter, that the father who is a third-country national has a right of residence under European Union law, at least as long as he has and actually exercises parental responsibility for his child who is a Union citizen, so that in particular the freedom of movement of the child who is a Union citizen is not deprived of all practical effect?

3. On Article 6(3) TEU in conjunction with the general principles of European Union law:

(a) Can the "unwritten" fundamental rights of the European Union developed in the Court's case‑law from Case 29/69 Stauder [1969] ECR 419, paragraph 7, up to, for example, Case C‑144/04 Mangold [2005] ECR I‑9981, paragraph 75, be applied in full even if the Charter is not applicable in the specific case; in other words, do the fundamental rights which continue to apply as general principles of Union law under Article 6(3) TEU stand autonomously and independently alongside the new fundamental rights laid down in the Charter in accordance with Article 6(1) TEU?

Para 78 As to the fundamental rights mentioned by the referring court, in particular the right to respect for private and family life and the rights of the child, laid down in Articles 7 and 24 of the Charter respectively, it must be borne in mind that, in accordance with Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing European Union law. Under Article 51(2) of the Charter, it does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called on to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (see Dereci and Others, paragraph 71).

Para 79 To determine whether the German authorities' refusal to grant Mr Iida a 'residence card of a family member of a Union citizen' falls within the implementation of

European Union law within the meaning of Article 51 of the Charter, it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it (see Case C‑309/96 Annibaldi [1997] ECR I‑7493, paragraphs 21 to 23).

Para 80 While Paragraph 5 of the FreizügG/EU, which provides for the issue of a 'residence card of a family member of a Union citizen', is indeed intended to implement European Union law, it is none the less the case that the situation of the claimant in the main proceedings is not governed by European Union law, since he does not satisfy the conditions for the grant of that card in accordance with Article 10 of Directive 2004/38. Moreover, in the absence of an application by him for the status of long-term resident in accordance with Directive 2003/109, his situation shows no connection with European Union law.

Para 81 In those circumstances, the German authorities' refusal to grant Mr Iida a 'residence card of a family member of a Union citizen' does not fall within the implementation of European Union law within the meaning of Article 51 of the Charter, so that its conformity with fundamental rights cannot be examined by reference to the rights established by the Charter.

Para 82 In the light of the foregoing, the answer to the referring court's question is that, outside the situations governed by Directive 2004/38 and where there is no other connection with the provisions on citizenship of European Union law, a third‑country national cannot claim a right of residence derived from a Union citizen.

Case C‑86/12 Adzo Domenyo Alokpa

- The case involves a Togolese national (Mrs Alopka) who was rejected asylum seeker application in Luxembourg but discretionary leave to remain was granted until 31 December 2008, as she had given birth to twins requiring care. Her French children acquired Union citizenship. Then, residence permit was rejected and she appealed, questions referred to the CJEU.

- Questions referred by the Administrative Court to the CJEU: 'Is Article 20 TFEU – if necessary, read in conjunction with Charter 'Is Article 20 TFEU – if necessary, read in conjunction with Articles 20, 21, 24, 33 and 34 of the Charter of Fundamental Rights [of the European Union], or with one or more of those provisions read separately or in conjunction – to be interpreted as precluding a Member State from refusing a third-country national, with sole responsibility for his or her minor children who are citizens of the European Union, residence in the Member State of residence of the children, where they have been living with that person since birth, without having that nationality, while refusing the third-country national a residence permit, or even a work permit?

In Case C‑86/12 Adzo Domenyo Alokpa, the Charter was only mentioned by the referring national court:

Para 19 In those circumstances, the Cour administrative decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 20 TFEU – if necessary, read in conjunction with Articles 20, 21, 24, 33 and 34 of the Charter of Fundamental Rights [of the European Union], or with one or more of those

provisions read separately or in conjunction – to be interpreted as precluding a Member State from refusing a third-country national, with sole responsibility for his or her minor children who are citizens of the European Union, residence in the Member State of residence of the children, where they have been living with that person since birth, without having that nationality, while refusing the third-country national a residence permit, or even a work permit?

Are such decisions to be regarded as being in the nature of decisions depriving those children, in their country of residence, in which they have lived since birth, of effective enjoyment of the substance of the rights attaching to the status of citizen of the European Union also in the situation where their other direct ascendant, with whom they have never shared family life, is resident in another Member State of the European Union, of which that person is a national?'

- CJEU: Articles 20 TFEU and 21 TFEU do not preclude a MS from refusing to allow a TCN with sole responsibility of two EU minor children to reside in its territory… in so far as those Union citizens do not satisfy the conditions set out in CR Directive or such a refusal does not deprive those citizens of effective enjoyment of the substance of the rights … to be determined by the referring court.

- Therefore, if the referring court holds that Article 21 TFEU does not preclude Mrs Alokpa from being refused a right of residence in Luxembourg, that court must still determine whether such a right of residence may nevertheless be granted to her, exceptionally – if the effectiveness of the Union citizenship that her children enjoy is not to be undermined – in light of the fact that, as a consequence of such a refusal, those children would find themselves obliged in practice to leave the territory of the European Union altogether, thus denying them the genuine enjoyment of the substance of the rights conferred by virtue of that status.

- In that regard, as the Advocate-General stated in his Opinion, Mrs Alokpa, as the mother of Jarel and Eja Moudoulou and as sole carer of those children since their birth, could have the benefit of a derived right to reside in France. (points 55 and 56)

- It follows that, in principle, the refusal by the Luxembourg authorities to grant Mrs Alokpa a right of residence cannot result in her children being obliged to leave the territory of the European Union altogether. It is, however, for the referring court to determine whether, in the light of all of the facts of the main proceedings, that is in fact the case.

- Nearly 10 years ago, the CJEU in the case of Chen C‑200/02 ruled that self-sufficient Union national children have the right to be accompanied by their TCN parents, but Alokpa case relates to the interpretation of Article 20 TFEU.

- It was not undertaken in the light of fundamental rights, as it was primarily concerned with the satisfaction of the conditions laid down by CR Directive.

- Thus, the lack of human rights dimension in the judgement and the mere application of the test leaving the national court to decide is unsatisfactory as the referring Court in Alokpa asked to interpret art 20 TFEU in light of the Charter.

Case C‑165/14 Alfredo Rendón Marín

- Mr Rendón Marín, a Colombian national, is the father of two minor children born in Malaga (Spain), namely a boy of Spanish nationality and a girl of Polish nationality. The children have always resided in Spain. Mr Rendón Marín was granted sole care and custody

of his children. The whereabouts of the children's mother, a Polish national, are unknown. The two children are receiving appropriate care and schooling.

• Mr Rendón Marín has a criminal record. In particular, he was sentenced in Spain to a term of nine months' imprisonment. However, he was granted a provisional two-year suspension of that sentence with effect from 13 February 2009. On the date of the order for reference, namely 20 March 2014, he was awaiting a decision on an application for mention of his criminal record to be removed from the register (cancelación).

On 18 February 2010, Mr Rendón Marín lodged an application with the Director-General of Immigration of the Ministry of Labour and Immigration for a temporary residence permit on the basis of exceptional circumstances, pursuant to paragraph 4 of the First Additional Provision of Royal Decree 2393/2004.

By decision of 13 July 2010, Mr Rendón Marín's application was rejected pursuant to Article 31(5) of Law 4/2000 because he had a criminal record.

Mr Rendón Marín's appeal against that decision was dismissed by judgment of the Audiencia Nacional (National High Court (Spain)) of 21 March 2012, whereupon he brought an appeal against that judgment before the Tribunal Supremo (Supreme Court, Spain).

Mr Rendón Marín based his appeal against the judgment on a single plea in law, alleging (i) misinterpretation of the judgments of 19 October 2004, Zhu and Chen (C‑200/02, EU:C:2004:639), and of 8 March 2011, Ruiz Zambrano (C‑34/09, EU:C:2011:124), since the case-law resulting from those judgments should, in his submission, have led to him being granted the residence permit sought, and (ii) infringement of Article 31(3) and (7) of Law 4/2000.

The referring court states that, leaving aside the specific circumstances of the main proceedings, in this case, as in the cases which gave rise to the judgments of 19 October 2004, Zhu and Chen (C‑200/02, EU:C:2004:639), and of 8 March 2011, Ruiz Zambrano (C‑34/09, EU:C:2011:124), the refusal in Spain to grant Mr Rendón Marín a residence permit would result in his removal from Spanish territory and, therefore, from the territory of the European Union, which the two minor children, his dependants, would leave as a consequence. That court observes, however, that, in contrast to the situations examined in the judgments of 19 October 2004, Zhu and Chen (C‑200/02, EU:C:2004:639), and of 8 March 2011, Ruiz Zambrano (C‑34/09, EU:C:2011:124), the applicable national legislation lays down a prohibition on the grant of a residence permit when the applicant has a criminal record in Spain.

Consequently, the referring court is uncertain whether national law, which prohibits, without any possibility of derogation, the grant of a residence permit when the applicant has a criminal record in the country where the permit is applied for, even though that has the unavoidable consequence of depriving a minor, a Union citizen who is a dependant of the applicant for a residence permit, of his right to reside in the European Union, is consistent with the Court's case-law, relied on in the case, relating to Article 20 TFEU.

It was in those circumstances that the Tribunal Supremo (Supreme Court) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is national legislation which excludes the possibility of granting a residence permit to the parent of a Union citizen who is a minor and a dependant of that parent on the ground that the parent has a criminal record in the country in which the application is made consistent with Article 20 TFEU, interpreted in the light of the judgments of 19 October 2004, Zhu and Chen

(C‑200/02, EU:C:2004:639), and of 8 March 2011, Ruiz Zambrano (C‑34/09, EU:C:2011:124), even if this results in the removal of the child from the territory of the European Union, inasmuch as the child will have to leave with its parent?'

In Case C‑165/14 Alfredo Rendón Marín, the Charter was referred to in the following two paragraphs:

Para 66 As regards, moreover, the possible expulsion of Mr Rendón Marín, it is necessary, first, to take account of the fundamental rights whose observance the Court ensures, in particular the right to respect for private and family life, as laid down in Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter') (see, to this effect, judgment of 23 November 2010, Tsakouridis, C‑145/09, EU:C:2010:708, paragraph 52) and, secondly, to observe the principle of proportionality. Article 7 of the Charter must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) thereof (see, to this effect, judgment of 23 December 2009, Detiček, C‑403/09 PPU, EU:C:2009:810, paragraphs 53 and 54).

The possibility of limiting a derived right of residence flowing from Article 20 TFEU

Para 81 Article 20 TFEU does not affect the possibility of Member States relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security. However, in so far as Mr Rendón Marin's situation falls within the scope of EU law, assessment of his situation must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter, an article which, as has been pointed out in paragraph 66 above, must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter.

CJEU: Article 21 TFEU and Directive 2004/38 must be interpreted as precluding national legislation which requires a third-country national to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record where he is the parent of a minor child who is a Union citizen and a national of a Member State other than the host Member State and who is his dependant and resides with him in the host Member State;

Left the decision to the national court – however told the national court to use art 20 TFEU
"In the event that the referring court, when reviewing the conditions laid down in Article 7(1) of Directive 2004/38, comes to the conclusion that those conditions are not fulfilled and, in any event, so far as concerns Mr Rendón Marín's son, a minor, who has always resided in the Member State of which he is a national, it should be examined whether a derived right of residence for Mr Rendón Marín may, where appropriate, be founded on Article 20 TFEU".

Article 20 TFEU must be interpreted as precluding the same national legislation which requires a third-country national who is a parent of minor children who are Union citizens in his sole care to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record, where that refusal has the consequence of requiring those children to leave the territory of the European Union.

THIRD COUNTRY NATIONALS

5. LEGALLY RESIDENT TCNs

The entry and residence status of TCNs in the host country determine the set of rights that each category enjoys. Some groups of third-country nationals enjoy free movement rights to varying extents as it is shown by a number of directives (see below).

Primary law

Article 78 TFEU

1.The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;

(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;

(c) a common system of temporary protection for displaced persons in the event of a massive inflow;

(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;

(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;

(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;

(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

3. In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the ember State(s) concerned. It shall act after consulting the European Parliament.

Article 79 TFEU

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

(a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;

(b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;

(c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;

(d) combating trafficking in persons, in particular women and children.

3. The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.

4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.

5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

Long-Term Residence Directive 2003/109/EC

This directive covers long-term resident TCNs – those who resided in one EU MS for at least 5 years. Allows rights of residence and movement to other EU Member States after obtaining permanent residence in the first Member State (which is after 5 years of legal continuous residence there). But subject to conditions, if residence over 3 months (Article 14).

Article 14(2):
"A long-term resident may reside in a second Member State on the following grounds:
(a) exercise of an economic activity in an employed or self-employed capacity (2nd MS can apply labour market test, give preference to EU citizens (art 14(3))
(b) pursuit of studies or vocational training;
(c) other purposes."

In the 2nd MS, a TCN must apply for residence permit (art 15(1))

2nd MS may require stable and regular resources (art 15 (2)(a), comprehensive sickness insurance (art 15 (2)(b)).

Family member can move too if constituted as a family in the 1st MS (art 16(1)).

EU Blue Card Directive 2009/50/EC

This directive covers TCNs, who are in highly qualified employees. A highly qualified employee is defined as a person who

"in the Member State concerned, - is protected as an employee under national employment law and/or in accordance with national practice, irrespective of the legal relationship, for the purpose of exercising genuine and effective work for, or under the direction of, someone else,

- is paid, and,

- has the required adequate and specific competence, as proven by higher professional qualifications" (art 2(b)).

EU Blue Card Holders enjoy more favourable rules on obtaining permanent residence status and free movement compared to long-term residents:

- accumulation of 5 years of legal and continuous residence, even within several Member States (art 15(2))
- application for PR as an EU Blue Car holder maybe submitted already after 2 years of continuous legal residence (art 15(2)(b))
- opportunity to change employer after in highly skilled employment after 2 years (art 12)
- movement to 2nd MS possible after 18 months of continuous legal residence in 1st MS, for the purpose of high-skilled employment (art 18(1))
- within 1 month after entry TCN/employer must submit application for Blue Card in the 2nd MS
- family members can move too, if family constituted in the 1st MS (art 19)

The current EU Blue Card Directive has demonstrated intrinsic weaknesses such as restrictive admission conditions and very limited facilitation for intra-EU mobility. This, combined with many different sets of parallel rules, conditions and procedures for admitting the same

category of highly skilled workers which apply across EU Member States, has limited the EU Blue Card's attractiveness and usage. This is neither efficient, as such fragmentation entails a burden for employers and individual applicants, nor effective, as shown by the very limited overall number of highly skilled permits issued.

Note: Proposal EU Blue Card Directive (Recast) because the original Directive considered ineffective (see http://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160607/directive_conditions_entry_residence_third-country_nationals_highly_skilled_employment_en.pdf)

Intra-Corporate Transfer Directive 2014/66/EU

It covers TCNs subject to intra-corporate transfer, which is defined as "the temporary secondment for occupational or training purposes of a third-country national who, at the time of application for an intra-corporate transferee permit, resides outside the territory of the Member States, from an undertaking established outside the territory of a Member State, and to which the third-country national is bound by a work contract prior to and during the transfer, to an entity belonging to the undertaking or to the same group of undertakings which is established in that Member State, and, where applicable, the mobility between host entities established in one or several second Member States" (art 3(a)).

Very limited chance to obtain permanent residence, max residence 3 years for managers and specialist and 1 year for trainee employees, then they need to leave the territory of the Member States unless they obtain a residence permit on another basis in accordance with Union or national law. (art 12(1))

MS may apply 6 months cooling of period (12(2))

No opportunity to change employer.

But have conditional intra-EU mobility rights (art 20)

Short-term mobility a period of up to 90 days in any 180-day period per Member State, based on the permit granted in the 1st MS, but 2nd MS may require notification of movement (art 21)

Long-term mobility a period of more than 90 days, 2nd MS may require notification or even application for permit (art 22).

Family member can move as well (art 19(1))

Seasonal Workers Directive 2014/36/EU

It covers a TCN "who retains his or her principal place of residence in a third country and stays legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between that third-country national and the employer established in that Member State;" (art 3(b))

There is a total maximum limit of between five and nine months per calendar year of residence for a seasonal worker; they must then return to a third country (art 14).

Within the maximum time limit, seasonal workers will be able, on one occasion, to change employers or to obtain an extension of their stay with their employer, if they still meet the criteria for admission, although the grounds for refusal will still apply. The preamble makes clear that this possibility is intended to avoid abuse, since the worker will not be tied to a single

employer. Member States will have an option to allow further extensions or changes of employer.

The directive facilitates the re-entry of seasonal workers who were admitted at least once within the previous five years, if they complied with immigration law during their stay (art 16). This could include a simplified application process, an accelerated procedure, priority for previous seasonal workers, or the issue of several seasonal worker permits at the same time.

There are no intra-EU mobility rights.

Single Permit Directive 2011/98/EU

It covers TCNs admitted to the EU for the purpose of employment, who have not yet achieved long-term residence status (art 3(1)).

There are no intra-EU mobility rights.

The following table summarises the free movement rights:

Category of migrants	***Free movement rights***
EU citizens	This is a fundamental right, which is now not only guaranteed in the TFEU and the Citizenship Directive but also in the Charter of Fundamental Rights.
Legally residing TCNs	Article 45 (2) of the Charter states that freedom to move and reside in the Member States can also be granted to them. However, the facultative nature of this provision makes it difficult to consider this as a fundamental right.
Long-term residents, students, researchers and highly qualified workers	Subject to restrictions
Refugees, beneficiaries of subsidiary protection and non-EU family members of TCNs	Not entitled to free movement. Differential treatment compared to EU citizens. Refugees, beneficiaries of subsidiary protection acquisition of free movement when they acquire the status of long term residents.

Category of migrants	***Security of residence***
Long-Term Residents Directive (LRD)	Most legally residing TCNs become eligible for permanent resident status when they have stayed in a Member State for five years.
Legally residing TCNs	• Students are excluded from the scope of the LRD, not entitled to permanent residence. • ICT no right to permanent residency – max stay in the host country, 3 years. • Refugees and beneficiaries of subsidiary protection only recently included within the personal scope of application of the amended Long-Term Residents Directive (see also Recast Qualification Directive 2011/95/EU).
Citizenship Directive (2004/38)	Family members of EU citizens are, however, entitled to permanent residence after five years without any further conditions being imposed

Blue Card Directive	For highly qualified workers, the directive contains more favourable criteria by which the period of five years residence is calculated

European Parliament and Council Regulation No 1931/2006

This Regulation establishes a local border traffic regime at the external land borders of the Member States and introduces for that purpose a local border traffic permit. This Regulation authorises Member States to conclude or maintain bilateral Agreements with neighbouring third countries for the purpose of implementing the local border traffic regime established by this Regulation. The local border traffic regime constitutes a derogation from the general rules governing the border control of persons crossing the external borders of the Member States of the European Union which are set out in Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

6. ILLEGALLY RESIDENT TCNS

The **Return Directive 2008/115/EC** is the key legal instrument for returning TCNs. It provides guidelines for EU Member States and Schengen Countries to follow return and removal procedures.[1] The common standards and procedures cover areas such as the use of coercive force, return, removal, detention, and re-entry. The Directive also provides provisions on postponement of removal (art 9), specifying criteria for when a Member State shall and may postpone a removal, and on safeguards pending return (concerning rights to family unity, health care, access to education for minors and specific needs of vulnerable persons).

The Return Directive also takes into consideration the 'Twenty guidelines on forced return', adopted in May 2005 by the Committee of Ministers of the Council of Europe.[2] These twenty guidelines form a non-binding code of good conduct for expulsion procedures that Member States can bear in mind when developing national legislation and regulations on returning illegal TCNs. They are based on detailed research by bodies such as the European Court of Human Rights, as well as a questionnaire on forced return sent to the Member States. For the most part, the issues discussed under the twenty guidelines are included in the Return Directive.

According to the Return Directive, a Member State can issue a return decision to TCNs if they are staying illegally on the Member State's territory, although they may refrain from making the decision, for example if the Member State decides to grant the TCN a residence permit based on humanitarian reasons. Also, a Member State should not issue a return decision if the TCN is waiting for a renewal of their residence permit. With the exception of cases where there is cause for concern for national security or similar situations, the return decision should include a period ranging from seven to 30 days, depending on each individual case[3], for the TCN to return voluntarily. If the TCN does not return within the voluntary period, then the Member State can take the necessary measures to enforce return of the TCN.

The Return Directive provides that the return decision itself should be issued in writing, and if the TCN requests it, then also with a written or oral translation of the main elements, in a

[1] Except Ireland and the UK who have decided not to opt into this area of Community law.

[2] Council of Europe 'Twenty Guidelines on Forced Return', September 2005.

[3] According to Art. 7(4) of the Return Directive, Member States may in some cases refrain from granting a period for voluntary departure or may grant a period shorter than seven days, if there is a risk absconding, if an application for legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person poses a risk to public policy, public or national security.

language that the TCN is believed to understand. The TCN should also be able to appeal against or seek review of the decision. In the case of detention, TCNs should be kept in detention for the shortest period possible, and for the most part only when there is a risk of absconding or the TCN avoids or hampers the preparation of return. If the use of coercive measures is required, as a last resort, then they shall not exceed reasonable force.

Special attention should be paid to vulnerable persons throughout the entire return process, particularly in relation to forced return. According to the Return Directive, vulnerable persons are defined as 'minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical, or sexual violence'. For example, in the case of minors, the best interests of the child must be considered, and minors should only be detained as a measure of last resort. This is also one of the goals of the Return Fund, which specifically states that it will provide assistance for the proper treatment of these vulnerable persons. For example, it will support the exchange of information of best practices for the return of vulnerable persons.[4]

This directive was interpreted in the *Case M.G., N.R. v Staatssecretaris van Veiligheid en Justitie.* The CJEU (Second Chamber) hereby ruled that: "Article 15(2) and (6) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, must be interpreted as meaning that, where the extension of a detention measure has been decided in an administrative procedure in breach of the right to be heard, the national court responsible for assessing the lawfulness of that extension decision may order the lifting of the detention measure only if it considers, in the light of all of the factual and legal circumstances of each case, that the infringement at issue actually deprived the party relying thereon".

7. CASE-LAW ON FREE MOVEMENT OF TCNS

Case C‑254/11 Szabolcs-Szatmár-Bereg Megyei Rendőrkapitányság Záhony Határrendészeti Kirendeltsége v Oskar Shomodi

- Case concerned a Ukrainian national (Mr Shomodi) who is in possession of a valid local border traffic permit, issued pursuant to Regulation No 1931/2006, which authorises him to enter the border area of Hungary. On 2 February 2010 he requested entry into Hungary at the Záhony border crossing. The Hungarian border police established that he had stayed in Hungarian territory for 105 days during the period from 3 September 2009 to 2 February 2010, entering that territory almost daily for several hours. Since Mr Shomodi had thus stayed for more than three months in the Schengen area during a six-month period, the Hungarian border police refused him entry into Hungarian territory on the basis of Hungarian national law, interpreted in the light of the Convention implementing the Schengen Agreement.

- Mr Shomodi brought an action against the decision of the border police before the Hungarian courts. In the appeal proceedings on a point of law before it, the Hungarian Supreme Court, referred to the Court of Justice the question of whether the agreement at issue as interpreted by the Hungarian authorities, limits the total length of a stay of a cross-border worker in the border area of Hungary to three months over a six-month period is compatible with the local border traffic regulation.

The CJEU found:

[4] Decision No 575/2007/EC.

1. First that the general rule in the Schengen acquis, which limits the stay of foreign nationals to three months over a six-month period, does not apply to local border traffic. The three-month limit laid down in the local border traffic regulation relates only to 'uninterrupted stays', whereas the limitation resulting from the Schengen acquis does not relate to such stays. In the Court's view, the fact that that limitation is, as in the Schengen acquis, limited to three months cannot cast doubt on its special nature in relation to the ordinary rules in place for third-country nationals who are not subject to visa requirements. It is not apparent from any provision of the regulation that those three months must fall within the same six-month period.
2. Second by adopting the regulation on local border traffic, the EU legislature intended to put rules in place for local border traffic which are independent of, and distinct from, those of the Schengen acquis. The purpose of those rules is to enable the residents of the border areas concerned to cross the external land borders of the EU for legitimate economic, social, cultural or family reasons, and to do so easily – that is to say, without excessive administrative constraints – and frequently, even regularly.
3. Third, in relation to the concerns expressed by certain Member States in relation to the alleged negative consequences of such an autonomous interpretation of the regulation, the Court responds that the easing of border crossing is intended for *bona fide* border residents with legitimate and duly substantiated reasons for frequently crossing an external land border. In addition, the Member States remain free to impose penalties on those who abuse or fraudulently use their local border traffic permit.

- Accordingly, the Court considered that the holder of a local border traffic permit must be able to move freely within the border area for a period of three months if his stay is uninterrupted and to have a new right to a three-month stay each time that his stay is interrupted.
- Finally, the Court stated that the stay of the holder of a local border traffic permit must be regarded as interrupted as soon as the person concerned crosses the border back into his State of residence in accordance with the conditions laid down in his permit, irrespective of the frequency of such crossings, even if they occur several times daily.

The Charter was not referred to in the judgment of Case C‑254/11 Oskar Shomodi.
However, it was mentioned rather extensively in the **Opinion of Advocate General CRUZ VILLALÓN.** The case is decided in the light of the scheme of the border crossing regime laid down by Regulation No 1931/2006 read in conjunction with Article 20 of the Convention implementing the Schengen Agreement, signed in Schengen on 19 June 1990. The suggestion of the Advocate General Villalon is to read Article 5 of Regulation No 1931/2006 in conjunction with the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

Compliance with the Charter and the ECHR

Para 65. In the light of the foregoing, the main question which is therefore submitted for the assessment of the Court is whether the regime established by the bilateral agreement concluded by Hungary, as interpreted and/or implemented by the competent Hungarian authorities, is compatible, in the first place, with the spirit of the local border traffic regime which I have just examined in detail, as interpreted in accordance with primary EU law, and, more specifically, with the relevant provisions of the Charter, or, if appropriate, of the ECHR and, in the second place and more widely, with all EU law, in accordance with Article 4(3) TEU.

Para 66. It should be noted, in that regard, that recital 13 in the preamble to Regulation No 1931/2006 states that the regulation respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter.

Para 67. Moreover, the conclusion of bilateral agreements such as the one at issue in the main proceedings falls within the scope of the implementation of the local border traffic regime, so that those agreements, which must be in accordance with the rules of Regulation No 1931/2006, must, more generally, be concluded in compliance with primary law and in particular with the provisions of the Charter, in accordance with Article 51(1) thereof or, failing that and as appropriate, the provisions of the ECHR, in accordance with Article 6(3) TEU.

Para 68. One may, very intuitively, be prompted to approach the question initially from the point of view of freedom of movement.

Para 69. However, it should be pointed out, putting aside the situation of 'persons enjoying the Community right of free movement' or equivalent rights, within the meaning of Article 3(4) of Regulation No 1931/2006, that Article 45(1) of the Charter, which establishes the right of every citizen of the European Union to move and reside freely within the territory of the Member States, does not apply ratione personae to the main proceedings, any more than Article 45(2) of the Charter, which provides that those same rights may be granted to third-country nationals legally resident in the territory of a Member State.

Para 70. However, and without the need to question whether the main proceedings fall, in any way at all, within the scope of Article 2 of Protocol No 4 to the ECHR, which enshrines the right to freedom of movement, it is clear that it is covered, in any event, owing to the scheme of the local border traffic regime, by Article 7 of the Charter, which guarantees respect for private and family life, a provision which, in accordance with Article 52(3) of the Charter, must be interpreted in the light of Article 8 ECHR.

Para 71. Third-country nationals who are not included within the definition of family members of a European Union citizen, within the meaning of the aforementioned Directive 2004/38 and who therefore do not enjoy an automatic right of entry and residence in the host Member State, but who fall within the scope of Regulation No 1931/2006, must, in my view, be able to have, in the implementation of the regulation, guarantees of the right to a private and family life in the broad sense, as do, reciprocally, the border residents in the Member States.

Application of Article 7 of the Charter and Article 8 ECHR

Para 72. In the end, therefore, it is definitely in the light of the relevant provisions of the Charter and the ECHR and also the general principles of EU law, and in particular the principle of proportionality, that Regulation No 1931/2006 must be interpreted and that the application of the relevant provision of the bilateral agreement concluded by Hungary must be assessed.

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EU Freedom of Information and Data Protection in tension: the right of access to documents and separately the right to access information within the ambit of EU law

1. INTRODUCTION

1.1 Freedom of information was not one of the 'four freedoms' which formed the foundations of the European project. The freedoms which a European common market[1] and customs union[2] were intended to herald were simply:

a) the ability freely to ship goods for trade across national boundaries[3];

b) the freedom of workers to 'up sticks' and go and take jobs abroad[4];

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[1] Art 26(2) TFEU states that:

'The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.'

[2] Art 30 TFEU:

'Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.'

[3] Art 28(1) TFEU:

'The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.'

[4] Article 45(1) TFEU:

'Freedom of movement for workers shall be secured within the Union.'

c) the freedom of individuals and companies to offer their economic services[5] and, if so minded, to establish their businesses abroad[6]; and

d) the freedom to transfer money across European borders.[7]

1.2 But, of course, the ambitions of the EU have long since outgrown the purely functionalist economic free trade area aims which were first set out in the 1957 Treaty of Rome. For example, one of the EU's aims now is to establish a common 'area of freedom, security and justice'[8] in which, among other things, a common EU policy on asylum in, and immigration into, the EU may be developed[9], police action may be coordinated,[10] criminal law may be harmonised,[11] and the judgments of national courts in criminal[12] and in civil matters[13] may be recognised and given effect Europe-wide. To this end, information on individuals might be shared among the public authorities of the Member States.

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[5] Art 56(1) TFEU:

> *'... [R]estrictions on freedom to provide services [normally provided for remuneration] within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.'*

[6] Art 49 TFEU

> *'[R]estrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms...'*

[7] Art 63 TFEU:

> *'[A]ll restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited [and] ... all restrictions on payments between Member States and between Member States and third countries shall be prohibited.'*

[8] See Art 3(2) TEU; and Arts 67–89 TFEU.

[9] Arts 78–79 TFEU.

[10] Arts 87–89 TFEU.

[11] Art 83 TFEU.

[12] Art 82 TFEU.

[13] Art 81 TFEU.

1.3 This official need to share information of course, immediately, brings up the possibility of abuse, and hence the need for regulation to ensure that the interests of the individual potentially informed upon or against are duly taken into account. Thus data protection laws can be seen as the necessary corollary in a national or supra-national polity which aspires to respect the principles of the rule of law in this information age.

1.4 A further realisation of the rule of law in the context of the information age is the ideal of transparency: that members of civil society should be able to ascertain the factual and legal bases on which official decisions are being made. This leads to the need for rules governing the possibility of access by interested parties to information held by public authorities.

1.5 In Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd* ECLI:EU:C:2014:238 [2015] QB 127 the Grand Chamber CJEU noted (at §32) that the retention of data for the purpose of possible access to them by the competent national authorities "*derogates from the system of protection of the right to privacy*" established under EU law, (specifically the Electronic Communications Directives 95/46 and 2002/58). Clearly, then, there is going to be a constant (productive?) tension and possibility of conflict between these two information age rule-of-law principles, namely:

a) the right of individuals as individuals to protection against the misuse of data on them held by public authorities ('data protection laws'); and

b) the right of individuals as members of civil society to know what information is being used by public authorities in making decisions in the public sphere ('freedom of information' laws).

1.6 This tension is paralleled by – but does not completely mirror – the tensions already implicit in the law between:

a) the recognition of an individual's right to privacy as against the public's 'right to know' proclaimed by a free press; and

b) an individual's legitimate expectation to respect for confidentiality as against another's right to free expression.

2. TREATY PROVISIONS

2.1 The twin principles of freedom of information and of data protection are expressly recognised within the provisions of the TFEU.

Freedom of Information and the Principle of Public Transparency

2.2 The Grand Chamber of the Court of Justice has noted:

> *"The principle of transparency is stated in Articles 1 TEU and 10 TEU and in Article 15 TFEU. It enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system…*[14]*"*

2.3 Article 15(1) TFEU (formerly Article 255 EC) sets out the general principle that 'in order to promote good governance and ensure the participation of civil society', the EU institutions 'shall conduct their work as openly as possible', noting in particular, in Article 15(2), that the European Parliament shall meet in public (as shall the Council when considering and voting on a draft legislative act) and, under Article 15(2)(v) TFEU, 'shall ensure publication of the documents relating to the legislative procedures'. Nothing is said, however, of the need for openness or publication of the workings of the Commission.

2.4 Article 15(3) TFEU confirms the general right of any EU resident or citizen to have access to EU documents. This is subject to particular EU regulation on the issue specifying the 'general principles and limits on grounds of public or private interest'. Consistently with such general EU regulation, each EU body is then required to 'ensure that its proceedings are transparent' and to set out in its own particular Rules of Procedure specific provisions regarding access to its documents, although the CJEU and the ECB and the EIB are said to be subject to these transparency and document access requirements 'only when exercising their administrative tasks.'

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[14] See Joined Cases C-92/09 & C-93/09 *Volker und Markus Schecke GbR v Land Hessen* [2010] ECR I-11063 at para 68, citing Case C-41/00 P *Interporc v Commission* [2003] ECR I-2125, para 39, and Case C-28/08 P *Commission v Bavarian Lager*, 29 June, [2010] ECR I-6055, para 54.

Data Protection and Respect for an Individual's Private Life

2.5 Article 16(1) TFEU (formerly Article 286 EC) states that

'everyone has the right to the protection of personal data concerning them'.

2.6 Article 16(2) TFEU provides an express Treaty basis for the adoption of EU legislation concerning the processing of data on individuals, both by the EU and by the Member States when carrying out activities falling within the scope of EU law. Such EU legislation shall be aimed at protecting the individual's interest in such 'personal data' and regulating its free movement. Due compliance with these rules is subject to the control of independent authorities.

2.7 In the sphere of the EU's Common Foreign and Security Policy, Article 39 TEU requires the Council to adopt a decision laying down rules relating to the protection of individuals and free movement of data with regard to the processing of personal data by the Member States when carrying out activities which fall within the scope of the Common Foreign and Security Policy. Again, compliance with these rules is subject to the control of independent authorities. The rules adopted on the basis of Article 39 TEU are by way of derogation from the general EU rules on data processing adopted on the basis of Article 16 TFEU.

The Treaties and Fundamental Rights

2.8 None of the rights set out in the EU Charter of Fundamental Rights is being newly introduced to EU law by the fact of their inclusion in the Charter. All of them have already been prefigured in the "fundamental rights as general principles" jurisprudence of the CJEU. The Charter rights are to be understood and applied against the background of this earlier fundamental rights/general principles jurisprudence, since the recognition of the rights, freedoms and principles set out in the Charter of Fundamental Rights and the according to them "the same legal value as the Treaties" effected by Article 6(1) TEU did not mark a disruption or break from the CJEU's prior fundamental rights case law, but rather its confirmation. Our approach to the Charter then may be described as one involving a "hermeneutic of continuity" with the body of case law based on unwritten fundamental rights as general principles of EU law. This is consistent with the Declaration by all Treaty signatories concerning

the Charter of Fundamental Rights of the European Union was appended to the Lisbon Treaty in the following terms

> "The Charter of Fundamental Rights of the European Union, which has legally binding force, confirms the fundamental rights 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. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties.

2.9 There is, however, still life in the case law of the CJEU on fundamental rights as general principles. This has been given an express basis in the Treaties by Article 6(3) TEU which states that

> "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 EU law."

2.10 As Advocate General Sharpston has noted:

> "Article 6(1) and (3) TEU merely represents what the United Kingdom terms in its observations a 'codification' of the pre-existing position. They encapsulate, to put it another way, a political desire that the provisions they seek to enshrine and to protect should be more visible in their expression. They do not represent a sea change of any kind" [15]

[15] In Case C-396/11 *Radu* [2013] QB 1031, CJEU (Grand Chamber) Opinion of Advocate General Sharpston of 18 October 2012 at para 51

3. THE RIGHT TO ACCESS/RECEIVE INFORMATION AS A FUNDAMENTAL RIGHT

Charter of Fundamental Rights

3.1 Article 42 of the Charter of Fundamental Rights (CFR) provides, under the heading 'Right of access to documents', that any citizen of the Union – and any natural or legal person residing or having its registered office in a Member State – has a right of access to documents (whether in hard copies, or in electronic or other form) of the EU's institutions, bodies, offices and agencies.

3.2 Article 42 CFR echoes the terms of Article 15 TFEU and the EU secondary legislation adopted thereunder (notably Regulation (EC) No 1049/2001,[16] the terms of which are considered more fully below).

3.3 Separately Article 41 CFR guarantees a 'right to good administration' in individuals' dealings with and within the EU, including the right of every person to have access to his or her file. As the CJEU noted in *SGL Carbon AG v Commission*:

> '*[I]n all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of Community law which must be complied with even if the proceedings in question are administrative proceedings.* [17] …
>
> *Observance of the rights of the defence requires, in particular, that the undertaking under investigation is put in a position during the administrative procedure to put forward its point of view on the reality and the relevance of the alleged facts and also on the documents used by the Commission.* [18]
>
> *These procedural rights (and the implicit promise of an 'open, efficient and independent European administration') are now set out in Article 41 of the EU Charter of Fundamental Rights (CFR), which guarantees a 'right to good administration' in the following terms (so far as relevant):*
>
> > *"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:*

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[16] [2001] OJ L145/43.

[17] See, in particular, Case C-194/99 P *Thyssen Stahl v Commission* [2003] ECR I-10821, paragraph 30)

[18] Case C-310/93 P *BPB Industries and British Gypsum v Commission* [1995] ECR I-865, paragraph 21)

(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."[19]

3.5 In *H. N. v Minister for Justice, Equality and Law Reform, Ireland* where the Court stated that an individual could rely upon the EU law right to good administration in claims made against national authorities, when they are acting within the scope of EU law, noting :

"49. ...[T]he right to good administration, enshrined in Article 41 of the Charter, ... right reflects a general principle of EU law.

50 Accordingly, where, in the main proceedings, a Member State implements EU law, the requirements pertaining to the right to good administration, including the right of any person to have his or her affairs handled impartially and within a reasonable period of time, are applicable in a procedure ... which is conducted by the competent national authorities. [20]

3.6 But just weeks later in *YS v Dutch Ministry for Immigration, Integration and Asylum* the Court denied that individuals could rely directly upon the *Charter right* to good administration to seek recovery of their files in immigration matters falling within the scope of EU law, noting

"67. .. It is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union. [21] *Consequently, an applicant for a resident permit cannot derive from Article 41(2)(b) of the Charter a right to access the national file relating to his application [for a residence permit].*

68 It is true that the right to good administration, enshrined in that provision, reflects a general principle of EU law. [22] *However, by their questions in the present cases, the referring courts are not seeking an interpretation of that*

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[19] Case C-328/05 P *SGL Carbon AG v Commission* [2007] ECR I-3921 at paras 70–71

[20] Case C-604/12 *H. N. v Minister for Justice, Equality and Law Reform, Ireland* 8 May [2014] ECR I-nyr ECLI:EU:C:2014:302 at paras 49-50

[21] See, to that effect, the judgment in C-482/10 *Teresa Cicala v. Sicily* [2011] ECR I-14139 paragraph 28

[22] Judgment in *HN*, C-604/12, EU:C:2014:302, paragraph 49

general principle, but ask whether Article 41 of the Charter may, in itself, apply to the Member States of the European Union." [23]

European Convention on Human Rights

3.7 Article 52(3) CFR is the provision which ensures that the ECHR is a base-line for fundamental rights protection within the ambit of EU law. It provides as follows:

> *Insofar 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.*

3.8 There is no direct provision in the European Convention on Human Rights guaranteeing a right of access to individual[24] or general information[25] held by public authorities as distinct from the right guaranteed – under both Article 10 ECHR and Article 11 CFR – freely to express and to receive and impart information and ideas one already has, without interference by public authority and regardless of frontiers. The European Court of Human Rights has, in its more recent case law, begun to tease out the implications of the right to 'receive ... information' set out in Article 10 ECHR.[26] The Strasbourg Court has begun to develop the idea implicit in Article 10 ECHR of a positive obligation on the State authorities – for example, in implementation of the State's responsibility to nurture and further the freedom of the press to carry out its

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[23] Joined Cases C-141/12 and C-372/12 *YS v Dutch Ministry for Immigration, Integration and Asylum* 17 July [2014] ECR I-nyr ECLI:EU:C:2014: 2081 at paras 67-8

[24] See *Leander v Sweden* (1987) 9 EHRR 433 at para 74:

> *'Article 10 ECHR does not ... confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.'*

[25] See *Loiseau v France – admissibility decision* [2003] ECHR 46809/99 (Second Section, 18 November 2003):

> *'It is difficult to derive from the ECHR a general right of access to administrative data and documents...'*

[26] See, eg, *Sdružení Jihočeské Matky v Czech Republic – non-admissibility decision* [2006] EHRR 19101/03 (Fifth Section,10 July 2006), where the Strasbourg Court articulated a broader interpretation of the notion of 'freedom to receive information' and in so doing moved closer towards the recognition of a positive right of access to information.

investigative functions in the public interest.[27] This may entail the State actively removing obstacles which exist solely because of the historic fact of public authorities holding a monopoly on information.

3.9 Thus, in *Kenedi v Hungary*[28] the Strasbourg Court held that Hungary's refusal to allow a professional historian access to historical documentation (which access had been authorised by a court order) was incompatible with his rights under Article 10 ECHR, given that access to original documentary sources for legitimate historical research was an essential element of the exercise of his right to freedom of expression.[29]

3.10 Further, in *Társaság a Szabadságjogokért v Hungary*,[30] the European Court of Human Rights upheld the complaint of the Hungarian Civil Liberties Union that the decisions of the Hungarian courts denying it access to the details of a parliamentarian's complaint pending before the Constitutional Court, had amounted to a breach of the Union's right to have access to information of public interest. In the Strasbourg Court's view, the submission of an application for an *a posteriori* abstract review of this legislation – especially by a Member of Parliament – undoubtedly constituted a matter of public interest. Consequently, the European Court of Human Rights found that the applicant – a recognised human rights NGO which the Court considered was properly exercising the function of 'social watchdog'[31] and so was entitled to similar Convention protection to that

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[27] See, eg, *Chauvy and Others v France* (2005) 41 EHRR 29 at para 66:

> *'The Court has on many occasions stressed the essential role the press plays in a democratic society. It has, inter alia, stated that although the press must not overstep certain bounds, in particular in respect of the rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.'*

[28] *Kenedi v Hungary* [2009] ECHR 31475/05 (Second Section, 26 May 2009)

[29] See Case Commentary, '*Kenedi v Hungary*: access to documents – civil right' (2009) 5 *European Human Rights Law Review* 694.

[30] *Társaság a Szabadságjogokért v Hungary* [2009] ECHR 37374/05 (Second Section, 14 April 2009).

[31] See, eg, *Vides Aizsardzības Klubs (Environmental Protection Club v Latvia* [2004] ECR 57829/00 (First Section, 27 May 2004) at para 42; and *Riolo v Italy* [2008] ECHR 42211/07 (Second Section, 17 July 2008) at para 63.

afforded to the press[32] – was involved in the legitimate gathering of information on a matter of public importance. In these circumstances, the Strasbourg Court considered that the refusal on the part of the Hungarian Constitutional Court to release the requested information 'amounted to a form of censorship' contrary to the requirements of Article 10 ECHR. It is difficult to see how the decision of the Grand Chamber of the Court of Justice in *Sweden and Association de la Presse Internationale asbl (API)*,[33] refusing press and public access to the court pleadings lodged before the Court of Justice, can, in the light of the above decision of the European Court of Human Rights, be said to be Convention compatible. We discuss this further below under reference to the UK open justice principle.

3.11 In *Haralambie v Romania*,[34] the Strasbourg Court reiterated the vital interest for individuals who were the subject of personal files held by the public authorities to be able to have access to them. The European Court of Human Rights emphasised that the authorities had a duty to provide an effective procedure for obtaining access to such information, and that their failure to provide for an effective and accessible procedure to enable the applicant to obtain access to his personal security files within a reasonable time constituted a violation of Article 8 ECHR.

3.12 In *Gillberg v Sweden* [35] the Strasbourg Grand Chamber held that a criminal conviction imposed on a university professor for misuse of office following his refusal to comply with a court order requesting the release of confidential information concerning children who had participated in a research study did not, in all the circumstances, breach his negative rights under either Article 8 or Article 10 ECHR not to release information pertaining to others. Indeed the Grand Chamber found that the professor's refusal to

[32] See, eg, *Dammann v Switzerland* [2006] ECHR 77551/01 (Fourth Section, 25 April 2006) at para 52.

[33] See Joined Cases C-514, C-528 & C-532/07 P *Sweden and Association de la Presse Internationale asbl (API) v Commission* ECLI:EU:C:2010:541 [2011] 2 AC 359

[34] *Haralambie v Romania* [2009] ECHR 21737/03 (Third Section, 27 October 2009).

[35] *Gillberg v Sweden* [2012] ECHR 41723/06 (Grand Chamber, 3 April 2012); 31 BHRC 471

allow other *bona fide* academic researchers access to the information collected in his studies would "impinge on their rights under Article 10 ECHR … to receive information".

3.13 The case law of the Strasbourg Court on the right under Article 10 ECHR to request and obtain information has been summarised by the Strasbourg Court in its decision in *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirt-schaftlichen Grundbesitzes v. Austria*. The Court found that the refusal (apparently on the basis of lack of time and resources) by the relevant Austrian authorities to provide a research NGO with suitably anonymised details of application to it for approval of transfers in agricultural/forest land had "made it impossible for the applicant association to carry out its research …. and to participate in a meaningful manner in the legislative process concerning amendments of real property transaction law in Tyrol" and so breached the NGO's right to receive information. The Court noted that the issue of land transfers was a matter of considerable public interest and the authorities held an information monopoly of this. It summarised its approach to the Article 10 ECHR right to receive information thus:

> *33. The Court has consistently recognised that the public has a right to receive information of general interest. Its case-law in this field has been developed in relation to press freedom, the purpose of which is to impart information and ideas on such matters. The Court has emphasised that the most careful scrutiny on its part is called for when measures taken by the national authorities may potentially discourage the participation of the press, one of society's "watchdogs", in the public debate on matters of legitimate public concern.* [36]
>
> *34. Furthermore, the Court has held that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom.* [37] *However, the function of creating forums for public debate is not limited to the press. That function may also be exercised by non-governmental organisations, the activities of which are an essential element of informed public debate. The Court has therefore accepted that non-governmental organisations, like the press, may be characterised as social "watchdogs". In that connection*

[36] See *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 26, 14 April 2009, with references to *Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239; *Jersild v. Denmark*, 23 September 1994, § 35, Series A no. 298; and *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 64, ECHR 1999-III)

[37] See *Dammann v. Switzerland* (no. 77551/01, § 52, 25 April 2006

their activities warrant similar Convention protection to that afforded to the press. [38]*"* [39]

3.14 The Convention right to receive information as guaranteed under Article 10 ECHR was most recently confirmed by the decision of the Strasbourg Court Grand Chamber in *Magyar Helsinki Bizottság (Hungarian Helsinki Committee) v. Hungary* [2016] ECtHR 18030/11 (Grand Chamber, 8 November 2016) at paras 156-7, 161-2:

"156. .. The Court continues to consider that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him."

Moreover, "the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion".

The Court further considers that Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual.

However, as is seen from the above analysis, such a right or obligation may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force (which is not an issue in the present case) and, secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right.

157. Whether and to what extent the denial of access to information constitutes an interference with an applicant's freedom-of-expression rights must be assessed in each individual case and in the light of its particular circumstances.
...

161. Maintaining this approach, the Court considers that the information, data or documents to which access is sought must generally meet a public-interest test in order to prompt a need for disclosure under the Convention. Such a need may exist where, inter alia, disclosure provides transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance by the public at large.

162. The Court has emphasised that the definition of what might constitute a subject of public interest will depend on the circumstances of each case. The public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern

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[38] See *Társaság a Szabadságjogokért,* cited above, § 27, and *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 103, 22 April 2013

[39] *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirt-schaftlichen Grundbesitzes v. Austria* [2013] ECHR 39534/07 (First Section, 28 November 2013)

it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about.

...

168. ... The Court would also note that given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information, [40] the function of bloggers and popular users of the social media may be also assimilated to that of "public watchdogs" in so far as the protection afforded by Article 10 is concerned."

...

197. The Court notes that the subject matter of the survey concerned the efficiency of the public defenders system (see paragraphs 15-16 above). This issue was closely related to the right to a fair hearing, a fundamental right in Hungarian law (see paragraph 33 above) and a right of paramount importance under the Convention. Indeed, any criticism or suggested improvement to a service so directly connected to fair-trial rights must be seen as a subject of legitimate public concern. In its intended survey, the applicant NGO wished to explore its theory that the pattern of recurrent appointments of the same lawyers was dysfunctional, casting doubt on the adequacy of the scheme. The contention that the legal-aid scheme might be prejudiced as such because public defenders were systematically selected by the police from the same pool of lawyers – and were then unlikely to challenge police investigations in order not to be overlooked for further appointments – does indeed raise a legitimate concern. The potential repercussions of police-appointed lawyers on defence rights have already been acknowledged by the Court in Martin v. Estonia (no. 35985/09, 30 May 2013). The issue under scrutiny thus going to the very essence of a Convention right, the Court is satisfied that the applicant NGO intended to contribute to a debate on a matter of public interest (see paragraphs 164-65 above). The refusal to grant the request effectively impaired the applicant NGO's contribution to a public debate on a matter of general interest."

3.15 Although this line of Strasbourg case law seems to privilege the right to obtain information to recognised "public watchdogs" such as journalists and campaigning groups, [41] the trend at least in UK law has been to accept that individual members of the public may have sufficient interest in or commitment to a matter such as to give them standing to raise court actions to prevent violations of (public) law, particularly

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[40] See *Delfi AS v. Estonia [GC]*, no. 64569/09, § 133, ECHR 2015

[41] See to similar effect *Roşiianu v. Romania* [2014] ECHR 27329/06 (Third Section, 24 June 2014) where the court held that the applicant, a journalist, had been involved in the legitimate gathering of information on a matter of public importance, namely the activities of the Baia Mare municipal administration. Given that the journalist's intention had been to communicate the information in question to the public and thereby to contribute to the public debate on good public governance, his right to impart information had clearly been impaired.

as regards matters having an environmental impact where the courts have accepted that private individuals may be able to "demonstrate that they have a genuine interest in the aspects of the environment that they seek to protect, and that they have sufficient knowledge of the subject to qualify them to act in the public interest in what is, in essence, a representative capacity". [42] In essence such individuals are acting in a public watchdog role and they too in principle should be able to pray in aid Article 10 ECHR in support of a right to information.

3.16 In Case T-727/15 *Association Justice & Environment z.s. v Commission* (General Court, 23 January 2017) the General Court appeared less than impressed by this line of Strasbourg case law when upholding the Commission's refusal to grant the applicant NGO access to certain documents contained in the file of the infringement procedure 2008/2186 which had been taken by the Commission against the Czech Republic in relation to the application of Directive 2008/50/EC on ambient air quality and cleaner air for Europe. The General Court noted that the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument formally

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[42] *Walton (formerly Roadsense) v. Scottish Ministers* [2012] UKSC 44, 2013 SC (UKSC) 67 per Lord Reed at para 94:

> [94] In many contexts it will be necessary for a person to demonstrate some particular interest in order to demonstrate that he is not a mere busybody. Not every member of the public can complain of every potential breach of duty by a public body. But there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public. The rule of law would not be maintained if, because everyone was equally affected by an unlawful act, no one was able to bring proceedings to challenge it.

And per Lord Hope at paras 152-3

> 152. …An individual may be personally affected in his private interests by the environmental issues to which an application for planning permission may give rise. Noise and disturbance to the visual amenity of his property are some obvious examples. But some environmental issues that can properly be raised by an individual are not of that character. Take, for example, the risk that a route used by an osprey as it moves to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines. Does the fact that this proposal cannot reasonably be said to affect any individual's property rights or interests mean that it is not open to an individual to challenge the proposed development on this ground? That would seem to be contrary to the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf. …So there has to be some room for individuals who are sufficiently concerned, and sufficiently well informed, to do this too. It will be for the court to judge in each case whether these requirements are satisfied."

incorporated into EU law: Case C-398/13 P *Inuit Tapiriit Kanatami and Others* v *Commission* EU:C:2015:535, paragraph 45. It also reiterated that the obligation to ensure consistency between the rights contained in the Charter and the corresponding rights guaranteed by the ECHR, was always subject to an obligation not adversely to affect the autonomy of EU law and that of the Court of Justice of the European Union: C-601/15 PPU *N*, EU:C:2016:84, paragraph 47, and Case C-294/16 PPU *JZ*, EU:C:2016:610, paragraph 50. The General Court then dismissed the NGO's attempt to rely upon the Strasbourg case law by noting (at para 73):

> "None of those judgments concerned a request for access to documents in the context of a regime comparable to that of Regulation No 1049/2001. On the other hand, none of the cases concerned a refusal of access to documents in order to protect the purpose of investigations and, in particular, preserve the atmosphere of necessary confidentiality in the pre-litigation stage of an infringement procedure. Therefore, contrary to the applicant's claim, the cited case-law of the European Court of Human Rights cannot be applied by analogy to the present case."

4. DATA PROTECTION/RESPECT FOR PRIVACY AS A FUNDAMENTAL RIGHT

Charter of Fundamental Rights

4.1 Article 7 CFR parallels Article 8 ECHR in setting out the fundamental EU right to respect for private and family life, home and communications [43]. The EU Charter of Fundamental Rights also contains the following provision, specifically dealing with protection of personal data, which has no direct parallel in the text of the Convention. Article 8 CFR provides that:

> *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.*

4.2 Article 8 CFR is clearly based on terms of the primary European Treaty provisions of Article 39 TEU and of Article 16 TFEU noted above. It is also based on provisions of secondary EU legislation already made under the Treaties – notably the Data Protection Directive 95/46/EC[44] and Regulation (EC) No 45/2001[45] – the provisions of each of which are considered more fully below.

4.3 The Grand Chamber of the Court of Justice has noted:

> *[T]he right to respect for private life with regard to the processing of personal data, recognised by Articles 7 and 8 of the Charter, concerns any information relating to an identified or identifiable individual [46] and the limitations which*

[43] Although the terms of Article 8 ECHR refer to the protection of "correspondence, the case law of the ECtHR has confirmed that this also covers phone-calls (*Alison Halford v United Kingdom* (1997) 25 EHRR 523) and E-mails (*Copland v United Kingdom* (2007) 45 EHRR 37).

[44] [1995] OJ L281/31.

[45] [2001] OJ L8/1.

[46] See, in particular, European Court of Human Rights, *Amann v Switzerland* [GC], no 27798/95, § 65, ECHR 2000-II, and *Rotaru v Romania* [GC], no 28341/95, § 43, ECHR 2000-V)

> *may lawfully be imposed on the right to the protection of personal data correspond to those tolerated in relation to Article 8 of the Convention.*[47]

4.4 In Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd* ECLI:EU:C:2014:238 [2015] QB 127 the Grand Chamber CJEU observed (at §33) - with reference to its previous judgment in Joined Cases C-465/00 & C-138,9/01 *Rechnungshof v Österreichischer Rundfunk* [2003] ECR I-4989 at **§** 75 **-** that an interference with privacy is constituted irrespective of

> *"whether the information on the private lives concerned is sensitive or whether the persons concerned have been inconvenienced in any way"*.

At §37 the Court emphasized that the fact that

> "*data are retained and subsequently used without the subscriber or registered user being informed is likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance*".

The Court also emphasized (at §48) that the judicial review of the EU legislature's discretion "*should be strict*" because of

> "*the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference with that right caused by the Data Retention Directive 2006/24*"

In addition, the Court emphasized that even highly important objectives such as the fight against serious crime and terrorism cannot justify measures which lead to forms of interference that go beyond what is "*strictly necessary*": §51. The Court concluded (at §54) that it was a condition of the lawfulness of this data retention legislation that it

> *"lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards so that the persons whose data have been retained have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data."*

4.5 In Case C-362/14 *Schrems v Data Protection Commissioner* EU:C:2015:650 the CJEU Grand Chamber confirmed that legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as

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[47] See Joined Cases C-92/09 & C-93/09 *Volker und Markus Schecke GbR v Land Hessen* [2010] ECR I-11063 at para 52.

guaranteed by article 7 of the Charter. The CJEU also ruled that Commission Decision 2000/520 (that the United States ensured an adequate level of protection of the personal data transferred there from the EU) made no reference the existence of effective legal protection against unlawful interference and that this did not respect the essence of the fundamental right to effective judicial protection as enshrined in article 47 of the Charter. It followed that Decision 2000/520 had to be declared invalid. The CJEU noted (at §95):

4.6 Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB* (21 December 2016), the Grand Chamber CJEU confirmed the foregoing *Schrems* line of case law and ruled that Article 15(1) of the E-Privacy Directive 2002/58/EC, read in the light of Articles 7, 8 and 11 and Article 52(1) CFR precluded national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication. It also precluded national legislation governing the protection and security of traffic and location data and, in particular, access of the competent national authorities to the retained data, where the objective pursued by that access, in the context of fighting crime, was not restricted solely to fighting serious crime, where access was not subject to prior review by a court or an independent administrative authority, and where there was no requirement that the data concerned should be retained within the European Union.

4.7 Finally In Case C-131/12 *Google Spain SL* EU:C:2013:424 [2014] QB 1022 confirmed that there was even a fundamental right to be forgotten and for still accurate but aging data no longer to be made readily publicly available in relation to an individual. The Grand Chamber noted at §§93-7 at §§93-7:

> *"93 .. [E]ven initially lawful processing of accurate data may, in the course of time, become incompatible with the Directive where those data are no longer necessary in the light of the purposes for which they were collected or processed. That is so in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed.*
>
> *94 Therefore, if it is found, following a request by the data subject pursuant to article 12(b) of Directive 95/46, that the inclusion in the list .... containing true information relating to him personally is, at this point in time, incompatible with article 6(1)(c) to (e) of the Directive because that information appears, having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue .... the information and links concerned in the list of results must be erased....*

...

95.....[I]t must be pointed out that in each case the processing of personal data must be authorised under article 7 for the entire period during which it is carried out....

...

96. ... [I]t is not necessary in order to find such a right that the inclusion of the information in question in the list of results causes prejudice to the data subject.

97 ..[T]he data subject may, in the light of his fundamental rights under articles 7 and 8 of the Charter, request that the information in question no longer be made available..."

European Convention on Human Rights

4.8 In *S and Marper v United Kingdom*, the Grand Chamber of the European Court of Human Rights found that the protection of personal data was of fundamental importance to a person's enjoyment of and respect for his private and family life under Article 8 ECHR, particularly when such data were the subject of automatic processing and were being used for police purposes.[48]

4.9 In *Alison Halford v United Kingdom*,[49] the European Court of Human Rights also recognised that the individual has rights of respect for private life even within the workplace, which require to be protected by her employer. The Strasbourg Court held that telephone taps carried out on Alison Halford's office and home telephones by her employer, to gather material to assist in their defence against sex discrimination proceedings brought by her, were an unlawful violation of her Article 8 ECHR rights. Similarly, in *Copland v United Kingdom*,[50] the Strasbourg Court held that monitoring by an employer of an employee's telephone, e-mail and Internet usage while at work and without her knowledge constituted a violation of her right to respect for private life and correspondence. It was irrelevant that the data were not disclosed to anybody, or used against the employee in disciplinary proceedings.

[48] *S and Marper v United Kingdom* (2009) 48 EHRR 50.

[49] *Alison Halford v United Kingdom* (1997) 25 EHRR 523.

[50] *Copland v United Kingdom* (2007) 45 EHRR 37.

4.10 In *Barbelescu v. Romania* [51] the European Court of Human Rights considered the case of an individual from Bucharest who was employed as an engineer in charge of sales by a private company. His employment lasted from 1 August 2004 until 6 August 2007. During his employment, he was asked to create a Yahoo Messenger account to respond to clients' enquiries. On 13 July 2007 the applicant was informed by the employer that his Yahoo Messenger communications had been monitored between 5 and 13 July 2007 and that they had discovered he was using the Messenger for personal purposes. The applicant was presented with a 45-page document containing transcripts of his messages. The employer terminated the applicant's employment for breach of internal regulations. The applicant unsuccessfully challenged the termination before the Bucharest Courts, claiming they had violated his right to correspondence as protected by the Romanian Constitution and Criminal Code. The employee then filed a complaint to the European Court of Human Rights claiming, under article 8 ECHR, that the decision to terminate his contract, and dismissal of his domestic case by the national courts, had breached his right to respect for his private life and correspondence. The Strasbourg court held that the complaint under Article 8 ECHR was admissible and noted that, without a warning of potential monitoring, an applicant has a reasonable expectation to privacy. In this case however the employer did have internal regulations strictly prohibiting the use of such communications for personal use. The case, therefore, revolved around whether the applicant could have a reasonable expectation of privacy in light of the general prohibition of such communications by his employer. By six votes to one the court held that there was no violation with the court holding that the employer's monitoring was legitimate due to employer's belief that the Messenger service accessed would contain professional messages. Additionally, the Court noted that the use of the applicant's Messenger transcripts had only been to establish the fact of disciplinary breach and that the private content of the transcripts was not given weight, mentioned or been a decisive element in the domestic courts' findings. The Court found that it is not unreasonable for employers to want to verify employees are completing professional tasks during work hours and that, in the applicant's case, the fact the employer only monitored the Messenger service, and no other documents on the applicant's computer, resulted in the employer's monitoring being proportionate.

[51] *Bărbulescu v Romania* [2016] ECHR 61496/08 (Fourth Section, 12 January 2016)

4.11 However, this Charter provision also reflects the terms of the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data. And in its conjoined judgments in *Bouchacourt v France*,[52] *Gardel v France*[53] and *MB v France*,[54] the European Court of Human Rights referred to and relied upon the terms of Article 5 of this 1981 Convention – and also upon Principles contained in Council of Ministers Recommendation R (87) 15 regulating the use of personal data in the police sector – in determining the Convention compatibility (with the right to respect for private life required under Article 8 ECHR) of requirements imposed on convicted sex offenders under French law to notify their personal details to the police.

[52] *Bouchacourt v France* [2009] ECHR 5335/06 (Fifth Section, 17 December 2009) at para 61.

[53] *Gardel v France* [2009] ECHR 16428/05 (Fifth Section, 17 December 2009) at para 61.

[54] *MB v France* [2009] ECHR 22115/06 (Fifth Section, 17 December 2009) at para 61.

5. EU SECONDARY LEGISLATION ON ACCESS TO DOCUMENTS AND ACCESS TO INFORMATION

ACCESS TO EU DOCUMENTS

5.1 The EU access-to-documents regime applies only to the EU's own institutions, bodies, offices and agencies. Strictly, it is not a freedom of information regime. Instead, as the General Court has stated:

> *[T]he concept of a document must be distinguished from that of information. The public's right of access to the documents of the institutions covers only documents and not information in the wider meaning of the word and does not imply a duty on the part of the institutions to reply to any request for information from an individual.*[55]

5.2 In any event, the protection and promotion of freedom of information by and within the Member States remains a matter for Member States to regulate. European Union law does not yet extend to giving a right of access to documents held – in their own right rather than as agents for the EU – by public authorities of the Member States, though Recital 15 of Regulation (EC) No 1049/2001,[56] which is the central provision of the EU freedom of information regime, states:

> *Even though it is neither the object nor the effect of this Regulation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions.*

5.3 Regulation (EC) No 1049/2001 aims at facilitating the 'fullest possible public access' to EU documents[57] (particularly in cases where the EU institutions are acting in a legislative capacity), while – at the same time – seeking to preserve the 'effectiveness' of the institutions' decision-making process, by preserving the secrecy of the institutions'

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[55] Case T-264/04 *WWF European Policy Programme v Council* [2007] ECR II-911 at para 76.

[56] [2001] OJ L145/43.

[57] See, eg, Case C-266/05 P *Sison v Council* [2007] ECR I-1233, para 61; Case C-64/05 P *Sweden v Commission* [2007] ECR I-11389, para 53; and Case C-139/07 P *Commission v Technische Glaswerke Ilmenau*, 29 June, [2010] ECR I-nyr at para 51.

internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks (Article 4(3)).[58]

5.4 Somewhat tendentiously, it is claimed that the right of public access to documents of the EU institutions is related to the 'democratic nature' of those institutions.[59]

5.5 Although the Regulation sets time-limits within which to respond to document access requests, failure on the part of the EU to comply with the time-limits laid down in that provision does not lead automatically to the annulment of the decision adopted after the deadline, as this would merely cause the administrative procedure for access to documents to be reopened. Instead, compensation for any loss resulting from the lateness of the institutional response may be sought through an action for damages.[60]

5.6 Article 4 of the EU Regulation also sets out a series of possible permissible reasons for refusing access to (or selectively redacting) requested documentation. As a derogation from the general principle of public access to documents held by the EU, these exceptions must be interpreted narrowly and applied strictly. They include where disclosure would undermine the protection of the public interest as regards public security,[61] defence and military matters, international relations, and/or the financial, monetary or economic

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[58] For discussion of this provision, see Case T-121/05 *Borax Europe Ltd v Commission* [2009] II-27* (Summ Pub) (Order of 11 March 2009) at paras 68 and 70:

> *'[W]hile the Community legislature has provided for a specific exception to the right of public access to the documents of the Community institutions as regards legal advice, it has not done the same for other advice, in particular scientific advice, such as that expressed in the recordings at issue. ... It follows that scientific opinions obtained by an institution for the purpose of the preparation of legislation must, as a rule, be disclosed, even if they might give rise to controversy or deter those who expressed them from making their contribution to the decision-making process of that institution.'*

[59] See, eg, Joined Cases C-39/05 P & C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, para 34.

[60] Joined Cases T-355/04 & T-446/04 *Co-Frutta Soc Coop v Commission*, 19 January, [2010] ECR II-nyr at para 71.

[61] Case C-266/05 P *Sison v Council* [2007] ECR I-1233.

policy of the EU or of a Member State[62] (Article 4(1)(a)). Refusal may also be made on the basis of harm to the privacy and the integrity of the individual, having particular regard to the EU's data protection legislation (Article 4(1)(b)). Further, unless there is an overriding public interest in disclosure, the EU institutions are also required under Article 4(2) of the EU Regulation to refuse access to a document where its disclosure would undermine the protection of:

a) commercial interests of a natural or legal person,[63] including intellectual property[64];

b) court proceedings[65] and legal advice[66]; and

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[62] See Joined Cases T-3/00 & T-337/04 *Pitsiorlas v Council* [2007] ECR II-4779.

[63] Joined Cases T-355/04 & T-446/04 *Co-Frutta*, above n 43, the General Court noted at para 133 in relation to this exception:

> *'The aim behind the application for access to the documents [in this case] is that of verifying the existence of fraudulent practices on the part of the applicant's competitors. The applicant thus pursues, amongst other objectives, the protection of its commercial interests. However, it is not possible to categorise the applicant's commercial interests as being an "overriding public interest" which prevails over the protection of the commercial interests of traditional operators, the objective underlying the refusal of access to a part of the documents requested. In addition, the pursuit of the public interest in identifying cases of fraud in order to ensure the smooth operation of the banana market is not a matter for the operators, but for the competent Community and national public authorities, where appropriate following an application made by an operator.'*

[64] Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-271.

[65] In Joined Cases C-514, C-528 & C-532/07P *Sweden and Association de la Presse Internationale asbl (API)* ECLI:EU:C:2010:541 [2011] 2 AC 359 the Grand Chamber CJEU ruled – more than a little paradoxically – that the disclosure of pleadings lodged in pending court proceedings is presumed to undermine the protection of those proceedings – because of the fact that the pleadings constitute the basis on which the Court carries out its judicial activities – and so a general rule can be applied to refuse access to court pleadings in open proceedings.

However, in closed proceedings held *in camera* no such general presumption can be applied, and so access to the pleadings in proceedings held behind closed doors can be refused by the Commission only after it undertakes a specific examination of the document to which access is requested and explains how disclosure of that document could specifically and effectively undermine the court proceedings in question.

[66] In Case C-477/10 P *Agrofert Holding as v Commission*, [2012] 5 CMLR, 9, CJEU, on appeal from the General Court the ECJ confirmed that it was insufficient for the Commission to refuse access to the legal advice in question merely by claiming a general need to maintain its confidentiality in order to be able to obtain full and frank legal advice. To rely upon this exemption effectively, the Commission would instead have to show how disclosure of the legal advice in question would, on

c) the purpose of inspections, investigations[67] and audits.[68]

5.7 In order to justify refusal of access to a document the disclosure of which has been requested, it is not sufficient, in principle, for that document to be covered by an activity mentioned in Article 4(2). If an EU institution or body subject to the provisions of Regulation (EC) No 1049/2001 decides to refuse access to a requested document, it must, in principle, explain how disclosure of that document could specifically and effectively undermine the interest protected by the Article 4 exceptions.[69] However, the Grand Chamber has also ruled that the EU institution may, in refusing a specific document access request, base its decisions on general presumptions which apply to certain categories of document, as considerations of a generally similar kind are likely to apply to applications for disclosure which relate to documents of the same nature.[70]

5.8 In Case C-127/13P *Strack v European Commission* EU:C:2014:455 EU:C:2014:2250 [2015] 1 WLR 2649 the CJEU held that the failure by an institution of the European Union to respond to a confirmatory application for access to documents within the time limit laid down amounted to a decision to refuse access and that that implied decision constituted the starting point for the period within which the applicant could bring an action for annulment. The court also held that Regulation No 1049/2001 did not allow for the derogation from the time limits laid down in articles 7 and 8, which could not be varied by the parties, and which were determinative in relation to the conduct of the procedure for access to documents. Accordingly if no express decision had been made by the expiry

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the facts of the particular case, constitute a genuine and reasonably foreseeable specific risk (rather than some purely hypothetical threat) to its legitimate interests.

[67] In Case T-111/07 *Agrofert Holding as v Commission*, 7 July, [2010] ECR II-nyr it was held (at para 97) that this proviso 'must be interpreted as applying only if disclosure of the documents in question may endanger the completion of inspections, investigations or audits'.

[68] In Joined Cases C-514, C-528 & C-532/07P *Sweden and Association de la Presse Internationale asbl (API)* ECLI:EU:C:2010:541 [2011] 2 AC 359 the Grand Chamber upheld the decision of the General Court on appeal to the effect that documents relating to investigations carried out by the Commission in the context of infringement proceedings under Art 258 TFEU are no longer covered by this last exception (undermining 'the purpose of inspections, investigations and audits') after the Court of Justice has delivered its judgment closing those proceedings.

[69] See, e.g., Joined cases C-514/11P & C-605/11 P *LPN and Finland* v *Commission* EU:C:2013:738, paragraph 44, and Case C-612/13 P *ClientEarth* v *Commission*, , EU:C:2015:486, paragraph 68.

[70] Joined Cases C-514, C-528 & C-532/07P *Sweden and Association de la Presse Internationale asbl (API)* ECLI:EU:C:2010:541 [2011] 2 AC 359, at para 74.

of the time limit for processing a confirmatory application laid down in article 8 of Regulation No 1049/2001, an implied refusal would be deemed to exist which could be the subject of an action for annulment. Further, any refusal of access to a requested document could be subject to challenge by way of an action for annulment, whatever the reason relied on to refuse access, including that the requested document did not exist or was not in the possession of the institution concerned

5.9 In principle, the right of access also applies to EU documents relating to the Common Foreign and Security Policy and to police and judicial cooperation in criminal matters. In principle too, the EU freedom of information regime is not limited only to documents drawn up by the EU institutions, but may also apply to documents received by them, although allowing for a Member State to request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement. But Member States do not have any general and unconditional right of veto on the disclosure of a document held by a Community institution simply because it originates from that Member State.[71]

5.10 The EU regulation sets up a two-stage administrative procedure in relation to dealing with access to documents requests, with the additional possibility of court proceedings being taken by a disappointed applicant before the CJEU or a complaint being made to the European Ombudsman. The object of Articles 7 and 8 of that regulation, by providing for a two-stage procedure, to achieve, first, the swift and straightforward processing of applications for access to documents of the institutions concerned and, second, as a priority, an amicable settlement of disputes that may arise. For cases in which such a dispute cannot be resolved by the parties, the abovementioned Article 8(1) provides two remedies, namely, the institution of court proceedings or the lodging of a complaint with the Ombudsman. One may note in this regard the provision of Article 43 CFR which states that

> *any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the European*

[71] Case C-64/05 P *Sweden v Commission* [2007] ECR I-11389, para 58, on appeal from Case T-168/02 *IFAW Internationaler Tierschutz-Fonds v Commission* [2004] ECR II-4135.

Ombudsman cases of maladministration in the activities of the institutions, bodies, offices or agencies of the Union, with the exception of the Court of Justice of the European Union acting in its judicial role.

5.11 The two stage procedure under Regulation gives institution concerned the chance to re-examine its position before taking a definitive refusal decision which could be the subject of an action before the EU courts. It is claimed that this procedure "makes it possible for initial applications to be dealt with more promptly and, consequently, more often than not to meet the applicant's expectations, while also enabling the institution to adopt a detailed position before definitively refusing access to the documents sought by the applicant, in particular where the applicant repeats the request for disclosure of those documents, notwithstanding a reasoned refusal by that institution": Case C-362/08P, *Internationaler Hilfsfonds* v *Commission*, EU:C:2010:40 (ECJ, 26 January 2010, paragraph 53-4).

5.12 Since the response to an initial application within the meaning of Article 7(1) of Regulation No 1049/2001 is only the first position in principle, in principle it is not actionable, since it does not produce legal effects. The situation is different, in particular, where the response to the initial application is vitiated by a defect in that it failed to inform the applicant of its right to make a confirmatory application: Case T-437/05 *Brink's Security Luxembourg* v *Commission* EU:T:2009:318, paragraphs 74 and 75. An initial position will also be actionable (in the sense of being something which can be challenged before the CJEU) where an EU institution adopts a definitive position with a response to an initial application: Case C-362/08 P *Internationaler Hilfsfonds* v *Commission*, EU:C:2010:40, paragraphs 58 to 62, and Case C-127/13 P *Strack* v *Commission*, EU:C:2014:2250, paragraph 36).

ACCESS TO ENVIRONMENTAL INFORMATION AND THE AARHUS CONVENTION

5.13 EU law - in the form of the United Nations Economic Commission for Europe Aarhus Convention on Information, Public Participation in Decision Making and Access to Justice in Environmental Matters ("Aarhus") which was ratified by the UK and separately by the EU in February 2005 - makes specific legislative provision in relation to national rules on access to justice and standing to challenge in the sphere of environmental law. The Aarhus Convention now forms an integral part of the legal

order of the European Union: Case C-240/09 *Lesoochranárske zoskupenie VLK v Slovakia* [2011] ECR I-1255 at § 58. The Aarhus Convention relating to access to documentation in environmental matters provides, so far as relevant, as follows:

> "**Article 1 *Objective***
>
> In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee *the rights of access to information, public participation in decision-making*, and access to justice in environmental matters in accordance with the provisions of this Convention
>
> **Article 4 - Access to Environmental Information**
>
> 1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:
>
> (a) Without an interest having to be stated;
>
> (b) In the form requested unless:
>
> (i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or
>
> (ii) The information is already publicly available in another form.
>
> 2. The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.
>
> 3. A request for environmental information may be refused if:
>
> ...
>
> (c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.
>
> 4. A request for environmental information may be refused if the disclosure would adversely affect:
>
> (a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;
>
> ...
>
> (d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;
>
> (e) Intellectual property rights;

(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;

(g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material;...

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.

...

6. Each Party shall ensure that, if information exempted from disclosure under paragraphs 3 (c) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.

Aarhus access to EU environmental information

5.14 The Aarhus obligations of the EU institutions to provide for public access to environmental information are set out in Regulation (EC) No 1367/2006.[72] In addition to making provision for requests for environmental information to be made of the EU institutions by any natural or legal person, the Regulation also make specific provision for the rights of NGOs to request internal review of any response to such a request and, if dissatisfied therewith, to raise an action before the Court of Justice of the European Union. In order to benefit from these provisions the NGO has to show that:

a) it is an independent non profit-making legal person in accordance with a Member State's national law or practice;

b) it has the primary stated objective of promoting environmental protection in the context of environmental law;

c) it has existed for more than two years and is actively pursuing the objective of environmental protection in the context of environmental law; and

d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities.

[72] [2006] OJ L264/13.

5.15 In Case C-673/13 *Commission v Stichting Greenpeace Nederland and PAN Europe* (ECJ, 23 November 2016) the court confirmed that the objective of the Aarhus regulation 1367/2006 is to ensure access to information concerning factors, such as emissions affecting or likely to affect elements of the environment, in particular air, water and soil. That is not the case as regards purely hypothetical emissions. But that concept cannot be limited to information concerning emissions actually released into the environment, at least in relation to products which are intended for general environmental release, for example as plant protection products. Consequently, the information which is covered by the Aarhus regulation include information on foreseeable emissions into the environment from the plant protection product or active substance in question, under normal or realistic conditions of use of that product or substance, namely the conditions under which the authorisation to place that product or substance on the market was granted and which prevail in the area where that product or substance is intended to be used

5.16 *In Case* C-442/14 *Bayer CropScience and Stichting De Bijenstichting* (ECJ, 23 November 2016) the court took a similarly broad view of the extent of the obligations under the Aarhus regulations, rejecting the finding of the General Court and the submissions of the Member States and the Commission that a restrictive approach should be taken, by for example reading the reference to emission affecting the environment as referring only to emissions emanating from industrial installations or processes.

5.17 Access to general environmental information and monitoring is also a matter which falls within the remit of the European Environmental Agency, which was set up by an EU Regulation[73] to create an information network, provide a report on the state of the environment every three years, and otherwise collate, record and assess environmental data.

Aarhus access to environmental information from Member States

5.18 The Public Access to Environmental Information Directive 2003/4/EC was expressly adopted so as to ensure consistency between the requirements of EU law and

[73] Council Regulation 1210/90 [1990] OJ L120/1.

the Aarhus principles, in order to allow the EU to ratify the Aarhus Convention. The Directive obliges public authorities to make practical and effective arrangements with a view to making available and disseminating environmental information to the general public to the widest extent possible – using, in particular, information and communication technologies. 'Environmental information' is given the broadest of definitions; and the 'public authorities' covered by the Directive include not only all national and local government bodies (whether or not they have specific responsibilities for the environment), but also persons or bodies performing public administrative functions under national law in relation to the environment, and other persons or bodies acting under their control and having public responsibilities or functions. The (non-) performance of these duties of disclosure and dissemination on request to the public has to be made judicially reviewable before the national courts at the instance of any persons whose request for environmental information has been refused (Article 6). Although Article 4 of the Directive sets out a list of reasons which might justify a refusal of a request for environmental information – including the generality of the request or its manifest unreasonableness, claims to confidentiality, asserted adverse effect on international relations, public security, national defence or the course of justice, or, except where the request relates to information on emissions into the environment, claims to confidentiality or the protection of the environment to which such information relates (such as the location of rare species) – the Article goes on to provide that these grounds of refusal

> shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure ... weighed against the interest served by the refusal.

5.19 The importance of access to information as a mechanism of ensuring that the Member State authorities duly abides by the law in environmental cases was underlined by the CJEU in *Solvay v. Walloon Region*, where the Luxembourg Court observed:

> *"[T]hird parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority was aware, in accordance with the rules laid down by national law, that an adequate prior evaluation had been carried out in accordance with the requirements of Directive 85/337.*
>
> *58 Moreover, interested parties, as well as the other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with that obligation of the competent authority as to an evaluation.*

59 In that regard, effective judicial review, which must be able to extend to the lawfulness of the reasons for the decision being challenged, presupposes in general that the court before which the matter is brought may require the competent authority to communicate those reasons. However, where it is more particularly a question of securing the effective protection of a right conferred by EU law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its decision is based, either in the decision itself or in a subsequent communication made at their request.[74]

60 That subsequent communication may take the form not only of an express statement of the reasons but also of the making available of relevant information." [75]

5.20 In *Flachglas Torgau GmbH* the Grand Chamber CJJEU confirmed that "public authorities should not be able to determine unilaterally the circumstances in which the confidentiality referred to in article 4(2) of Directive 2003/4 can be invoked". [76]

5.21 In *Fish Legal* the Grand Chamber CJEU reiterated that the Aarhus Convention (and consequently Directive 2003/4) seeks, among other things, "to achieve the widest possible systematic availability and dissemination to the public" of environmental information. Accordingly the Court ruled privatised water companies fall within the ambit of the environmental freedom of information regime "in respect of all the environmental information which they hold" if they can be said to be vested as a matter of national law with "special powers beyond those which result from the normal rules applicable in relations between persons governed by private law" and hence fall within the ambit of Article 2(2)(b). The CJEU records (at para 54) that "the water companies concerned have certain powers under the applicable national law, such as the power of compulsory purchase, the power to make byelaws relating to waterways and land in their ownership, the power to discharge water in certain circumstances, including into private watercourses, the right to impose temporary hosepipe bans and the power to

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[74] S*ee* Case 222/86 *Heylens* [1987] ECR 4097 at [15], *Mellor* [2009] ECR I-3799 at [59]

[75] Case C-182/10 *Solvay and others v. Région Wallonne* [2012] 2 CMLR 19 (ECJ, (16 February 2012)

[76] Case C-204/09 *Flachglas Torgau GmbH v Federal Republic of Germany* [2013] QB 212 (CJEU Grand Chamber) at para 63

decide, in relation to certain customers and subject to strict conditions, to cut off the supply of water." Separately if the system of national regulation is such that a privatised water company could not be said to have power to "determine in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it" then the company will fall within the ambit of Article 2(2)(c) and has an obligation of public disclosure but only in respect of the environmental information which it holds "in the context of the supply of those public services". Companies are not required to provide environmental information if it is not disputed that the information does not relate to the provision of those public services but if this is disputed or is uncertain then the information in question must be provided. In relation to the Article 2(2)(c) control test, the CJEU observed as follows:

> *"69. The manner in which such a public authority may exert decisive influence pursuant to the powers which it has been allotted by the national legislature is irrelevant in this regard. It may take the form of, inter alia, a power to issue directions to the entities concerned, whether or not by exercising rights as a shareholder, the power to suspend, annul after the event or require prior authorisation for decisions taken by those entities, the power to appoint or remove from office the members of their management bodies or the majority of them, or the power wholly or partly to deny the entities financing to an extent that jeopardises their existence.*
>
> *70 The mere fact that the entity in question is, like the water companies concerned, a commercial company subject to a specific system of regulation for the sector in question cannot exclude 'control' within the meaning of Article 2(2)(c) of Directive 2003/4 …*
>
> *71 If the system concerned involves a particularly precise legal framework which lays down a set of rules determining the way in which such companies must perform the public functions related to environmental management with which they are entrusted, and which, as the case may be, includes administrative supervision intended to ensure that those rules are in fact complied with, where appropriate by means of the issuing of orders or the imposition of fines, it may follow that those entities do not have genuine autonomy vis-à-vis the State, even if the latter is no longer in a position, following privatisation of the sector in question, to determine their day-to-day management."*[77]

[77] Case C-279/12 *Fish Legal and another v Information Commissioner and others* EU:C:2013:853

6. OPEN JUSTICE AND ACCESS TO COURT DOCUMENTS

No right of access to CJEU court pleadings

6.1 In an Order of 3 April 2000 in Case C-376/98 *Germany v European Parliament* the CJEU stated that the parties in action before the CJEU are, in principle, free to disclose their own written submissions (which would include any documents appended thereto). The Court observed as follows:

> *2. … In these proceedings, the Council and Parliament, the defendants, requested, in a letter of 30 June 1999 and in their rejoinders respectively, that the documents produced by the German Government as Annexes 2, 4 and 5 to its reply be removed from the case-file.*
>
> *3. Annexes 2, 4 and 5 to the reply are three applications by which three companies instituted proceedings against the Parliament and Council before the Court of First Instance seeking annulment of the directive.*
>
> *4 … The Council submits that production of those applications infringes the principle of the confidentiality of legal proceedings.*
> ….
> *5. The Parliament likewise takes the view that production of those applications by the German Government in support of its arguments on the facts, regarding the economic repercussions of the directive, and, in the case of Annex 5, to support the legal arguments set out in its application infringes the principle that the case-files in legal proceedings are confidential …*
> ….
> *8 In its observations of 31 August 1999 on the Council's request, the German Government first of all argues that all of the companies that have brought actions before the Court of First Instance sent to it copies of their applications for purposes of information and accepted that those applications be annexed to the German Government's reply. It submits that the confidential nature of an application depends exclusively on the decision of the applicant and that there is no general principle of confidentiality of judicial proceedings, with the consequence that there can be no infringement of any such principle. …*
>
> *9. The arguments put forward by the Council and the Parliament must be rejected.*
>
> *10 So far as infringement of the principle of confidentiality is concerned, there is no rule or provision under which parties to proceedings are authorised to or prevented from disclosing their own written submissions to third parties. Apart from exceptional cases where disclosure of a document might adversely affect the proper administration of justice, which is not the case here, the principle is that parties are free to disclose their own written submissions."* [78]

[78] Case C-376/98 *Germany v European Parliament* [2000] ECR I-2249

6.2 In his Opinion in *Sweden and Association de la Presse Internationale asbl (API) v Commission* A-G Maduro stated that the CJEU should take the opportunity of expressly departing from and over-ruling this Order. He observed:

> *"14 While litigation is ongoing, it should be for the court, not the commission, to decide whether the public should have access to the documents in a particular case….During the course of litigation, the court is master of the case. Only the court is in a position to weigh the competing interests and to determine whether the release of documents would cause irreparable harm to either party or undermine the fairness of the judicial process. If the decision to release documents is left to the parties, they may be too cautious in releasing documents where they fear damage to their own interests and too ready to release documents that might cause harm to their adversaries.*
>
> *…*
>
> *15. I believe that the best conclusion in the present case would be to find that all documents submitted by parties in pending cases fall outside the scope of Regulation No 1049/2001. Once submitted to the court, they become elements of the judicial process, the administration of which lies within the exclusive competence of the court. This does not mean that the court itself is not subject to constraints when deciding whether to allow access. On the contrary, it may be under a duty to assess requests for access in the light of the principles of fairness and transparency, taking carefully into account all the interests at stake. Put differently, justice should be administered in a fair and transparent way, and it is for the court to ensure that this requirement is satisfied in all cases.*
>
> *16 My position is in tension with the order of the court in Germany v European Parliament (Case C-376/98) [2000] ECR I-2247. If it were true that, as the court stated in that order, the parties are, in principle, free to disclose their own written submissions (ibid, para 10) the court would be unable to control access to the documents in the case file.*
>
> *Furthermore, if, as that order indicates, a party's voluntary release of its own submissions is not to be viewed as undermining the integrity of the judicial process, there would be no basis for the commission's blanket refusal to release submissions in pending cases. Whether documents are released willingly or because it is required by regulation, the potential for the release to generate public pressure affecting the integrity of judicial proceedings or disadvantaging one of the parties would be the same.*
>
> *Actually, the order in Federal Republic of Germany v European Parliament is slightly contradictory in the following sense: while recognising that the parties are, in principle, free to disclose their written submissions, the court also notes that in exceptional circumstances disclosure might adversely affect the proper administration of justice. What follows, logically, is that the question of disclosure in those exceptional cases where the proper administration of justice is at stake cannot be left to the parties but should be decided by the court. But who is going to assess whether a specific case is sufficiently exceptional to merit the court's attention? The answer is obvious: only the court itself can make such an assessment. It is equally obvious that the court's intervention is meaningful only if it takes place before any disclosure by one of the parties. If a party releases a document which should have*

remained secret and, as a result, the integrity of the judicial process is threatened, no later action by the court can remedy the damage.

....

18 Thus, the time has come for the court to reconsider its statement in Federal Republic of Germany v European Parliament and to make clear that the court, not the parties, must control access to documents in pending cases.

Although the court 'has always shown itself to be circumspect with regard to reversing an interpretation of the law given in earlier judgments' in order to protect the important values of stability, uniformity, cohesion and legal certainty [79] it has been willing to reconsider its past decisions in exceptional circumstances. This seems to me to be one of those situations in which reconsideration is justified. When the order was made, its full effect on the issue of access to judicial documents was not clear." [80]

6.3 In its decision in *Sweden and Association de la Presse Internationale asbl (API) v Commission* the CJEU did not expressly follow the approach of the A-G Maduro, nor did it overrule the Order in the earlier *Germany v. Parliament* case, noting instead as follows:

"80. .... [I]t is quite clear from the wording of article 255EC that the court is not subject to the obligations of transparency laid down in that provision.

81 The purpose of that exclusion emerges even more clearly from article 15FEU, which replaced article 255EC and which, while extending the scope of the principle of transparency, specifies in the fourth subparagraph of paragraph 3 thereof that the Court of Justice is to be subject to paragraph 3 only when exercising its administrative tasks.

82 It follows that the fact that the Court of Justice is not among the institutions which, in accordance with article 255EC, are subject to those obligations is justified precisely because of the nature of the judicial responsibilities which it is called upon to discharge under article 220EC.

...

84 Thus, it follows both from article 255EC and from Regulation No 1049/2001 that the limitations placed on the application of the principle of transparency in relation to judicial activities pursue the same objective: that is to say, they seek to ensure that exercise of the right of access to the documents of the institutions does not undermine the protection of court proceedings.

85 In that regard, it should be noted that the protection of court proceedings implies, in particular, that compliance with the principles of equality of arms and the sound administration of justice must be ensured.

....

86. [I]f the content of the commission's pleadings were to be open to public debate, there would be a danger that the criticism levelled against them,

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[79] See my opinion in Joined Cases C-94/04 and C-202/04 *Cipolla v Fazari*[2006] ECR I-11421, point 28

[80] Joined Cases C-514, C-528 & C-532/07P *Sweden and Association de la Presse Internationale asbl (API) v Commission* [2010] ECR I-8533

whatever its actual legal significance, might influence the position defended by the commission before the EU courts.

87 In addition, such a situation could well upset the vital balance between the parties to a dispute before those courts, the state of balance which is at the basis of the principle of equality of arms, since only the institution concerned by an application for access to its documents, and not all the parties to the proceedings, would be bound by the obligation of disclosure.

...

92 As regards, secondly, the sound administration of justice, the exclusion of judicial activities from the scope of the right of access to documents, without any distinction being drawn between the various procedural stages, is justified in the light of the need to ensure that, throughout the court proceedings, the exchange of argument by the parties and the deliberations of the court in the case before it take place in an atmosphere of total serenity.

93 Disclosure of the pleadings in question would have the effect of exposing judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings.

....

95 Such disclosure would flout the special nature of that category of documents and would be tantamount to making a significant part of the court proceedings subject to the principle of transparency. As a consequence, the effectiveness of the exclusion of the Court of Justice from the institutions to which the principle of transparency applies, in accordance with article 255 EC, would be largely frustrated.

96 In addition, such a presumption is also justified in the light of the Statute of the Court of Justice of the European Union and the Rules of Procedure of the EU courts [81]

97 Although the Statute of the Court of Justice provides that the hearing in court is to be public (article 31), it restricts those entitled to receive communication of procedural documents to the parties and to the institutions whose decisions are in dispute: article 20, second paragraph.

98 Similarly, the Rules of Procedure of the EU courts provide for procedural documents to be served only on the parties to the proceedings. In particular, article 39 of the Rules of Procedure of the Court of Justice, article 45 of the Rules of Procedure of the General Court and article 37(1) of the Rules of Procedure of the Civil Service Tribunal provide that the application is to be served only on the defendant.

99 It is clear, therefore, that neither the Statute of the Court of Justice nor the above Rules of Procedure provide for any third-party right of access to pleadings submitted to the court in court proceedings." [82]

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[81] See, by analogy, Case C-139/07P *Commission of the European Communities v Technische Glaswerke Ilmenau GmbH (Kingdom of Denmark intervening)*[2011] 1 CMLR 79, para 55.

[82] Joined Cases C-514, C-528 & C-532/07P *Sweden and Association de la Presse Internationale asbl (API) v Commission* [2010] ECR I-8533

6.4 Trying to reconcile the order in 2000 with the observations in of the Grand Chamber in its 2010 decision one could say that in the *Sweden* case the court simply established that third parties have no general right of access to the pleadings upon which the CJEU is proceeding in pending cases. Nor is the CJEU bound by the general principle of transparency. The Order of 2000 makes it plain however that it is open to a party to proceedings before the CJEU to makes its own pleadings public should it choose to do so.

6.5 In its decision in *Sweden and Association de la Presse Internationale asbl (API) v Commission*, the Grand Chamber CJEU seemed to set little store by the idea of compliance with the principle of transparency in decision making – at least in the context of CJEU proceedings – as being in itself of overriding public interest, and summarily dismissed 'mere claims' made by API to the effect that the public's right to be informed about important issues of EU law – such as those concerning competition, and about issues which are of great political interest raised by infringement proceedings against Member States – should 'prevail over the protection of the court proceedings'. Instead, in the Grand Chamber's view,

> *it is only where the particular circumstances of the case substantiate a finding that the principle of transparency is especially pressing that that principle can constitute an overriding public interest capable of prevailing over the need for protection of the disputed documents and, accordingly, capable of justifying their disclosure.*[83]

6.6 The decision of the Grand Chamber CJEU in *Sweden and Association de la presse internationale asbl (API) v Commission* that there is no public right of access to written pleadings before the CJEU is difficult to justify, particularly against the apparent lack of transparency in the Court's actual reasoning in so many cases given the requirement for composite unanimous non-dissenting judgments which too often conceal more than they reveal in Delphic prose.

The principle of open justice in UK law

[83] *Ibid*, at para 156.

6.7 The decision and approach of the CJEU is particularly difficult to justify within the context of the United Kingdom where it has been a constant theme of the courts that rights of open justice require that the public should be able to scrutinise both written and oral evidence and argument upon which the court has been invited to arrive at its decision. The achievement of that purpose requires that a member of the public who is an observer should be afforded access to the same written submissions and witness statements, given to the judge and referred to in open court. What this means is that there is a strong presumption in favour all court papers lodged with the court (including parties arguments and the court pleadings) to be released and made available to the public and to the press on request. Thus in *GIO Personal Investment Services Ltd v Liverpool and London Steamship P&I Association Ltd* [1999] 1 WLR 984 Potter LJ noted at 996E-G

> "If, as in the instant case, an opening speech is dispensed with in favour of a written opening (or a skeleton argument treated as such) which is not read out, or even summarised, in open court before the calling of the evidence, it seems to me impossible to avoid the conclusion that an important part of the judicial process, namely the instruction of the judge in the issues of the case, has in fact taken place in the privacy of his room and not in open court. In such a case, I have no doubt that, on application from a member of the press or public in the course of the trial, it is within the inherent jurisdiction of the court to require that there be made available to such applicant a copy of the written opening or skeleton argument submitted to the judge.

6.8 In *SmithKline Beecham Biologicals SA v. Connaught Laboratories* [2000] FSR 1 Lord Bingham CJ observed at the close of his judgment (at page 15-16):

> *"Since the date when Lord Scarman expressed doubt in Home Office v. Harman [1983] AC 280 as to whether expedition would always be consistent with open justice, the practices of counsel preparing skeleton arguments, chronologies and reading guides, and of judges pre–reading documents (including witness statements) out of court, have become much more common. These means of saving time in court are now not merely permitted, but are positively required, by practice directions. The result is that a case may be heard in such a way that even an intelligent and well–informed member of the public, present throughout every hearing in open court, would be unable to obtain a full understanding of the documentary evidence and the arguments on which the case was to be decided.*
>
> *In such circumstances, there may be some degree of unreality in the proposition that the material documents in the case have (in practice as well as in theory) passed into the public domain. That is a matter which gives rise to concern. In some cases (especially cases of obvious and genuine public interest) the judge*

may in the interests of open justice permit or even require a fuller oral opening, and fuller reading of crucial documents, than would be necessary if economy and efficiency were the only considerations. In all cases the judge's judgment (delivered orally in open court, or handed down in open court in written form with copies available for the press and public) should provide a coherent summary of the issues, the evidence and the reasons for the decision.

…

Public access to documents referred to in open court (but not in fact read aloud and comprehensibly in open court) may be necessary, with suitable safeguards, to avoid too wide a gap between what has in theory, and what has in practice, passed into the public domain.

6.9 In *Lilly Icos Ltd v Pfizer Ltd (2)* [2002] 1 WLR 2253 the Court of Appeal set out (at paragraphs 25(i) the general principle of open justice:-

"25 i) The court should start from the principle that very good reasons are required for departing from the normal rule of publicity. That is the normal rule because, as Lord Diplock put it in Home Office v Harman [1983] AC 280 at p303C, citing both Jeremy Bentham and Lord Shaw of Dunfermline in Scott v Scott

> *"Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial."*

The already very strong English jurisprudence to this effect has only been reinforced by the addition to it of this country's obligations under articles 6 and 10 of the European Convention.

6.10 In *R v Howell* [2003] EWCA Crim 486 Judge LJ said, at para 197:

"Subject to questions arising in connection with written submissions on [public interest immunity] applications, or any other express justification for non-disclosure on the basis that the written submissions would not properly have been deployed in open court, we have concluded that the principle of open justice leads inexorably to the conclusion that written skeleton arguments, or those parts of the skeleton arguments adopted by counsel and treated by the court as forming part of his oral submissions, should be disclosed if and when a request to do so is received.'

6.11 In *R (Mohammed) v Secretary of State for Foreign & Commonwealth Affairs* [2011] QB 218 Lord Judge CJ said:-

"38. Justice must be done between the parties. The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law. For that reason, every judge sitting in judgment is on trial. So it should be, and any exceptions to the principle must be closely limited. In reality very few citizens can scrutinise the

judicial process: that scrutiny is performed by the media, whether newspapers or television, acting on behalf of the body of citizens. Without the commitment of an independent media the operation of the principle of open justice would be irremediably diminished.

39. There is however a distinct aspect of the principle which goes beyond proper scrutiny of the processes of the courts and the judiciary. The principle has a wider resonance, which reflects the distinctive contribution made by the open administration of justice to what President Roosevelt described in 1941 as the "...first freedom, freedom of speech and expression". In litigation, particularly litigation between the executive and any of its manifestations and the citizen, the principle of open justice represents an element of democratic accountability, and the vigorous manifestation of the principle of freedom of expression. Ultimately it supports the rule of law itself. Where the court is satisfied that the executive has misconducted itself, or acted so as to facilitate misconduct by others, all these strands, democratic accountability, freedom of expression, and the rule of law are closely engaged.

40. Expressed in this way, the principle of open justice encompasses the entitlement of the media to impart and the public to receive information in accordance with article 10 of the European Convention of Human Rights. Each element of the media must be free to decide for itself what to report."

6.12 All of these principles were recently summed up and affirmed in the judgment of Lord Reed in *A v. BBC Scotland* [2014] UKSC 25, 2014 SC (UKSC) 151 where he states makes clear:

"The general principle of open justice

[23] It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy. As Toulson LJ explained in R (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court [2013] Q.B., p.630, para.1, society depends on the courts to act as guardians of the rule of law. Sed quis custodiet ipsos custodes? Who is to guard the guardians? In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny.

...

[25] The principle that courts should sit in public as important implications for the publishing of reports of court proceedings. In Sloan v B, 1991 S.C., p.442; 1991 S.L.T., p.550, Lord President Hope, delivering the opinion of the court, explained that it is by an application of the same principle that it has long been recognised that proceedings in open court may be reported in the press and by other methods of broadcasting in the media.

> *"The principle on which this rule is founded seems to be that, as Courts of Justice are open to the public, anything that takes place before a Judge or*

Judges is thereby necessarily and legitimately made public, and, being once made legitimately public property, may be republished" [84]

[26] The connection between the principle of open justice and the reporting of court proceedings is not however merely functional. Since the rationale of the principle is that justice should be open to public scrutiny, and the media are the conduit through which most members of the public receive information about court proceedings, it follows that the principle of open justice is inextricably linked to the freedom of the media to report on court proceedings.

Exceptions to the principle of open justice

[27] Since the principle of open justice is a constitutional principle to be found in the common law, it follows that it is for the courts to determine its ambit and its requirements, subject to any statutory provision. The courts therefore have an inherent jurisdiction to determine how the principle should be applied."

…

[31] More recently still, the importance of the common law principle of open justice was emphasised by nine justices of this court in Bank Mellat v HM Treasury. Lord Neuberger, giving the judgment of the majority, described the principle as fundamental to the dispensation of justice in a modern, democratic society (para 2). He added that it had long been accepted that, in rare cases, a court had an inherent power to receive evidence and argument in a hearing from which the public and the press were excluded, but said that such a course might only be taken (i) if it was strictly necessary to have a private hearing in order to achieve justice between the parties and (ii) if the degree of privacy was kept to an absolute minimum.

…

[32] It has also been recognised in the English case law, consistently with Lord Neuberger's requirement of the degree of privacy being kept to a minimum, that where the interests of justice require some qualification of the principle of open justice, it may not be necessary to exclude the public or the press from the hearing: it may suffice that particular information is withheld. …

….

41. … Whether a departure from the principle of open justice was justified in any particular case would depend on the facts of that case. As Lord Toulson observed in Kennedy v Charity Commissioner (para 113), the court has to carry out a balancing exercise which will be fact specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and, conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others.

[84] *Richardson v Wilson* (1879) 7 R., p.241 per Lord President Inglis

6.13 Somewhat shockingly, one of the cases in which the UK courts felt it necessary to conceal the identities of litigants was *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 7 [2017] 2 WLR 583 the recent challenge to the attempt by the UK Government to trigger the process for the withdrawal of the United Kingdom from the EU without prior Parliamentary legislative authorization. In the light of threats made against the individual in whose name the challenge had been brought the UK Supreme Court made an order forbidding the publication of the names or any other means of identifying those claims whose identities were not already public. They also permitted the lead claimant Gina Miller to attend court accompanied by two personal bodyguards

7. EU SECONDARY LEGISLATION ON DATA PROTECTION

Data protection and the EU institutions

7.1 Regulation (EC) No 45/2001 [85] was made by the EU legislature under reference to Article 286 EC (what is now Article 16(2) TFEU, the provisions of which are outlined in para 16.10 above). Those protected under the Regulation are identified or identifiable individuals whose personal data are processed by EU institutions or bodies in any context whatsoever. The Regulation's provisions do not apply to wholly anonymised data; but the Regulation is not limited, for example, simply to those who are employed by the EU.

7.2 ' Personal data' for the purposes of the Regulation comprise any information held on an individual; the Regulation does not apply to information held on a company or other legal person.[86] Particularly sensitive personal data are those which may disclose details of an individual's racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, health or sex life. The lawful processing of such information has either to be expressly consented to or otherwise shown to be specifically necessary for a legitimate purpose (Article 10(2), which may include for the purposes of preventative medicine, medical diagnosis, the provision of care or treatment, or the management of health-care services; and any such processing will be subject to the rules on medical confidentiality (Article 10(3)).

7.3 Article 10(4) provides that data concerning an individual's offences, criminal convictions, or security measures or authorisations may lawfully be processed only if specifically properly authorised, whether under the Treaty or EU secondary legislation, or by the European Data Protection Supervisor. The European Data Protection Supervisor is the independent EU supervisory authority who may grant exemptions, guarantees, authorisations and impose conditions relating to data processing operations, to ensure compliance with the requirements of the regulations within the EU. Data subjects may also complain to the European Data Protection Supervisor under Article 32(2), of alleged breach of the requirements of data protection in relation to them. The Regulation also

[85] [2001] OJ L8/1.

[86] See Case T-198/03 *Bank Austria Creditanstalt v Commission* [2006] ECR II-1429 at para 95.

requires that in each EU institution or body, one or more Data Protection Officers should ensure that the provisions of the Regulation are applied and should advise data controllers on fulfilling their obligations under it.

7.4 The Regulation has the dual aim of ensuring individuals' fundamental right to protection of their private data, while facilitating – for purposes connected with the exercise of their respective legal competence – the free flow of personal data between Member States and the EU, and within the EU itself. To this end the Regulation seeks to ensure consistency in the relevant rules and procedures applicable in different EU legal contexts, for example in judicial cooperation in criminal affairs or cooperation between police and customs authorities. Thus the substantive provisions of Article 4 of the EU Regulation effectively mirror the general principles already set out in Article 5 of the Council of Europe Data Protection Convention 1981 (see also para 16.21 above), by requiring in effect that personal data used by the EU institutions should be:

a) obtained and processed fairly and lawfully;

b) stored for specified and legitimate purposes and not used in a way incompatible with those purposes;

c) adequate, relevant and not excessive in relation to the purposes for which they are stored;

d) accurate and, where necessary, kept up to date; and

e) preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.

7.5 The Regulation also provides:

a) a right of access by the data subject to the information held on him (Article 13);

b) a right to obtain rectification of any errors therein (Article 14);

c) a right to block *ad interim* the use of data the accuracy, continued need for, or lawful retention of which is disputed (Article 15);

d) a circumscribed right for the data subject to object to the particular use of his data (Article 18); and

e) the right to have unlawfully or improperly held data erased from the record (Article 16).

7.6 Article 32(1) of the Regulation confirms that the CJEU has jurisdiction to hear all disputes which relate to its provisions, including claims for damages; and under Article 32(4), any person who has suffered damage because of an unlawful processing operation or any action incompatible with this Regulation shall have the right to have the damage made good in accordance with Article 340 TFEU (formerly Article 288 EC). Lastly, Recital 36 to the Regulation notes that the Regulation 'does not aim to limit Member States' room for manoeuvre in drawing up their national laws on data protection under Article 32 of Directive 95/46/EC'.

7.7 The Court of Justice has held that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary.[87] It has also held that no automatic priority can be conferred on the objective of transparency over the right to protection of personal data, even if important economic interests are at stake.[88] The Grand

[87] See Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* [2008] ECR I-9831, para 56.

[88] See Case C-28/08 P *Commission* v *Bavarian Lager*, 29 June, [2010] ECR I-nyr, paras 75–79. For commentary on this decision see European Data Protection Supervisor ("EDPS") Paper "Public access to documents containing personal data after the *Bavarian Lager* ruling" at http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/BackgroundP/11-03-24_Bavarian_Lager_EN.pdf He observes at page 6:

> 'In case of a public access request for a document containing personal data, such as in the *Bavarian Lager* case, the rules on data protection are entirely applicable, with Article 8(b) having crucial importance. It follows from the judgment that the Commission, under Article 8(b) of the data protection regulation, should in principle have weighed up the various interests of the parties concerned. However, since Bavarian Lager had not provided any express and legitimate justification, this balance of interests could not be made by the Commission. The Court was therefore not in a position to evaluate the outcome of such a balancing test. As a consequence, the judgment itself provides no guidance as to the way in which to strike a fair balance between the different interests at stake. The Court furthermore considered that the Commission rightly verified whether the data subjects *had* given their consent to the disclosure of their personal data and in the absence of express consent rightly required Bavarian Lager to establish the necessity of the transfer. The

Chamber of the CJEU has held a measure disclosing personal data of and on an individual (as distinct from a legal corporation, since 'the seriousness of the breach of the right to protection of personal data manifests itself in different ways for, on the one hand, legal persons and, on the other, natural persons'[89]) may yet be determined to be proportionate and hence lawful where there is a specific decision which expressly considers and seeks to balance that individual's claim to privacy and confidentiality against such general considerations as the principle of transparency of public acts or the open and proper expenditure of public funds.[90]

Data protection and the Member States

7.8 Data Protection Directive 95/46/EC was also passed by the EU legislature under what is now Article 16(2) TFEU. The Data Protection Directive creates provisions which parallel – for Member States when acting within the sphere of EU law – the provisions of Regulation (EC) No 45/2001 which apply to activities of the EU institutions. The Directive has the same dual aim as the Data Protection Regulation, i.e. of protecting the fundamental rights and freedoms of natural persons – and in particular their right to privacy in the processing of personal data – while allowing for the continued free flow and processing of personal data EU-wide.

7.9 Article 3(2) provides that the Directive's provisions do not apply to Member States' data-processing activities in the field of public security, defence and State security (including the economic well-being of the State when the processing operation relates to State security matters), or to the activities of the State in areas of criminal law.[91] And even where

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EDPS takes the view that, with regard to the analysis under Article 8(b), these considerations should not be read as obliging the institutions to request the consent of the data subject in every case in which public disclosure of personal data is asked for. The data protection rules provide that the legitimate interests of the data subject may be sufficiently safeguarded if he or she is afforded the right *to object* to the disclosure as provided for in Article 18 of the data protection regulation.'

[89] See Joined Cases C-92/09 & C-93/09 *Volker und Markus Schecke GbR v Land Hessen*[2010] ECR I-11063 at para 87.

[90] Joined Cases C-465/00, C-138/01 & C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989.

[91] In Case C-524/06 *Heinz Huber v Germany* [2008] ECR I-9705, the Grand Chamber ruled that the putting in place by a Member State, for the purpose of fighting crime, of a system for processing personal data specific to EU citizens who are not nationals of that Member State was contrary to

a data-processing activity falls within the ambit of the Directive, Article 13(1) allows for restrictions to be imposed by Member States on the subject's rights of access and information in so far as they are necessary to safeguard, for example, national security,[92] defence or public safety, criminal investigations and prosecutions,[93] and action in respect of breaches of ethics in regulated professions.

7.10 Otherwise the Data Protection Directive seeks to ensure that there is a common level of protection of the rights and freedoms of individuals with regard to the processing of personal data which is equivalent in all Member States. The Directive does not seek minimal base level harmonisation of Member States' laws but is, instead, aimed at harmonisation which is generally complete, so as to allow for free movement of data throughout the EU which is consistent with respect for the protection of private life. The Directive therefore allows relatively limited scope for variation in the implementation of its provisions within the Member State. In C-468/10 *Asociacion Nacional de Establecimientos Financieros de Credito (ASNEF) v Administracion del Estado* [2011] ECR I-12181 the CJEU confirmed the provisions of the DPD have to be read and applied in a manner which is compatible with the relevant rights contained in the CFR, and/or with other general principles of EU law such as the principle of proportionality. As the Court of Justice observed in *Criminal Proceedings against Bodil Lindqvist*, in relation to the Data Protection Directive 95/46/EC:

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the nationality discrimination provisions of the Treaty, and that the storage and processing of personal data containing individualised personal information in this Central Register of Foreign Nationals for statistical purposes could not, on any basis, be considered to be 'necessary' within the terms of Directive 95/46/EC.

[92] In Joined Cases C-317/04 & C-318/04 *European Parliament and the European Data Protection Supervisor (EDPS) v Council and Commission* [2006] ECR I-4721, the Grand Chamber annulled an Agreement between the EU and the USA for the transfer of personal data contained in the Passenger Name Record of air passengers from European air carriers to the US Department of Homeland Security, on the basis of there being in the Agreement inadequate protection of personal data on such transfer to the US authorities.

[93] See also the Electronic Data Retention Directive 2006/24/EC [2006] OJ L105/54, which, with a view to detecting, preventing and safeguarding common security, requires the Member States to retain for a certain time data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks. See Case C-301/06 *Ireland v Council* [2009] ECR I-593, an unsuccessful challenge to the legal basis for the measure, for a discussion of the background to this Directive.

[I]t is for the authorities and courts of the Member States not only to interpret their national law in a manner consistent with [the] Directive … but also to make sure they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law, such as inter alia the principle of proportionality.

… [T]he provisions of Directive 95/46/EC do not, in themselves, bring about a restriction which conflicts with the general principles of freedom of expression or other freedoms and rights, which are applicable within the European Union and are enshrined inter alia in Article 10 of the ECHR. It is for the national authorities and courts responsible for applying the national legislation implementing Directive 95/46/EC to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order.[94]

7.11 Article 1 of Directive 95/46/EC identifies the objective of the Data Protection Directive as being 'to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data'. It is therefore primarily a privacy protection measure, rather than a general 'freedom of information measure', although the principle of public access to official documents is to be taken into account by Member States when implementing the principles set out in the Directive (see Recital 72). The purpose of the right of access to information held on an individual is primarily in order to verify in particular the accuracy of the data and the lawfulness of the data processing (Recital 41); and even then the interests or the rights and freedoms of the data subject are not overriding.[95]

7.12 Article 2(a) of Directive 95/46/EC defines 'personal data' as meaning 'any information relating to an identified or identifiable natural person'. Again, as with the EU Data Protection Regulation, its provisions do not apply to anonymous (or properly anonymised) data (see Recital 26). Article 3(1) of Directive 95/46 states that the provisions of the Directive

shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal

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[94] Case C-101/01 C*riminal Proceedings against Bodil Lindqvist* [2003] ECR I-12971 at paras 87 and 90.

[95] See Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 80, where the Court of Justice observed that the right to the protection of personal data is not an absolute right but must be considered in relation to its function in society.

data which form part of a filing system or are intended to form part of a filing system.

The Directive therefore makes a distinction between automatic processing of data held on computer and the manual processing of hard copies. While it is necessary for hard copy data to be part of a relevant structured filing system relating to individuals to be covered by the Data Protection Directive, any data which are in fact stored electronically will fall within the Data Protection Directive regardless of whether they form part of a relevant filing system.

7.13 Like the EU Data Protection Regulation, substantive data protection provisions of Article 6 of Directive 95/46/EC also effectively mirror the general principles already set out in the Council of Europe Data Protection Convention 1981, by requiring that personal data be:

a) obtained and processed fairly and lawfully;

b) stored for specified and legitimate purposes, and not used in a way incompatible with those purposes;

c) adequate, relevant and not excessive in relation to the purposes for which they are stored;

d) accurate and, where necessary, kept up to date; and

e) preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.

7.14 Article 9 of the Directive seeks to reconcile two fundamental rights – the protection of privacy and freedom of expression – by requiring Member States to provide for a number of derogations or limitations in relation to the protection of data (and, therefore, in relation to the fundamental right to privacy) for journalistic purposes, or for the purpose of artistic or literary expression, which fall within the scope of the fundamental right to freedom of expression. The Grand Chamber of the CJEU has observed that

in order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary, first, to interpret notions relating to that freedom, such as journalism, broadly. Secondly, and in order to achieve a balance

between the two fundamental rights, the protection of the fundamental right to privacy requires that the derogations and limitations in relation to the protection of data provided for in the chapters of the directive referred to above must apply only in so far as is strictly necessary.[96]

7.15 Article 12(a) of the Data Protection Directive requires Member States to ensure a right of access to information on the recipients or categories of recipient of personal data, and on the content of the data disclosed not only in respect of the present but also in respect of the past. The Court of Justice has held that rules which limit the storage of information on the recipients or categories of recipient of personal data (and on the content of the data disclosed) to a period of one year – and correspondingly limit access to that information – do not in principle appear to strike a fair balance in relation to the privacy interests of the data subject.[97]

7.16 Lastly, Article 28 of the Directive requires that properly independent supervisory authorities be set up in each Member State to ensure compliance with the provisions of the Data Protection Directive[98]; and Article 23 gives a data subject the right to seek damages in respect of a breach of the data protection requirements as regards that individual.[99]

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[96] See Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* [2008] ECR I-9831, para 56.

[97] Case C-553/07 *Rijkeboer* [2009] ECR I-3889.

[98] See Case C-518/07 *European Commission and European Data Protection Supervisor v Germany*, 9 March, [2010] ECR I-nyr, where the CJEU held that by making the authorities responsible for monitoring the processing of personal data in the different *Länder* subject to State scrutiny, Germany incorrectly transposed the Directive's requirement that those authorities perform their functions 'with complete independence'.

[99] In Case T-48/05 *Yves Franchet and Daniel Byk v Commission* [2008] ECR II-1585, an action for damages brought against the EU by the former Director-General and the former Director of Eurostat (Statistical Office of the European Communities) under Art 340 TFEU (formerly Art 288 EC). The General Court refused the claim for compensation in so far as based on material damages but made an award for non-material damages, noting (at para 411): '[T]he applicants experienced feelings of injustice and frustration and … they sustained a slur on their honour and their professional reputation on account of the unlawful conduct of OLAF and of the Commission. Taking account of the particular circumstances of the present case and of the fact that the applicants' reputation was very seriously affected, the Court evaluates the damage, on an equitable basis, at EUR 56 000.' In *Vidal-Hall and others v Google Inc.* [2015] EWCA Civ 311 [2015] 3 WLR 409 the Court of Appeal held that section 13(2) of the Data Protection Act 1998 which expressly provided that an individual who suffered distress by reason of a contravention by a data controller of any of the requirements of the 1998 Act was entitled to compensation only if he also suffered pecuniary or material loss thereby (or if the contravention related to the processing of personal data for special purposes) was incompatible with the terms and objectives of the Data Protection Directive 95/46/EC which the 1998 bore to implement into UK law. The Court of Appeal considered that the reference to "damage" in article 23 of the Directive should be given its natural and wide meaning so as to include both material and non-material damage. Accordingly, in order to ensure victims

7.17 With effect from 25 May 2018 the Data Protection Directive will be repealed and its provisions replaced by the directly applicable General Data Protection Regulation (EU) 2016/679. An examination of its provisions would require a whole other paper, however.

Data protection and cross-border criminal investigations

7.18 The provisions of the Framework Decision 2008/977/JHA[100] on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, seek to ensure a high level of protection of individuals' right to privacy while still guaranteeing a high level of public safety. The Framework Decision seeks to set out clear rules concerning data transmitted or made available, with a view to enhancing mutual trust between the competent authorities while fully respecting individual fundamental rights. It was adopted on the basis that the existing provisions of EU law on data protection, notably the Data Protection Directive 95/46/EC (above), were insufficient, since the Data Protection Directive did not apply to the processing of personal data in the course of an activity which falls outside the scope of EC law (such as the Third Pillar actions of the Member States under the then EU Treaty), and in any case did not apply to processing operations concerning public security, defence, State security or the activities of the State in areas of criminal law.

7.19 The Framework Decision applies only to data gathered or processed by competent authorities for the purpose of the prevention, investigation, detection or prosecution of criminal offences, or the execution of criminal penalties. It provides that 'personal data' may be collected only for specified, explicit and legitimate purposes. Processing must be lawful and adequate, relevant and not excessive. The rules in this Framework Decision regulating and restricting the transmission of personal data by the judiciary, police or

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of data breach the effective remedy to which they were entitled under and in terms of Article 47 of the EU Charter of Fundamental Rights (CFR) for breach of the right to respect for private and family life under article 7 CFR and the right to protection of personal data under article 8 CFR, section 13(2) of the 1998 Act should be disapplied. This would mean that victim of data protection breach would be entitled to compensation under section 13(1) of the 1998 Act for any damage suffered as a result of a data controller's contravention of *any* of the 1998 Act's requirements.

[100] [2008] OJ L350/60.

customs to private parties do not apply to the disclosure of data to private parties (such as defence lawyers and victims) in the context of criminal proceedings. Personal data must be rectified if they are inaccurate, and erased or made anonymous when they are no longer required. The Framework Decisions also provides a right to compensation and a right to a judicial remedy. It may be necessary to inform data subjects about the processing of their data, in particular where there has been particularly serious encroachment on their rights as a result of secret data collection measures, in order to ensure that those data subjects can enjoy effective legal protection.

7.20 The Framework Decision allows for the possibility of archiving collated data in a separate data set if the data are no longer required and used for the prevention, investigation, detection or prosecution of criminal offences, or the execution of criminal penalties. Archiving in a separate data set is also permitted if the archived data are stored in a database with other data in such a way that they can no longer be used for the prevention, investigation, detection or prosecution of criminal offences, or the execution of criminal penalties. The appropriateness of the archiving period should depend on the purposes of archiving and the legitimate interests of the data subjects. In the case of archiving for historical purposes, the Framework Decision allows that a very long period may be envisaged.

7.21 Framework decision 2008/977/JHA will be repealed and its provisions replaced with effect from 6 May 2018 by Directive (EU) 2016/680 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. The provisions of this Directive have to be implemented into national law of the Member State by 6 May 2018.

8. CONCLUSION

8.1 The foregoing survey on rights of access to documents and separately to information within the ambit of EU law will, I hope illustrate the complexity of the issues raised by this subject. It is covered by two fundamental principles – transparency and privacy – which pulling entirely opposite directions from one another. It is almost impossible to reconcile these two principle in the abstract. They have always to be considered in the light of the particular factual circumstances in which they have to be applied.

8.2 This means that any general legislation will always be subject to challenge in litigation. This is not then the most ideal situation for ourselves as citizens. For lawyers, alas, there is much fruitful work in all this still to be done.

Aidan O'Neill QC (Scot) QC
24 February 2017

CASE STUDIES RE ACCESS TO EU DOCUMENTATION

1. Case Study 1: Information on initiatives concerning radicalisation

1.1 The Case study concerns an application to the Council made by an NGO for the Council to produce documentation it has concerning "the EU's emerging initiatives on violent radicalisation".

1.2 The request is made for disclosure of documents pursuant to Regulation (EC) No. 1049/2001. It seeks disclosure of seven specific EU documents and also makes a general request seeking the disclosure of "all documents materially connected to the EU's emerging initiatives on violent radicalisation".

1.3 Divide into three teams. One team represents the General Secretariat of the Council. One represents the NGO seeking the information. The third team represents the General Court before whom an application is to be made.

1.4 The General Secretariat should set out the factual and legal bases for why they might refuse to comply with this request, whether in part or in full.

1.5 The NGO team should set out its arguments as to why it should be given access to the material it has requested, whether in whole or in part.

1.6 The third team representing the General Court, should after hearing the arguments on both sides, gives its judgment upholding or refusing the request, whether in whole or in part, and giving its reasons.

1.7 In preparation for this case study everyone should read Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233.

2. Case Study 2: Information on initiatives concerning food safety

2.1 The EU's Food Standards Agency decided that a guidance document should be developed for those seeking authorisation to place a plant protection product on the market.

2.2 A working group submitted a draft document to two of the Food Standards Agency advisory bodies, some of whose members were external scientific experts, who were invited to submit comments on it.

2.3 An environmental NGO requested access to documents related to the preparation of the draft guidance document, including the comments of the external experts and the name of the author of each comment.

2.4 The Food Standards Agency initially granted the NGO partial access to all documents requested except two. When this limited access was challenged before the General Court the Food Standards Agency then granted the NGO access to the documents but redacted the names and any identifying information of the experts who had commented on the draft guidance document.

2.5 The NGO applied for annulment of the decision to grant access only under redactions of personal information.

2.6 Divide into three teams. One team represents the Food Standards Agency One represents the NGO seeking the information. The third team represents the General Court before whom an application is to be made.

2.7 The Food Standards Agency should set out the factual and legal bases for why they insist on maintaining the redaction

2.8 The NGO team should set out its arguments as to why it should be given access to the material it has requested in full

2.9 The third team representing the General Court, should after hearing the arguments on both sides, gives its judgment upholding or refusing the request, whether in whole or in part, and giving its reasons.

2.10 In preparation for this case study everyone should read Case T-214/11 *ClientEarth v European Food Safety Authority* EU:T:2013:483; [2014] 1 C.M.L.R. 34

REGULATION (EC) No 1049/2001 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 30 May 2001 regarding public access to European Parliament, Council and Commission documents

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 255(2) thereof,

Having regard to the proposal from the Commission [1],

Acting in accordance with the procedure referred to in Article 251 of the Treaty [2],

Whereas:

(1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

(3) The conclusions of the European Council meetings held at Birmingham, Edinburgh and Copenhagen stressed the need to introduce greater transparency into the work of the Union institutions. This Regulation consolidates the initiatives that the institutions have already taken with a view to improving the transparency of the decision-making process.

(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.

(5) Since the question of access to documents is not covered by provisions of the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, the European Parliament, the Council and the Commission should, in accordance with Declaration No 41 attached to the Final Act of the Treaty of Amsterdam, draw guidance from this Regulation as regards documents concerning the activities covered by those two Treaties.

(6) Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.

(7) In accordance with Articles 28(1) and 41(1) of the EU Treaty, the right of access also applies to documents relating to the common foreign and security policy and to police and judicial cooperation in criminal matters. Each institution should respect its security rules.

(8) In order to ensure the full application of this Regulation to all activities of the Union, all agencies established by the institutions should apply the principles laid down in this Regulation.

(9) On account of their highly sensitive content, certain documents should be given special treatment. Arrangements for informing the European Parliament of the content of such documents should be made through interinstitutional agreement.

(10) In order to bring about greater openness in the work of the institutions, access to documents should be granted by the European Parliament, the Council and the Commission not only to documents drawn up by the institutions, but also to documents received by them. In this context, it is recalled that Declaration No 35 attached to the Final Act of the Treaty of Amsterdam provides that a Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement.

(11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities.

(12) All rules concerning access to documents of the institutions should be in conformity with this Regulation.

[1] OJ C 177 E, 27.6.2000, p. 70.
[2] Opinion of the European Parliament of 3 May 2001 (not yet published in the Official Journal) and Council Decision of 28 May 2001.

(13) In order to ensure that the right of access is fully respected, a two-stage administrative procedure should apply, with the additional possibility of court proceedings or complaints to the Ombudsman.

(14) Each institution should take the measures necessary to inform the public of the new provisions in force and to train its staff to assist citizens exercising their rights under this Regulation. In order to make it easier for citizens to exercise their rights, each institution should provide access to a register of documents.

(15) Even though it is neither the object nor the effect of this Regulation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions.

(16) This Regulation is without prejudice to existing rights of access to documents for Member States, judicial authorities or investigative bodies.

(17) In accordance with Article 255(3) of the EC Treaty, each institution lays down specific provisions regarding access to its documents in its rules of procedure. Council Decision 93/731/EC of 20 December 1993 on public access to Council documents [1], Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents [2], European Parliament Decision 97/632/EC, ECSC, Euratom of 10 July 1997 on public access to European Parliament documents [3], and the rules on confidentiality of Schengen documents should therefore, if necessary, be modified or be repealed,

HAVE ADOPTED THIS REGULATION:

Article 1

Purpose

The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as 'the institutions') documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents,

(b) to establish rules ensuring the easiest possible exercise of this right, and

(c) to promote good administrative practice on access to documents.

Article 2

Beneficiaries and scope

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

2. The institutions may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.

4. Without prejudice to Articles 4 and 9, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register. In particular, documents drawn up or received in the course of a legislative procedure shall be made directly accessible in accordance with Article 12.

5. Sensitive documents as defined in Article 9(1) shall be subject to special treatment in accordance with that Article.

6. This Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them.

Article 3

Definitions

For the purpose of this Regulation:

(a) 'document' shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;

(b) 'third party' shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.

[1] OJ L 340, 31.12.1993, p. 43. Decision as last amended by Decision 2000/527/EC (OJ L 212, 23.8.2000, p. 9).
[2] OJ L 46, 18.2.1994, p. 58. Decision as amended by Decision 96/567/EC, ECSC, Euratom (OJ L 247, 28.9.1996, p. 45).
[3] OJ L 263, 25.9.1997, p. 27.

Article 4

Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:
   — public security,
   — defence and military matters,
   — international relations,
   — the financial, monetary or economic policy of the Community or a Member State;

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

— commercial interests of a natural or legal person, including intellectual property,

— court proceedings and legal advice,

— the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

Article 5

Documents in the Member States

Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation.

The Member State may instead refer the request to the institution.

Article 6

Applications

1. Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 314 of the EC Treaty and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.

2. If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.

3. In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.

4. The institutions shall provide information and assistance to citizens on how and where applications for access to documents can be made.

Article 7

Processing of initial applications

1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.

3. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

4. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application.

Article 8

Processing of confirmatory applications

1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

3. Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.

Article 9

Treatment of sensitive documents

1. Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as 'TRÈS SECRET/TOP SECRET', 'SECRET' or 'CONFIDENTIEL' in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.

2. Applications for access to sensitive documents under the procedures laid down in Articles 7 and 8 shall be handled only by those persons who have a right to acquaint themselves with those documents. These persons shall also, without prejudice to Article 11(2), assess which references to sensitive documents could be made in the public register.

3. Sensitive documents shall be recorded in the register or released only with the consent of the originator.

4. An institution which decides to refuse access to a sensitive document shall give the reasons for its decision in a manner which does not harm the interests protected in Article 4.

5. Member States shall take appropriate measures to ensure that when handling applications for sensitive documents the principles in this Article and Article 4 are respected.

6. The rules of the institutions concerning sensitive documents shall be made public.

7. The Commission and the Council shall inform the European Parliament regarding sensitive documents in accordance with arrangements agreed between the institutions.

Article 10

Access following an application

1. The applicant shall have access to documents either by consulting them on the spot or by receiving a copy, including, where available, an electronic copy, according to the applicant's preference. The cost of producing and sending copies may be charged to the applicant. This charge shall not exceed the real cost of producing and sending the copies. Consultation on the spot, copies of less than 20 A4 pages and direct access in electronic form or through the register shall be free of charge.

2. If a document has already been released by the institution concerned and is easily accessible to the applicant, the institution may fulfil its obligation of granting access to documents by informing the applicant how to obtain the requested document.

3. Documents shall be supplied in an existing version and format (including electronically or in an alternative format such as Braille, large print or tape) with full regard to the applicant's preference.

Article 11

Registers

1. To make citizens' rights under this Regulation effective, each institution shall provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay.

2. For each document the register shall contain a reference number (including, where applicable, the interinstitutional reference), the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner which does not undermine protection of the interests in Article 4.

3. The institutions shall immediately take the measures necessary to establish a register which shall be operational by 3 June 2002.

Article 12

Direct access in electronic form or through a register

1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.

2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.

3. Where possible, other documents, notably documents relating to the development of policy or strategy, should be made directly accessible.

4. Where direct access is not given through the register, the register shall as far as possible indicate where the document is located.

Article 13

Publication in the Official Journal

1. In addition to the acts referred to in Article 254(1) and (2) of the EC Treaty and the first paragraph of Article 163 of the Euratom Treaty, the following documents shall, subject to Articles 4 and 9 of this Regulation, be published in the Official Journal:

(a) Commission proposals;

(b) common positions adopted by the Council in accordance with the procedures referred to in Articles 251 and 252 of the EC Treaty and the reasons underlying those common positions, as well as the European Parliament's positions in these procedures;

(c) framework decisions and decisions referred to in Article 34(2) of the EU Treaty;

(d) conventions established by the Council in accordance with Article 34(2) of the EU Treaty;

(e) conventions signed between Member States on the basis of Article 293 of the EC Treaty;

(f) international agreements concluded by the Community or in accordance with Article 24 of the EU Treaty.

2. As far as possible, the following documents shall be published in the Official Journal:

(a) initiatives presented to the Council by a Member State pursuant to Article 67(1) of the EC Treaty or pursuant to Article 34(2) of the EU Treaty;

(b) common positions referred to in Article 34(2) of the EU Treaty;

(c) directives other than those referred to in Article 254(1) and (2) of the EC Treaty, decisions other than those referred to in Article 254(1) of the EC Treaty, recommendations and opinions.

3. Each institution may in its rules of procedure establish which further documents shall be published in the Official Journal.

Article 14

Information

1. Each institution shall take the requisite measures to inform the public of the rights they enjoy under this Regulation.

2. The Member States shall cooperate with the institutions in providing information to the citizens.

Article 15

Administrative practice in the institutions

1. The institutions shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by this Regulation.

2. The institutions shall establish an interinstitutional committee to examine best practice, address possible conflicts and discuss future developments on public access to documents.

Article 16

Reproduction of documents

This Regulation shall be without prejudice to any existing rules on copyright which may limit a third party's right to reproduce or exploit released documents.

Article 17

Reports

1. Each institution shall publish annually a report for the preceding year including the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register.

2. At the latest by 31 January 2004, the Commission shall publish a report on the implementation of the principles of this Regulation and shall make recommendations, including, if appropriate, proposals for the revision of this Regulation and an action programme of measures to be taken by the institutions.

Article 18

Application measures

1. Each institution shall adapt its rules of procedure to the provisions of this Regulation. The adaptations shall take effect from 3 December 2001.

2. Within six months of the entry into force of this Regulation, the Commission shall examine the conformity of Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community [1] with this Regulation in order to ensure the preservation and archiving of documents to the fullest extent possible.

3. Within six months of the entry into force of this Regulation, the Commission shall examine the conformity of the existing rules on access to documents with this Regulation.

Article 19

Entry into force

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Communities*.

It shall be applicable from 3 December 2001.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 30 May 2001.

For the European Parliament	*For the Council*
The President	*The President*
N. FONTAINE	B. LEJON

[1] OJ L 43, 15.2.1983, p. 1.

SISON v COUNCIL OF THE EUROPEAN UNION
(CASE C-266/05 P)

BEFORE THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES
(FIRST CHAMBER)

Presiding, Jann P.; Cunha Rodrigues, Schiemann (*Rapporteurs*), Ilešič and Levits JJ.; Geelhoed A.G.

February 1, 2007

[2007] 2 C.M.L.R. 17

LT Access to information; Decisions; EC law; European Council; Public interest; Terrorism

H1 *Administrative law—access to documents—Council decision implementing Regulation 1049/2001—list of persons whose assets be frozen with a view to combating terrorism—Council refusal to disclose documents leading to include appellant in list and to identity States providing those documents—appeal against Council decision dismissed by CFI—further appeal—broad discretion of Community legislator—limited scope of review by Community courts—strict application of exceptions to access to documents—distortion of facts—not affecting operative part of judgment under appeal—no breach of duty to state reasons, presumption of innocence, right to effective legal remedy or right of access to documents—action dismissed.*

H2 Appeal against a CFI judgment.

H3 In 2002, Council decided to include S on the list of persons subject to specific restrictive measures aimed at the combating of terrorism. By three separate decisions, the Council refused to grant S access to certain documents underlying this decision, as well as disclosure of the identity of the States which had provided some of those documents. The Council argued that disclosure would undermine the public interest as regards public security, invoking the first and third indents of Art.4(1)(a) of Regulation 1049/2001. Applications by S for annulment of these decisions were dismissed by the CFI in Joined Cases T 110, 150 and 405/03, *Sison v Council*. By the present appeal, S was asking the Court of Justice to set aside that judgment, alleging infringement of, inter alia, Arts 220, 225 and 230 EC, the rights of the defence, the right to a fair hearing, the duty to state reasons, and the right to effective judicial protection.

Held:

Applications in Cases T-150/03 and T-405/03 dismissed

H4 It followed from Art.225 EC, Art.58 (1) of the Statute of the Court and Art.112(1)(c) of the Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment which the appellant sought to have set aside and also the legal arguments specifically advanced in support of the appeal. The grounds of appeal were directed exclusively against the reasons on which the CFI relied for the purpose of dismissing the application in Case T-110/03. In those circumstances, the appeal must be dismissed as inadmissible to the extent to which it sought to have the judgment under appeal set aside in so far as it dismissed the applications in Cases T-150/03 and T-405/03. [23]–[25]

Reynolds Tobacco and Others v Commission (C-131/03 P) [2007] 1 C.M.L.R. 1, followed.

Broad discretion of Community legislator

H5 The scope of the review of legality incumbent on the Community Courts under Art.230 EC could vary according to the matters under consideration. The Community legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it was called upon to undertake complex assessments. The legality of a measure adopted in those fields could be affected only if the measure was manifestly inappropriate having regard to the objective which the competent institution was seeking to pursue. [32]–[33]

IATA and ELFAA (C-344/04) [2006] E.C.R. I-403; [2006] 2 C.M.L.R. 20, followed.

Limited scope of review

H6 (a) The CFI correctly held that the Community Court's review of the legality of a decision of the Council refusing public access to a document on the basis of one of the exceptions provided for in Art.4(1)(a) of Regulation 1049/2001 must be limited to verifying whether the procedural rules and the duty to state reasons had been complied with, whether the facts had been accurately stated, and whether there had been a manifest error of assessment or a misuse of powers. [34]–[46]

H7 (b) The CFI was correct to hold that the particular interest of an applicant in obtaining access to documents could not be taken into account by the institution called upon to rule on the question whether the disclosure to the public of those documents would undermine the interests protected by Art.4(1)(a) of Regulation 1049/2001 and to refuse, if that was the case, the access requested. The same applied to alleged infringements of the rights of the defence and the right to be informed. [47]–[53]

Strict application of exceptions to access to documents

H8 (a) The purpose of Regulation 1049/2001 was to give the fullest possible effect to the right of public access to documents held by the institutions. However, the right of access to documents was nonetheless subject to certain limitations based on grounds of public or private interest. As they derogated from the principle of the

widest possible public access to documents, such exceptions must be interpreted and applied strictly. [61]–[63]

Netherlands and van der Wal v Commission (C 174 & 189/98 P) [2000] E.C.R. I-1; [2002] 1 C.M.L.R. 16, followed.

H9 (b) Such a principle of strict construction did not preclude the Council from enjoying a wide discretion for the purpose of determining whether disclosure of a document to the public would undermine the interests protected by that provision. The CFI correctly found that the Council did not make a manifest error of assessment in refusing access to the documents requested on the ground that their disclosure would undermine the public interest as regards public security. [64]–[66]

Distortion of facts

H10 By basing its reasoning on the circumstance that documents had been submitted to the Council by non-member countries, whereas it was clear from the casefile, as indeed the Council accepted, that such documents emanated from Member States, the judgment of the CFI was vitiated by a distortion of the facts. Such distortion in this instance vitiated, to a very great extent, the reasoning that the Council had not made a manifest error of assessment in taking the view that disclosure of the document in respect of which disclosure was sought was likely to undermine the public interest as regards international relations. [67]–[68]

Distortion of facts not affecting operative part of judgment under appeal

H11 Such a distortion of the facts could be relied on as a ground of appeal and might lead to annulment of the judgment vitiated by it. However, even if the CFI had not distorted the facts, and supposing that it would, in that case, had concluded that the Council had been wrong to base its decision on the public-interest exception as regards international relations, that conclusion could not have led to the annulment by the CFI of the first decision refusing access, as that decision in fact remained valid in the light of the public-interest exception relating to public security. The distortion of the facts which vitiated the judgment under appeal did not affect the operative part of that judgment, with the result that it needed not be annulled on that ground. [69]–[76]

P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya v Commission (C 442 & 471/03 P) June 1, 2006: not yet reported, followed.

No breach of duty to state reasons

H12 (a) The statement of reasons required by Art.253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depended on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it was of direct and individual concern, might have in obtaining explanations. It was not necessary for the reasoning to go into all the

relevant facts and points of law, since the question whether the statement of reasons met the requirements of Art.253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. [80]

Interporc v Commission (C-41/00 P) [2003] E.C.R. I-2125; [2005] 2 C.M.L.R. 17, followed.

H13 (b) In the present case, the CFI correctly applied those principles and did not err in law in deciding that, brief though it might be, the reasoning of the first decision refusing access was still adequate in the light of the context of the case and sufficient to enable the appellant to ascertain the reasons for the refusal and the CFI to carry out the review of legality incumbent upon it. [81]–[87]

No infringement of presumption of innocence or of right to effective legal remedy

H14 (a) The appellant alleged an infringement of the presumption of innocence by virtue of his inclusion on the list at issue, which was subsequently made public, and in asserting that such infringement could justify access to the documents sought, since disclosure of those documents and the potential public debate concerning them would be the only effective means of securing a remedy for that infringement. Although presented as ostensibly intended to take issue with an error of assessment by the CFI in regard to the scope of the action, such a ground of appeal in fact amounted fundamentally to a challenge to the lawfulness of the first decision refusing access. [92]–[93]

H15 (b) Since it was not pleaded in support of the action for annulment of that decision brought before the CFI, such a ground of appeal constituted a new plea in law which extended the subject matter of the proceedings and could not therefore be pleaded for the first time at the appeal stage. [94]

H16 (c) To allow a party to put forward for the first time before the Court of Justice a plea in law which it had not raised before the CFI would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals was limited, a case of wider ambit than that which came before the CFI. On appeal, the jurisdiction of the Court of Justice was confined to review of the findings of law on the pleas argued before the CFI. [95]

Commission v Brazzelli Lualdi and Others (C-136/92 P) [1994] E.C.R. I-1981; *VBA v VGB and Others* (C-266/97 P) [2000] E.C.R. I-2135; *Henkel v OHIM* (C 456 & 457/01 P) [2004] E.C.R. I-5089; *JCB Service v Commission* (C-167/04 P) [2006] 5 C.M.L.R. 23, followed.

No breach of right of access to documents

H17 (a) Regulation 1049/2001 required the consent of the originating authority before documents within the terms of Art.9 of that Regulation were recorded in the register or released. The CFI acted correctly in law when it concluded that such authority also had the power to prevent disclosure of its own identity in the event that the existence of that document should become known. This could not be held to be disproportionate on the ground that it might give rise, for an applicant refused access to a sensitive document, to additional difficulty, or indeed practical impossibility, in identifying the State of origin of that document. [100]–[104]

H18 (b) Contrary to the appellant's submission, his argument that the Council wrongly failed to state the grounds upon which disclosure of the identity of the States concerned could have harmed the public interest as regards public security and international relations was indeed considered by the CFI. [105]–[108]

H19 **Cases referred to in the judgment:**

1 *Commission of the European Communities v Brazzelli Lualdi* (C-136/92 P) [1994] E.C.R. I-1981

2 *Cooperatieve Vereniging de Verenigde Bloemenveilingen Aalsmeer BV (VBA) v Vereniging van Groothandelaren in Bloemkwekerijproducten (VGB) and Others* (C-266/97 P) [2000] E.C.R. I-2135

3 *Denkavit Nederland BV v Commission of the European Communities* (T-20/99) [2000] E.C.R. II-3011; [2000] 3 C.M.L.R. 1014

4 *Hautala v Council of the European Union* (T-14/98) [1999] E.C.R. II-2489; [1999] 3 C.M.L.R. 528

5 *Henkel KGaA v Office for Harmonisation in the Internal Market(Trade Marks and Designs) (OHIM)* (C 456 & 457/01 P) [2004] E.C.R. I-5089

6 *Interporc Im- und Export GmbH v Commission of the European Communities* (C-41/00 P) [2003] E.C.R. I-2125; [2005] 2 C.M.L.R. 17

7 *JCB Service v Commission of the European Communities* (C-167/04 P) [2006] 5 C.M.L.R. 23

8 *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya v Commission of the European Communities* (C 442 & 471/03 P) June 1, 2006: not yet reported

9 *RJ Reynolds Tobacco Holdings Inc v Commission of the European Communities* (C-131/03 P) [2007] 1 C.M.L.R. 1

10 *R. (on the application of International Air Transport Association and European Low Fares Airline Association) v Department for Transport* (C-344/04) [2006] E.C.R. I-403; [2006] 2 C.M.L.R. 20

11 *The Netherlands and van der Wal v Commission of the European Communities* (C 174 & 189/98 P) [2000] E.C.R. I-1; [2002] 1 C.M.L.R. 16

12 *WWF UK (World Wide Fund for Nature) v Commission of the European Communities* (T-105/95) [1997] E.C.R. II-313; [1997] 2 C.M.L.R. 55

H20 **Further cases referred to by the Advocate General:**

Before the European courts:

13 *Council of the European Union v Hautala* (C-353/99 P) [2001] E.C.R. I-9565; [2002] 1 C.M.L.R. 15

14 *Empresa Nacional Siderúrgica SA (ENSIDESA) v Commission of the European Communities* (C-198/99 P) October 2, 2003: not yet reported

15 *Hüls AG v Commission of the European Communities* (C-199/92 P) [1999] E.C.R. I-4287; [1999] 5 C.M.L.R. 1016

16 *Kuijer v Council of the European Union* (T-211/00) [2002] E.C.R. II-485; [2002] 1 C.M.L.R. 42

17 *Scippacercola v Commission of the European Communities* (T-187/03) [2005] E.C.R. II-1029; [2005] 2 C.M.L.R. 54

Before the European Court of Human Rights:

18 *Allenet de Ribemont v France* (A/308) (1995) 20 E.H.R.R. 557

H21 **Legislation referred to by the Court:**
EC Treaty, Arts 220, 225, 230, 253
Regulation 1049/2001, Arts 4(1)(a), 9
Statute of the European Court of Justice, Art.58 (1)
Rules of Procedure of the European Court of Justice, Art.112(1)(c)

H22 *J. Fermon*, avocat, for Jose Maria Sison.
M. Bauer and *E. Finnegan*, acting as Agents, for the Council of the European Union.

OPINION[1]

I—Introduction

AG1 By judgment of April 26, 2005 in *Jose Maria Sison v Council* (T 110, 150 & 405/03),[2] the Court of First Instance (hereinafter: CFI) dismissed the appellant's action for the annulment of three Council decisions refusing him access to documents underlying the Council's decision to include him on the list of persons subject to specific restrictive measures aimed at the combating of terrorism, as provided for in Art.2(3) of Regulation 2580/2001.[3] By the present action the appellant seeks the annulment of the CFI's judgment.

AG2 Parallel to this action, the appellant instituted proceedings under Art.230 EC for the partial annulment of Council Decision 2002/974, which retained his name on the list of persons whose assets are to be frozen pursuant to Regulation 2580/2001. In these proceedings he also seeks a declaration of the invalidity of Regulation 2580/2001 under Art.241 EC and compensation on the basis of Arts 235 and 288 EC. This case was registered under number T-47/03 and is currently pending before the CFI.[4]

II—Relevant provisions

AG3 Article 2(1) and (3) to (6) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents[5] describe the scope *ratione personae* and *ratione materiae* of the regulation in the following terms:

> "1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.
>
> . . .

[1] Opinion of A.G. Geelhoed, delivered on June 22, 2006.
[2] [2005] E.C.R. II-1429.
[3] Council Regulation 2580/2001: [2001] O.J. L344/70.
[4] [2003] O.J. C101/41.
[5] Regulation 1049/2001: [2001] O.J. L145/43.

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.

4. Without prejudice to Articles 4 and 9, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register. In particular, documents drawn up or received in the course of a legislative procedure shall be made directly accessible in accordance with Article 12.

5. Sensitive documents as defined in Article 9(1) shall be subject to special treatment in accordance with that Article.

6. This Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them."

AG4 Exceptions to the right of access to documents held by Community institutions are laid down in Art.4 of Regulation 1049/2001. The following paragraphs of this provision are relevant to the present case:

"1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:
—public security,
—. . .
—international relations,
—. . .
. . .

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

—commercial interests of a natural or legal person, including intellectual property,
—court proceedings and legal advice,
—the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

. . .

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released . . .”

AG5 Article 9 of Regulation 1049/2001 contains the following provisions on the treatment of sensitive documents:

“1. Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as ‘TRÈS SECRET/TOP SECRET’, ‘SECRET’ or ‘CONFIDENTIEL’ in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.

. . .

3. Sensitive documents shall be recorded in the register or released only with the consent of the originator.

4. An institution which decides to refuse access to a sensitive document shall give the reasons for its decision in a manner which does not harm the interests protected in Article 4 . . .”

III—Facts

AG6 The factual background to this case was summarised by the CFI at paras [2] to [7] of the contested judgment as follows:

“2. On 28 October 2002, the Council of the European Union adopted Decision 2002/848/EC implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/460/EC (OJ 2002 L 295, p.12). That decision included the applicant in the list of persons whose funds and financial assets are to be frozen pursuant to that regulation (‘the list at issue’). That list was updated, inter alia, by Council Decision 2002/974/EC of 12 December 2002 (OJ 2002 L 337, p.85) and Council Decision 2003/480/EC of 27 June 2003 (OJ 2003 L 160, p.81), repealing the previous decisions and establishing a new list. The applicant’s name was retained on that list on each occasion.

3. Under Regulation No 1049/2001, the applicant requested, by confirmatory application of 11 December 2002, access to the documents which had led the Council to adopt Decision 2002/848 and disclosure of the identity of the states which had provided certain documents in that connection. By confirmatory application of 3 February 2003, the applicant requested access to all the new documents which had led the Council to adopt Decision 2002/974 maintaining him on the list at issue and disclosure of the identity of the states which had provided certain documents in that connection. By confirmatory application of 5 September 2003, the applicant specifically requested access to the report of the proceedings of the Permanent Representatives Committee (Coreper) 11 311/03 EXT 1 CRS/CRP concern-

ing Decision 2003/480, and to all the documents submitted to the Council prior to the adoption of Decision 2003/480, which form the basis of his inclusion and maintenance on the list at issue.

4. The Council's response to each of those applications, given by confirmatory decisions of 21 January 2003, 27 February 2003 and 2 October 2003 respectively ('the first decision refusing access', 'the second decision refusing access' and 'the third decision refusing access' respectively), was a refusal of even partial access.

5. As regards the first and second decisions refusing access, the Council stated that the information which had led to the adoption of the decisions establishing the list at issue was to be found in the summary reports of the Coreper proceedings of 23 October 2002 (13 441/02 EXT 1 CRS/CRP 43) and 4 December 2002 (15 191/02 EXT 1 CRS/CRP 51) respectively, which were classified as 'CONFIDENTIEL UE'.

6. The Council refused to grant access to those reports, invoking the first and third indents of Article 4(1)(a) of Regulation No 1049/2001. It stated, first, that 'disclosure of [those reports] and of the information in possession of the authorities of the Member States combating terrorism, could give the persons, groups or entities which are the subject of this information the opportunity to prejudice the efforts of these authorities and would thus seriously undermine the public interest as regards public security'. Secondly, in the Council's view, the 'disclosure of the information concerned would also undermine the protection of the public interest as regards international relations because third states' authorities [we]re also involved in the action taken in the fight against terrorism'. The Council refused to grant partial access to that information on the ground that it was 'all ... covered by the aforesaid exceptions'. The Council also refused to disclose the identity of the states which had provided the relevant information, stating that 'the originating authority(ies) of this information, after consultation in accordance with Article 9(3) of Regulation No 1049/2001, is (are) opposed to the disclosure of the information requested'.

7. As regards the third decision refusing access, the Council first stated that the applicant's request concerned the same document as that in respect of which disclosure had been refused to him by the first decision refusing access. The Council confirmed its first decision refusing access and added that access to report 13 441/02 also had to be refused on the basis of the exception relating to court proceedings (second indent of Article 4(2) of Regulation No 1049/2001). The Council then acknowledged that it had by mistake identified report 11 311/03, relating to Decision 2003/480, as relevant. It explained in that regard that it had received no further information or documents justifying the revocation of Decision 2002/848 in so far as it concerns the applicant".

IV—Form of order sought

AG7 In the contested judgment, the CFI dismissed the applications in Cases T-110/03 and T-150/03 as unfounded. In case T-405/03 it dismissed part of the application as inadmissible and the remainder as unfounded.

AG8 The appellant submits, for the reasons given below, that the court should:

—annul the judgment of the Court of First Instance (Second Chamber) of April 26, 2005 in Joined Cases T 110, 150 & 405/03;
—annul, on the basis of Art.230 EC, the following: (a) Council Decision of February 27, 2003 (06/c/01/03): answer adopted by the Council on February 27, 2003 to the confirmatory application of Mr Jan Fermon sent by fax on February 3, 2002 under Art.7(2) of the Regulation 1049/2001, notified to the appellant's counsel on February 28, 2003; (b) Council Decision of January 21, 2003 (411c/01/02): answer adopted by the Council on January 21, 2003 to the confirmatory application of Mr Jan Fermon sent by fax on December 11, 2002 under Art.7(2) of the Regulation 1049/2001, notified to the appellant's counsel on January 23, 2003; and (c) Council Decision of October 2, 2003 (36/c/02/03): reply adopted by the Council on October 2, 2003 to the confirmatory application by Mr Jan Fermon (2/03) made to the Council by telefax on September 5, 2003 registered by the General Secretariat of the Council on September 8, 2003, pursuant to Art.7(2) of Regulation 1049/2001, for access to documents;
—require the Council to bear the costs of suit.

AG9 The Council asks the court to:

—dismiss the appeal as unfounded; and
—order the appellant to pay the costs of these proceedings.

V—Pleas in law

AG10 The appellant advances five pleas in law which may be summarised as follows:

1. By unduly limiting the scope of its review of legality of the Council's decisions refusing access, the CFI infringed Arts 220, 225 and 230 EC, the general principles of Community law enshrined in Arts 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) and the rights of defence.
2. The interpretation given by the CFI to the exceptions to the right to (partial) access to documents in effect leads to complete discretion of the Council and to a complete denial of the right of access to documents and thus infringes Art.1, second paragraph, EU, Art.6(1) EU, Art.255 EC and Art.4(1)(a) and Art.4(6) of Regulation 1049/2001, as well as Arts 220, 225 and 230 EC.
3. By accepting the brief and formulaic reasons given by the Council in respect of the refusal to grant (partial) access to the requested documents, the CFI infringed the obligation to state reasons laid down in Art.253 EC.
4. By limiting the scope of the application, the CFI infringed the right of access to documents, guaranteed by Art.255 EC, the presumption of innocence guaranteed by ECHR, Art.6(2) and the right to an effective remedy to violations of the rights enshrined in the ECHR, guaranteed by ECHR, Art.13.

5. The CFI misinterpreted Arts 4(5) and 9(3) of Regulation 1049/2001 by holding that these provisions only refer to "documents" and that, consequently, the Council was justified in refusing to disclose the identity of the Member States which had communicated them where these states were opposed to this.

VI—Analysis

A—Preliminary remarks

AG11 I would observe at the outset that to the extent that the appellant requests the court to annul the Council's decisions refusing access to the documents requested, it must in the way it is presented be dismissed as manifestly inadmissible in view of the fact that it is only the CFI's judgment which can be the subject of an appeal.[6]

AG12 Secondly, it should be noted that, as the reasons given for dismissing the applications in Cases T-150/03 and T-405/03 are not challenged in the appellant's pleas in law, the present appeal must be regarded as concerning the CFI's judgment in Case T-110/03 relating to the first decision refusing access.

B—First plea in law: infringement of Articles 220, 225 and 230 EC and the rights of the defence as guaranteed by ECHR, Articles 6 and 13

1. The CFI's judgment

AG13 As regards the scope of its review of the legality of the Council's decisions refusing access on the basis of the mandatory exceptions laid down in Art.4(1)(a) of Regulation 1049/2001, the CFI held:

> "46. With regard to the scope of the court's review of the legality of a decision refusing access, it should be noted that, in *Hautala v Council*[7] . . . and *Kuijer v Council*[8] . . . the court recognised that the Council enjoys a wide discretion in the context of a decision refusing access founded, as in this case, in part, on the protection of the public interest concerning international relations. In *Kuijer v Council*, such a discretion was conferred on an institution when it justifies its refusal of access by reference to the protection of the public interest in general. Thus, in areas covered by the mandatory exceptions to public access to documents, provided for in Article 4(1)(a) of Regulation No 1049/2001, the institutions enjoy a wide discretion.
>
> 47. Consequently, the court's review of the legality of decisions of the institutions refusing access to documents on the basis of the exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation No 1049/2001 must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts

[6] *cf.*, inter alia, *Hüls v Commission* (C-199/92 P) [1999] E.C.R. I-4287; [1999] 5 C.M.L.R. 1016 at [92]; and *Ensidesa v Commission* (C-198/99 P): not yet reported at [32].
[7] Case T-14/98 [1999] E.C.R. II-2489; [1999] 3 C.M.L.R. 528 at [71].
[8] Case T-211/00 [2002] E.C.R. II-485; [2002] 1 C.M.L.R. 42 at [53].

or a misuse of powers (see, by analogy, *Hautala v Council*, paragraphs 71 and 72, confirmed on appeal, and *Kuijer v Council*, paragraph 53)."

2. Appellant

AG14 According to the appellant the CFI, in the paragraphs cited above, erroneously restricted the scope of its powers of reviewing the legality of the Council's decisions refusing access to the requested documents by holding that the Council enjoys a wide discretion in invoking the grounds related to the public interest under Art.4(1)(a) of Regulation 1049/2001 and by inferring from this that its own role is restricted to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers. This interpretation, which amounts to unfettered discretion of the Council in applying the exception on grounds related to the public interest, goes against the will of the Community legislator which was aimed at establishing complete judicial control of the legality of decisions refusing access in the interest of ensuring transparency. He refers in this regard to Art.67(3) of the Rules of Procedure of the CFI,[9] which enables the CFI to consult the requested documents.

AG15 The appellant observes that his case must be distinguished from that of *Hautala*,[10] which the CFI relied on for guidance. He points out that, unlike the documents involved in *Hautala*, the requested documents in his case fall within the scope of the EC Treaty and not of that of Title V of the Treaty on European Union on the common foreign and security policy. In addition, in *Hautala* the document concerned was produced for internal use, not for publication. By contrast, the documents to which he seeks access were adopted in the context of a legislative process leading to a decision of the Council and did not contain information the disclosure of which would risk causing tension with third countries. Finally, his case must be distinguished from *Hautala* as the appellant is personally concerned with the requested documents. By holding, at para.[52] of the contested judgment, that the particular interest which may be asserted by a requesting party in obtaining access to a document concerning him personally cannot be taken into account when applying the mandatory exceptions provided for by Art.4(1)(a) of Regulation 1049/2001, the CFI contradicted its case law according to which the Council is required to carry out a "genuine examination of the particular circumstances of the case".[11]

AG16 The appellant maintains that by limiting the scope of its review, the CFI violated his rights of defence as guaranteed by ECHR, Art.6. He also complains that the CFI did not respond to his arguments based on ECHR Art.6(3), according to which everyone charged with a criminal offence has the right to be informed in detail of the nature and cause of the accusation against him. As a result, the CFI denied him an effective remedy in respect of the protection of these rights as guaranteed by ECHR, Art.13.

[9] The third paragraph of this article provides: "Where a document to which access has been denied by a Community institution has been produced before the Court of First Instance in proceedings relating to the legality of that denial, that document shall not be communicated to the other parties."

[10] Cited above.

[11] See *Hautala*, at para.[67] of the CFI's judgment.

3. Respondent

AG17 The Council considers that the differences between *Hautala* and the present case referred to by the appellant are irrelevant. It takes the view that the contested judgment is wholly consistent with the CFI's judgment in *Hautala* and that the limits to the extent of judicial review which follow from that case are applicable in the present case.

AG18 The CFI was correct in ruling that there is no need to take the appellant's particular interest in the documents requested into account. The Council's refusal was based on Art.4(1), first and third indents, of Regulation 1049/2001, for which no balance of interests is required. Where disclosure of the document would undermine the protection of the public interest as regards public security and/or international relations, the Council is duty-bound to refuse access without examining whether the applicant might have an overriding personal interest in the document. In response to the appellant's assertion that the decision refusing access should be based on a "genuine examination of the particular circumstances of the case", as required by *Hautala*,[12] the Council states that this can only relate to objective circumstances, such as the content of the document and the risk of prejudice to the interests to be protected which its disclosure would entail.

AG19 The Council rejects the appellant's argument based on Art.67(3) of the Rules of Procedure of the CFI. That provision is of a purely procedural nature and is aimed at enabling the CFI to examine a litigious document. It has no bearing on the scope of the CFI's powers of review.

4. Assessment

AG20 The first question raised by the first plea in law put forward by the appellant concerns the extent of the judicial review of decisions refusing access to documents on the grounds of the mandatory exceptions laid down in Art.4(1) of Regulation 1049/2001. Is this review restricted in the manner indicated by the CFI in *Hautala* and, in its wake, the contested judgment to determining whether procedural requirements and the duty to state reasons have been complied with, whether the facts have been accurately stated, whether there has been a manifest error of assessment of the facts or a misuse of powers? Or should it, as is suggested implicitly by the appellant, extend to assessing whether the public interest ground was correctly invoked, i.e. whether the Council was correct in maintaining that the public interests involved would be damaged if access to the requested documents were granted?

AG21 Although the CFI's judgment in *Hautala* was appealed against,[13] the aspect of the scope of the judicial review in respect of the Council's reliance on the mandatory exceptions in denying access to documents was not dealt with by the court in its judgment. This can be explained by the fact that it was the Council, which obviously did not have an interest in raising this point, and not the original applicant who was the appellant party. This question, therefore, remains to be considered by the court.

[12] See the previous footnote.
[13] *Council v Hautala* (C-353/99 P) [2001] E.C.R. I-9565; [2002] 1 C.M.L.R. 15.

AG22 The scope of the judicial review of decisions refusing access to documents held by one of the institutions of the European Union on the basis of the exceptions provided for in Art.4 of Regulation 1049/2001 must be determined in function of the nature of the interests covered by these exceptions and the system established by the regulation as a whole.

AG23 As the latter aspect is more general in character, it should be dealt with first. The basic principle established by Regulation 1049/2001 is that the widest possible access to documents held by the institutions should be guaranteed. This principle serves the two-fold purpose of creating the conditions for enabling citizens to exercise their rights of participation in public affairs, on the one hand, and of ensuring that citizens whose interests have been adversely affected by decisions taken by the institutions are in a position to defend their interests, on the other hand.[14]

AG24 Where the preamble to the regulation states that its objective is "to give the fullest *possible* effect to the right of the public access to documents"[15] and that "[*i*] *n principle*, all documents of the institutions should be accessible to the public",[16] it is clear that there can be no absolute right of access to documents. Regulation 1049/2001 recognises various public and private interests which require special protection and which, therefore, can be invoked by the institutions to refuse access to documents. These interests have been defined in Art.4 in various categories of exceptions to the right of access to documents.

AG25 The exceptions provided for in Art.4(1), (2) and (3) of Regulation 1049/2001 are all, as such, drafted in mandatory terms: the institutions *shall* refuse access to a document where disclosure would undermine the protection of the interests concerned. However, in contrast with the exceptions in Art.4(1), those provided for in Art.4(2) and (3) make allowance for disclosure of the documents to which access has been requested if this is justified by an overriding public interest.

AG26 For the purpose of the present discussion on the scope of judicial review, two inferences can be drawn from this difference between the exceptions contained in Art.4(1) and those contained in Art.4(2) and (3).

AG27 The first is that it is clear from the explicit wording of the latter two provisions that they require institutions, in considering whether access to documents should be refused, to balance the particular interest to be protected by refusing disclosure (e.g. protection of commercial interests, court proceedings or the institutions, decision-making process) against the general, public interest in the document concerned being made accessible. No such balancing of interests has been provided for in Art.4(1) of the regulation. On the contrary, it is apparent that that balancing of interests was made by the Community legislator and has been laid down in the regulation itself: as the interests listed in that provision are deemed to be of overriding importance themselves there is no other interest which could

[14] *cf.* para.2 of the preamble to Regulation 1049/2001: "Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union."

[15] See para.4 of the preamble to Regulation 1049/2001 (emphasis added).

[16] See para.11 of the preamble to Regulation 1049/2001 (emphasis added).

outweigh them. This implies that if one of these interests is involved, the exception applies automatically.

AG28 The second inference to be drawn is that, in view of the fact that the interests protected under the exceptions in Art.4(2) of the regulation can only be outweighed by an overriding public interest, the personal interest an applicant may have in gaining access to a document is not relevant in that context. *Ipso facto* this must also apply in the context of Art.4(1) of the regulation which does not provide for a balancing of interests.

AG29 This is a first indication that the scope of judicial review is more restricted in the context of Art.4(1), than it is in the context of Art.4(2) of the regulation.

AG30 As regards the nature of the interests protected by the exceptions provided for in Art.4(1)(a) of Regulation 1049/2001, notably public security and international relations, it should be recognised that these are interests for which the Council bears primary political responsibility, as is also apparent from Arts 11 to 28 EU. A decision whether or not to grant access to a document which has a bearing on these interests necessarily depends on policy considerations and must be taken on the basis of information which is available only to the competent political authorities. As the efficacy of policy in this area in many cases depends on confidentiality being observed, the Community institutions involved must have complete discretion in respect of determining whether one of the interests listed in Art.4(1)(a) could be undermined by disclosure of documents. If it considers that granting access to a document would undermine the interests of the European Union in these respects, it is under an obligation to refuse access, irrespective of the interests which the applicant may have in gaining access.

AG31 As it would transcend the nature of the judicial function for the Community courts to replace the assessment of the responsible political institutions by its own judgment, it follows that judicial review of decisions refusing access on the grounds listed in Art.4(1)(a) of Regulation 1049/2001 is, in principle, restricted. I would, therefore, conclude that the CFI was correct in holding that the scope of judicial review in respect of decisions refusing access under Art.4(1) of the regulation must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers.

AG32 I would add that this restriction of the scope of judicial review does not amount to unfettered discretion, as is alleged by the appellant, of an institution relying on Art.4(1)(a) of the regulation in refusing access to a document. Where review is focused on the aspects indicated by the CFI, particularly on the statement of reasons given to justify the refusal to grant access, it can effectively be established whether the reliance on the mandatory exceptions by the institution concerned is genuine and that that institution was entitled to consider that disclosure of a document would pose a threat to the public interest.

AG33 I do not agree with the appellant where he states that it was the aim of the Community legislator to establish complete judicial control in respect of decisions refusing access to documents under Regulation 1049/2001 and that this is apparent from Art.67(3) of the CFI's Rules of Procedure. That provision merely determines that, where the document to which access has been denied is produced before the

CFI in proceedings relating to the legality of that denial, the document shall not be communicated to the other parties. Indeed, the fact that the document concerned has been produced by the institution or has been requested by the CFI under Art.65 of its Rules of Procedure does not entitle the CFI to replace the Council's assessment by its own. It does enable the CFI to verify whether or not the institution concerned made a manifest error in invoking the exceptions of Art.4(1)(a) of the Regulation.

AG34 Where the appellant seeks to distinguish his case from *Hautala* on the grounds mentioned in point AG15 above, it is debatable whether these grounds are either relevant or even correct. First, it is apparent that although the decision refusing access related to documents underlying a decision adopted under the EC Treaty as distinct from Title V of the EU Treaty, it is obvious that it was closely connected to Common Position 2001/931/CFSP on the application of specific measures to combat terrorism.[17] Be that as it may, Regulation 1049/2001 applies equally to documents relating to the common foreign and security policy. The contention that the document concerned was not drawn up for internal use is untenable in view of its obvious confidential character. The decisions implementing Art.2(3) of Regulation 2580/2001 cannot, moreover, be regarded as being legislative in character. The fact that the appellant was personally concerned, as distinct from the situation in *Hautala*, is irrelevant in view of the fact that, as was concluded in point 28 above, personal interest plays no role in the assessment of whether access should be granted to documents. The fact that the appellant's personal interest was not taken into account does not, therefore, imply that there was no genuine examination of the circumstances relating to the possible disclosure of the document requested.

AG35 Finally, the refusal to grant access to a document covered by one of the mandatory exceptions of Art.4(1)(a) cannot in itself be regarded as an infringement of the appellant's rights of defence. What is relevant in this context is that he is adequately informed of the reasons for his inclusion on the list of persons, to whom the restrictive measures imposed under Regulation 2580/2001 apply. This can be done by other means than granting access to a document which is considered by the Council to be confidential. This is, however, a matter to be considered in the context of the action challenging the legality of the inclusion and maintenance of his name on the list referred to above which is currently pending before the CFI.

AG36 I, therefore, conclude that the first plea in law must fail.

C—Second plea in law: infringement of the right of access to documents resulting from a too broad interpretation of the exceptions to that right

1. The CFI's judgment

AG37 On the question as to whether the Council made a manifest error of assessment in considering that disclosure of the document requested could undermine the

[17] O.J. L344/93.

protection of public security and the public interest as regards international relations, the CFI ruled:

> "77. In that regard, it must be accepted that the effectiveness of the fight against terrorism presupposes that information held by the public authorities on persons or entities suspected of terrorism is kept secret so that that information remains relevant and enables effective action to be taken. Consequently, disclosure to the public of the document requested would necessarily have undermined the public interest in relation to public security. In that regard, the distinction put forward by the applicant between strategic information and information concerning him personally cannot be accepted. Any personal information would necessarily reveal certain strategic aspects of the fight against terrorism, such as the sources of information, the nature of that information or the level of surveillance to which persons suspected of terrorism are subjected.
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> 78. The Council did not, therefore, make a manifest error of assessment in refusing access to report 13 441/02 for reasons of public security.
>
> 79. With regard, in the second place, to the protection of the public interest as regards international relations, it is obvious, in the light of Decision 2002/848 and Regulation No 2580/2001, that its purpose, namely the fight against terrorism, falls within the scope of international action arising from United Nations Security Council Resolution 1373 (2001) of 28 September 2001. As part of that global response, states are called upon to work together. The elements of that international co-operation are very probably, or even necessarily, to be found in the document requested. In any event, the applicant has not disputed the fact that third states were involved in the adoption of Decision 2002/848. On the contrary, he has requested that the identity of those states be disclosed to him. It follows that the document requested does fall within the scope of the exception relating to international relations.
>
> 80. That international co-operation concerning terrorism presupposes a confidence on the part of states in the confidential treatment accorded to information which they have passed on to the Council. In view of the nature of the document requested, the Council was therefore able to consider, rightly, that disclosure of that document could compromise the position of the European Union in international co-operation concerning the fight against terrorism.
>
> 81. In that regard, the applicant's argument—to the effect that the mere fact that third states are involved in the activities of the institutions cannot justify application of the exception in question—must be rejected for the reasons set out above. Contrary to what that argument assumes, the co-operation of third states falls within a particularly sensitive context, namely the fight against terrorism, which justifies keeping that co-operation secret. Moreover, read as a whole, the decision makes it clear that the states concerned even refused to allow their identity to be disclosed.
>
> 82. It follows that the Council did not make a manifest error of assessment in considering that disclosure of the document requested was likely to undermine the public interest as regards international relations."

2. Appellant

AG38 The appellant alleges that the CFI infringed the right of access to documents and Art.230 EC by ignoring the principle that exceptions to such a fundamental right have to be interpreted and applied strictly. The CFI should have determined the applicability of each exception itself and should not have confined itself to declaring that the Council did not make any manifest errors of assessment. This applies in particular in respect of the Council's denial of partial access to the documents requested.

AG39 As to the exception on grounds of public security, the CFI's analysis in paras [77] and [78] of the contested judgment, according to which any information held by authorities in respect of persons suspected of terrorism should remain confidential, so as not to reveal strategic information on the fight against terrorism, would deprive the principle of transparency of all effect in the field of the fight against terrorism, making access to documents, even partial access, officially impossible.

AG40 As to the exception on grounds of the protection of international relations, the CFI's reasoning in para.[79] of the contested judgment amounts to permitting the institutions to systematically refuse on the basis of vague and general criteria access to documents where they concern third countries. The argument that co-operation with third countries in this field should remain secret is manifestly wrong as it is a public fact that it exists.

AG41 More significantly, although paras [80] and [81] of the contested judgment emphasise the fact that states must be able to rely on the confidentiality of information they share, it appears from the dossier that only Member States and not third countries had provided information regarding the appellant. The CFI therefore misinterpreted the notion of international relations as this cannot apply to relations between the Member States, but only to those with third countries. For this reason the CFI failed to give reasons why revealing the identity of the Member States providing information would harm international relations.

3. Respondent

AG42 The Council submits that the CFI committed no error of law in finding that the Council had not exceeded the margin of discretion connected with its political responsibilities under Title V of the EU Treaty in considering that the requested document was covered by the public interest exception and that, hence, not even partial access to the requested documents could be granted. The CFI did not conclude that the Council could have come to another conclusion.

AG43 As regards the exception on grounds of the protection of international relations, the Council agrees with the appellant that the CFI's findings in paras [80] and [81] of the contested judgment appear to be based on the erroneous assumption that the requested document contained information submitted to the Council by third countries. It is apparent from the file that the documents concerned were submitted by Member States and it was these Member States whose identity the Council, at their request, refused to divulge. Despite this misunderstanding, the Council maintains that the CFI's assessment of what was at stake in the area of international co-operation in combating terrorism is correct. The high sensitivity of this subject

matter justifies a particularly cautious approach being adopted when it comes to protecting information the disclosure of which would allow inferences to be drawn on the organisational structure and the efficiency of the co-operation between the European Union and third countries in this field and would prejudice the very purpose of the international efforts to fight terrorism.

AG44 The Council denies that its approach negates the right of access to documents, as is claimed by the appellant. In fact, it examines each document in the light of its content and a risk assessment. The Council states that it has already wholly or partially disclosed a large number of documents dealing with those subjects.

AG45 In any event, even if the court were to find that the CFI's assessment regarding the exception relating to the protection of international relations was flawed, this would not alter the result of the case as the decision to refuse the document in question was based cumulatively the grounds relating to the protection of public security and international relations. If it were to be found that the Council could not rely on one of these exceptions, its decision would still stand on the basis of the other one. The Council adds that the confusion as to whether it was third states or Member States which had submitted documents to the Council in the course of the procedure is irrelevant since these documents were returned to the Member States concerned and thus were no longer held by the Council.

4. Assessment

AG46 By his second plea in law the appellant criticises the CFI's assessment of the question whether the Council's decision refusing (partial) access to the documents requested could be justified on the grounds of the protection of public security and international relations.

AG47 As I already found above, the scope of judicial review in respect of the application of the exceptions relating to the public interest listed in Art.4(1)(a) of Regulation 1049/2001 is restricted to a number of aspects, including the questions of whether the institution concerned made a manifest error of assessment of the facts or it misused its powers.

AG48 As regards the exception relating to the protection of public security, the CFI first established that the document requested did indeed relate to that sphere in view of the fact that it was used as a basis for identifying persons, groups or entities suspected of terrorism. Next, it observed that the fact that the document concerns public security cannot in itself justify the application of the exception. It therefore went on to examine whether the Council had made a manifest error of assessment in considering that disclosure of the document requested could undermine the protection of public security. In this context it observed that it must be accepted that the effectiveness of the fight against terrorism presupposes that information held by the public authorities on persons or entities suspected of terrorism is kept secret so that that information remains relevant and enables effective action to be taken. Disclosure would necessarily have undermined the public interest in relation to public security. The CFI concluded that the Council had not made any manifest error of assessment in refusing access to the document requested.[18]

[18] See paras [74]–[78] of the contested judgment.

AG49 In reaching this conclusion on the basis of this approach, the CFI did not in my view commit any error in law. It did not merely accept the fact that the refusal to grant access to the document was based on the ground that the document pertained to the area of the protection of public security, it proceeded to examining the plausibility of that claim and to confirming that disclosure of the document could potentially undermine the protection of public security. It, therefore, correctly carried out its task of reviewing the legality of the Council's decision refusing access within the limits inherent to that function in the context of Art.4(1)(a) of Regulation 1049/2001.

AG50 Contrary to what the appellant asserts, the approach adopted by the CFI does not amount to a negation of the right of access to documents where these relate to the fight against terrorism. Where it is apparent that such documents concern operational aspects of the policy in this field it is evident that they are covered by the ground concerning the protection of public security. It is the task of the Community courts to verify that the document in question does indeed relate to this field of activity and that the Council is not invoking this exception gratuitously.

AG51 As regards the CFI's assessment of the applicability of the exception relating to the protection of international relations, both parties agree that the CFI erroneously assumed that the document requested contained information provided by third countries and that consequently the Council was entitled to invoke the exception regarding the protection of international relations. Indeed, to the extent that it is not disputed that the document underlying the decisions to which access was refused was based on information provided by Member States only, the reasoning adopted by the CFI is indeed flawed. The exception relating to the protection of international relations clearly refers only to relations with non-Member States and international organisations and can be invoked only where disclosure of a document is likely to put those relations at risk.

AG52 The question is which consequences should be attached to this error. In my view, there are two reasons why the flaw in the CFI's reasoning should not lead to the annulment of the contested judgment. The first is that, even though no information apparently was provided directly by third countries, it cannot be excluded that disclosure of the document requested nevertheless could have revealed details on the fight against terrorism in a more general sense, which by its very nature involves many states and organisations outside the European Union. This clearly could have repercussions on the relations with these states and bodies. The CFI referred to this dimension of the exception on grounds of protecting international relations in its introductory observations to this point in para.[79] of the contested judgment.

AG53 The second, more operational, reason is that, as the Council correctly points out, the decision refusing access was based cumulatively on the grounds relating to the protection of public security and international relations. As the former was properly invoked by the Council as the basis for its refusal to grant access to the document requested, partially annulling the contested judgment because of the error made in respect of the latter would serve no practical purpose. Indeed, I would suggest, in the light of my observations in the previous paragraph, there are good grounds for substituting the reasons given by the CFI in respect of the exception relating to the protection of international relations, in that disclosure of a

document containing information on persons and entities suspected of involvement in terrorist activities by its very nature could damage the international effort to combat terrorism.

AG54 The appellant claims, next, that even if the public interest grounds could be invoked by the Council, this cannot reasonably cover the entirety of the document requested and that partial access should have been granted. The Council asserts that the reasons for denying access apply to the entirety of the document concerned.

AG55 On this point, the contested judgment focuses on the question of whether the Council examined whether partial access could have been granted to the document requested. The CFI found that there was no evidence that the Council had not concretely considered that possibility. In addition, the CFI held, at para.[88] of the contested judgment, that:

> "... because all the passages of the document requested are covered by the exceptions put forward, any demonstration which was more complete and individualised as regards its content could only jeopardise the confidentiality of information intended, on the basis of those exceptions, to remain secret".

AG56 The appellant has not advanced any argument challenging this consideration by the CFI. There is no reason to find that it is inaccurate.

AG57 Finally under this heading, the appellant maintains that by confusing Member States with third countries, the CFI misapplied the law by concluding that even a request for disclosure of the identity of the Member States that provided documents could be turned down.

AG58 As regards this point the CFI referred to Art.9(3) of Regulation 1049/2001 which provides that sensitive documents, i.e.:

> "... documents originating from the institutions or the agencies established by them, Member States, third countries or international organisations classified as ... 'CONFIDENTIEL' ...",

shall be released only with the consent of the originator. It went on to find that:

> "[t]he Council was therefore not obliged to disclose the documents in question, of which states are the authors, relating to the adoption of Decision 2002/848, including the identity of those authors, in so far as, firstly, those documents are sensitive documents and, secondly, the states responsible for them have refused to agree to their disclosure".

AG59 As this consideration applies equally to documents originating in Member States and third countries, there are no grounds for accepting the appellant's claim that as a result of the confusion regarding the origin of the information in the requested document, the CFI misapplied the law regarding the refusal to reveal the identity of the Member States involved.

AG60 In the light of the foregoing considerations, I am of the opinion that the second plea in law must be rejected.

D—Third plea in law: infringement of the duty to state reasons in contravention of Article 253 EC

1. The CFI's judgment

AG61 As regards the question of whether the Council, in refusing access to the requested documents provided a statement of reasons from which it was possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, secondly, whether the need for protection relating to that exception is genuine, the CFI held:

> "62. In this case, with regard to report 13 441/02, the Council clearly specified the exceptions on which it was basing its refusal by relying on both the first and third indents of Article 4(1)(a) of Regulation No 1049/2001. It set out in what respects those exceptions were relevant in relation to the documents concerned by referring to the fight against terrorism and to the involvement of third states. Moreover, it provided a brief explanation relating to the need for protection relied on. Thus, as regards public security, it explained that disclosure of the documents would give the persons who were the subject of that information the opportunity to undermine the action taken by the public authorities. As regards international relations, it briefly referred to the involvement of third states in the fight against terrorism. The brevity of that statement of reasons is acceptable in light of the fact that mentioning additional information, in particular making reference to the content of the documents concerned, would negate the purpose of the exceptions relied on.
>
> 63. With regard to the refusal of partial access to those documents, the Council expressly stated, firstly, that it had considered that possibility and, secondly, the reason for the rejection of that possibility, namely that the documents in question were covered in their entirety by the exceptions relied on. For the same reasons as before, the Council could not identify precisely the information contained in those documents without negating the purpose of the exceptions relied on. The fact that that statement of reasons appears formulaic does not, in itself, constitute a failure to state reasons since it does not prevent either the understanding or the ascertainment of the reasoning followed.
>
> 64. With regard to the identity of the states which provided relevant documents, it must be noted that the Council itself drew attention to the existence of documents from third states in its original decisions refusing access. First, the Council specified the exception put forward in that regard, namely Article 9(3) of Regulation No 1049/2001. Second, it provided the two criteria used for the application of that exception. In the first place, it implicitly but necessarily took the view that the documents in question were sensitive documents. That factor appears comprehensible and ascertainable in the light of the relevant context, and in particular in the light of the classification of the documents in question as 'CONFIDENTIEL UE'. In the second place, the Council explained that it had consulted the authorities concerned and had taken note of their opposition to any disclosure of their identity.

65. Despite the relative brevity of the statement of reasons for the first decision refusing access (two pages), the applicant was fully able to understand the reasons for the refusals given to him and the court has been able to carry out its review. The Council therefore duly provided statements of reasons for those decisions."

2. Appellant

AG62 The appellant asserts that by accepting that the Council's statement of reasons for refusing (partial) access to the requested documents was very brief, formulaic and non-individualised and that by even providing, at para.[77] of the contested judgment, supplementary reasons for the Council's decisions, the CFI's judgment amounts to a denial of the duty to state reasons laid down in Art.253 EC.

AG63 As to the Council's refusal to divulge the identity of the states which provided relevant documents or information, by confusing Member States with third countries, the CFI deprived the appellant of any explanation why the Council refused to disclose the identity of the Member States concerned. In addition, the CFI's interpretation of Art.253 EC in this regard resulted in an unacceptable limitation of its review powers and consequently violates Art.230 EC.

3. Respondent

AG64 The Council takes the view that the CFI correctly examined the statement of reasons for its refusal to grant access to the requested documents in paras [59] to [65] of the contested judgment. It points out that the CFI's reasoning in paras [77], [80] and [81] of the contested judgment relates to the question of whether the Council made a manifest error of assessment in considering that disclosure of the requested document could undermine the protection of the public interest relating respectively to public security and international relations. In this context the CFI is not necessarily bound by the explicit arguments and reasons given in the decision refusing access. It can also rely on considerations which are common general knowledge in a given context and which thus can be legitimately presumed to underlie the institution's decision.

AG65 As to the aspect of partial access, the Council observes that, in particular as regards sensitive documents, it may be extremely difficult to state in detail for each element of the document the reasons why it cannot be disclosed without revealing the content of the passages concerned and thereby depriving the exception of its very purpose.

AG66 As regards the reasons for the non-disclosure of the identity of the Member States which provided relevant documents, the Council indicates that where documents are classified "CONFIDENTIEL UE" and are thus sensitive documents within the meaning of Art.9(1) of Regulation 1049/2001, according to Art.9(3) of that regulation, the originator has complete control over that document, including the information about its very existence. It follows that in providing reasons for refusing access to such a sensitive document, it is sufficient to refer to the originator's opposition to its disclosure.

4. Assessment

AG67 The third plea of law put forward by the appellant attacks the CFI's assessment of the Council's statement of reasons regarding its refusal to grant (partial) access to the requested documents.

AG68 The basic test regarding the adequacy, in conformity with Art.253 EC, of the statement of reasons given by an institution for decisions taken by it is, first, whether it enables the persons concerned to ascertain the reasons for the measure and, secondly, whether it enables the competent Community Court to exercise its power of review. In that context, it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question of whether the statement of reasons meets the requirements of Art.253 EC must be assessed with regard not only to its wording, but also to its context and to all the legal rules governing the matter in question.[19] These basic principles were reiterated by the CFI at para.[59] of the contested judgment as the point of departure for its assessment.

AG69 Focusing on the decisions refusing access to documents, the CFI, in line with existing case law, in paras [60] and [61] of the contested judgment pointed out that where an institution refuses such access:

> "... it must demonstrate in each individual case, on the basis of the information at its disposal, that the documents to which access is sought do indeed fall within the exceptions listed in Regulation No 1049/2001 ... However, it may be impossible to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and, thereby, depriving the exception of its very purpose."[20]
>
> "Under that case law, it is therefore for the institution which has refused access to a document to provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine."

AG70 Applying these criteria, the CFI subsequently thoroughly examined the statement of reasons provided by the Council on the points relating to the application of the exceptions of Art.4(1)(a) of Regulation 1049/2001, its refusal to grant partial access and the refusal to disclose the identity of the states which provided relevant documents. In para.[65] of the contested judgment, it reached the conclusion that:

> "... despite the relative brevity of the statement of reasons for the first decision refusing access ... the applicant was fully able to understand the reasons for the refusals given to him and the court has been able to carry out its review. The Council therefore duly provided statements of reasons for those decisions."

[19] See, inter alia, *Interporc v Commission* (C-41/00 P) [2003] E.C.R. I-2125; [2005] 2 C.M.L.R. 17 at [55].
[20] The CFI cites by analogy, *Netherlands and Van der Wal v Commission* (C 174 & 189/98 P) [2000] E.C.R. I-1; [2002] 1 C.M.L.R. 16 at [24]; and *WWF UK v Commission* (T-105/95) [1997] E.C.R. II-313; [1997] 2 C.M.L.R. 55 at [65].

AG71 To my mind there is nothing to fault in the analysis carried out by the CFI in paras [59] to [65] on this point. Although accepting in the present case that brief and even formulaic statements of reasons complied with Art.253 EC, it did not do so without first verifying whether the statement of reasons met the two basic criteria set out above, namely were they sufficient in order to enable the appellant to understand why access had been refused to the documents requested and did they permit the CFI to exercise judicial control? There is therefore no question of the CFI permitting the Council to arbitrarily refuse access to documents either regarding the activities of third countries or otherwise regarding the protection of public security.

AG72 The appellant's allegation that the CFI supplemented the reasoning provided by the Council in para.[77] of the contested judgment is misleading. As the Council correctly observes, this consideration was made in the context of assessing whether the exception relating to the protection of public security had been properly invoked. It certainly was not intended to supplement the statement of reasons for the decisions refusing access.

AG73 As regards the fact that no reasons were given explaining why the disclosure of the identity of Member States which provided documents would constitute a threat to the protection of public security and international relations, I refer to my observations on this same point, in points AG57 to AG59 above, in the context of the discussion of the second plea in law.

AG74 Consequently, I consider that the third plea in law must be rejected.

E—Fourth plea in law: infringement of the right of access to documents, the presumption of innocence and the right to an effective judicial remedy

1. The CFI's judgment

AG75 As to the appellant's claim that by refusing him access to the documents requested, the Council acted in breach of the general principles of Community law enshrined in ECHR, Art.6, the CFI responded as follows:

> "50. It should be recalled, first, that, under Article 2(1) of Regulation No 1049/2001, the beneficiaries of the right of access to documents of the institutions are '[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State'. That provision makes it clear that the purpose of the regulation is to guarantee access for everyone to public documents and not only access for the requesting party to documents concerning him.
>
> 51. Second, the exceptions to access to documents, provided for by Article 4(1)(a) of Regulation No 1049/2001, are framed in mandatory terms. It follows that the institutions are obliged to refuse access to documents falling under any one of those exceptions once the relevant circumstances are shown to exist (see, by analogy, Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, paragraph 58, and Case T-20/99 *Denkavit Nederland v Commission* [2000] ECR II-3011, paragraph 39).
>
> 52. Consequently, the particular interest which may be asserted by a requesting party in obtaining access to a document concerning him personally

cannot be taken into account when applying the mandatory exceptions provided for by Article 4(1)(a) of Regulation No 1049/2001.

53. The applicant claims, in essence, that the Council was obliged to grant him access to the documents requested in so far as those documents are necessary in order for him to secure his right to a fair trial in Case T-47/03.

54. Since the Council relied on the mandatory exceptions provided for by Article 4(1)(a) of Regulation No 1049/2001 in the first decision refusing access, it cannot be accused of not having taken into account any particular need of the applicant to have the requested documents made available to him.

55. Consequently, even if those documents prove necessary for the applicant's defence in Case T-47/03, which is a question to be considered in that case, that circumstance is not relevant for the purpose of assessing the validity of the first decision refusing access.

56. Accordingly, the third plea in law must be rejected as unfounded."

2. Appellant

AG76 The appellant maintains that the CFI, at paras [50] to [56] of the contested judgment, misinterprets the scope of his request and, consequently, violates the presumption of innocence and the right to an effective judicial remedy, as guaranteed by ECHR, Arts 6(2) and 13. The CFI erroneously deduced from a statement made by appellant's counsel at the hearing that the appellant was only requesting access to the documents concerned in order to assure his rights of defence in Case T-47/03. However, his application was aimed at obtaining access to the documents underlying his inclusion on the list at issue, both for himself and for the general public. Given the social stigmatisation resulting from his name being included on that list, it was important for him to be able to react publicly to the facts of which he is accused.

AG77 The possibility for the appellant to request access to the documents in the context of Case T-47/03 does not constitute an effective remedy as provided by EHCR, Art.13. In view of the fact that the accusations of his involvement in terrorist activities were widely published in the international press, an effective remedy regarding this infringement of the presumption of innocence, his right to the protection of his honour and his reputation and his right to be considered innocent until proven guilty implies that he can publicly answer these accusations, not only in general terms, but by discussing the alleged specific evidence brought against him about his pretended involvement in specific crimes. In this context he refers to the judgment of the European Court of Human Rights in *Allenet de Ribemont v France*,[21] according to which all public authorities are under an obligation to respect the presumption of innocence and to refrain from making any statements which might encourage the public to believe him guilty.

3. Respondent

AG78 According to the Council, the CFI's findings, at paras [50] to [56] of the contested judgment, on the purpose of Regulation 1049/2001 and its interpretation

[21] Judgment of the European Court of Human Rights (A/308) (1995) 20 E.H.R.R. 557 at [36].

of the mandatory exceptions laid down in Art.4(1)(a) of that regulation are entirely correct. As the refusal of access was based on these mandatory exceptions, the CFI was right in disregarding the particular interests asserted by the appellant. The appellant's contention according to which he was requesting access to documents only in so far as they related to him did not affect the CFI's judgment on this point.

AG79 Contrary to what the appellant claims, access to the documents underlying the Council's decision to include him in the lists established by Council Decisions 2002/848, 2002/974 and 2003/480 cannot be regarded as a more effective means enabling him to publicly contradict accusations of his involvement in terrorist activities than asserting his rights of defence in pending Case T-47/03.

4. Assessment

AG80 The appellant's fourth plea in law raises two points, both of which have been dealt with in the context of my discussion of the first plea in law.

AG81 By his first point, the appellant asserts essentially that the CFI misinterpreted the scope of his application by assuming that his application to gain access to the requested document was intended to support his defence in the context of Case T-47/03, whereas he sought access to this document in order to assist him in defending himself in public.

AG82 However, as I already observed in point AG27 above and the Council, too, submits, in the context of the application of Art.4(1)(a) of Regulation 1049/2001 there is no place for the balancing of the public interest in respecting the confidential character of certain documents against the personal interests a citizen or entity may have in the disclosure of that document. The fact that the appellant's application to gain access to the document in question was inspired by motives other than those mentioned by the CFI at para.[53] of the contested judgment, is irrelevant for the assessment made by the CFI and cannot affect its validity.

AG83 The appellant submits in his second point that the possibility of gaining access to the document requested in the context of the proceedings of Case T-47/03 cannot be considered an effective remedy within the meaning of ECHR, Art.13. He states that he should be in a position to answer the specific accusations against him in public.

AG84 In point AG35 above, I found that where a document relates to one of the public interests covered by the mandatory exceptions of Art.4(1)(a) of Regulation 1049/2001, the refusal to grant access to that document cannot in itself be regarded as an infringement of the rights of defence, or more specifically, as a denial of the right to an effective remedy. The fact that an effective remedy is available under Community law is evidenced by the fact that the appellant has the opportunity under Art.230 EC to challenge the validity of his inclusion on the list of persons, groups and entities to whom the special measures of Regulation 2580/2001 apply and that he has availed himself of the opportunity.

AG85 Finally, I do not consider that the position of the appellant can be likened to that which was at issue in *Allenet de Ribemont* before the European Court of Human Rights. In that case, as the person involved was publicly branded by certain public authorities as having instigated a murder, there was a probability that this could

undermine the presumption of innocence. By contrast, although it is true that the persons included on the list referred to are publicly suspected of being involved in terrorist activities, it must be recognised that the object of this Community measure is to prevent terrorist activity by combating the funding of terrorism. As the freezing of funds which this entails can only be achieved with the co-operation with public and private financial institutions, it is inevitable that the list of persons, groups and entities concerned be made public.

AG86 In view of these observations, the fourth plea in law must be rejected.

F—Fifth plea in law: violation of Articles 4(5) and 9(3) of Regulation 1049/2001

1. The CFI's judgment

AG87 The CFI considered the aspect of the statement of reasons given for refusing to disclose the identity of the Member States having provided documents in para.[64] of the contested judgment, cited in point AG61 above. As to the obligation of the Council to disclose the identity of the Member States concerned, the CFI ruled as follows:

> "91. It should be noted at the outset that the applicant's argument is essentially based on old case law relating to the Code of conduct of 6 December 1993 concerning public access to Council and Commission documents (OJ 1993 L 340, p.41; 'the code of conduct') implemented by Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p.43) and by Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p.58).
>
> 92. Under the code of conduct, where the author of the document held by an institution was a third person, the application for access was to be sent direct to that person. The court concluded from this that the institution was required to inform the person concerned of the identity of the author of the document so that he could contact that author directly (*Interporc v Commission*, cited in paragraph 59 above, paragraph 49).
>
> 93. However, under Article 4(4) and (5) of Regulation No 1049/2001, it is for the institution in question itself to consult the third party who is the author unless the correct response, affirmative or negative, to the request for access is inherently obvious. In the case of the Member States, they may request that their agreement be provided.
>
> 94. The authorship rule, as referred to in the code of conduct, therefore underwent a fundamental change in Regulation No 1049/2001. As a result, the identity of the author assumes much less importance than under the previous rules.
>
> 95. In addition, for sensitive documents, Article 9(3) of Regulation No 1049/2001 provides that such documents 'shall be recorded in the register or released only with the consent of the originator'. It must therefore be held that sensitive documents are covered by a derogation the purpose of which is clearly to guarantee the secrecy of their content and even of their existence.

96. The Council was therefore not obliged to disclose the documents in question, of which states are the authors, relating to the adoption of Decision 2002/848, including the identity of those authors, in so far as, firstly, those documents are sensitive documents and, secondly, the states responsible for them have refused to agree to their disclosure."

2. Appellant

AG88 The appellant claims that the CFI erroneously considered, at paras [64] and [96] of the contested judgment, that Arts 4(5) and 9(3) of Regulation 1049/2001 apply both to "information" as well as to "documents", thereby justifying the Council's refusal to disclose the identity of the Member States which had furnished the documents concerned. This constitutes a disproportionate restriction on the rights of interested parties to address themselves directly to the authorities of the Member States to obtain access to documents, which obviously implies that their identity be disclosed. Furthermore, the CFI omitted examining the appellant's plea that the Council did not state reasons on the question how disclosure of the identities of the Member States that provided information could in any way harm public interest in relation to public security and/or international relations.

3. Respondent

AG89 The Council maintains that the CFI was correct in holding, at paras [95] and [97] of the contested judgment that the purpose of Art.9(3) of Regulation 1049/2001 is to guarantee the secrecy of the content of documents and even of their existence. As the court has made clear, the rules on access to documents do not concern only access to documents as such, but rather the information contained in them.[22] The identity of the author of a document is clearly an element of information contained in the document and thus subject to the same rules as the document as such.

AG90 As regards the appellant's submission that the CFI did not examine his plea that the Council did not state reasons how disclosure of the identity of the Member States that provided information could harm the public interest, the Council reiterates that it is sufficient to indicate that the national authorities had requested that it not be disclosed, as the institution is bound by such a request.[23] It is neither obliged to assess the reasons given by the author, nor is it under any duty to explain the reasons which led the Member State in question to make the request pursuant to Art.4(5) of Regulation 1049/2001, since that provision does not oblige Member States to give reasons for such a request. These considerations apply *a fortiori* to sensitive documents which are protected by law under Art.9(3) of the regulation, without an express request by the Member State concerned.

4. Assessment

AG91 The issue raised by the fifth plea in law is whether there is an obligation on the part of the Council to disclose the identity of Member States which provided

[22] *Hautala*, cited above, at [23].
[23] *Scippacercola v Commission* (T-187/03) [2005] E.C.R. II-1029; [2005] 2 C.M.L.R. 54 at [68]–[70].

documents following its decision to deny access to them on the grounds that they are covered by the mandatory exceptions of Art.4(1)(a) of Regulation 1049/2001.

AG92 The appellant essentially contends that as the identity of a Member State is "information" and not a "document" and the regulation only concerns access to documents, there were no grounds for the Council's refusal to reveal the identity of the Member States concerned. The Council opposes this interpretation and agrees with the CFI that, where under Art.9(3) of Regulation 1049/2001 the originator of a sensitive document may prevent this document being recorded in the public register referred to in Art.11 of the regulation, the purpose of this provision is to guarantee the secrecy of their content and even of their existence.

AG93 Although the appellant may be correct in pointing out that there is no provision in Regulation 1049/2001 prohibiting the Council from disclosing the identity of a Member State having provided a document, the question raised by the fifth plea in law should be answered having regard to the system laid down in the regulation in respect of sensitive documents.

AG94 As regards third-party documents, which are defined as documents originating outside the institutions and therefore include documents provided by the Member States, Art.4(4) of Regulation 1049/2001 provides that the institution shall consult with the third party concerned with a view to assessing whether an exception laid down in Art.4(1) or (2) of the regulation applies to that document. Article 4(5) of the regulation permits the Member States to request that a document originating from it not be disclosed without its prior agreement. Sensitive documents, according to Art.9(3) of the regulation, may only be recorded in the public register or released with the consent of the originator.

AG95 It is clear from these provisions that where access to a document originating in a Member State and held by an institution is sought, rather than referring the applicant to the Member State concerned, it is the institution which must consult with that Member State in order to determine whether the application can be granted. This procedure already indicates that the identity of the Member State having provided the document is regarded as an element which is covered by the exceptions laid down in Art.4 of the regulation.

AG96 Where the document is sensitive in character, the originator of the document retains complete control over the question of disclosure and even of its being registered. Since this necessarily entails, as was established at para.[95] of the contested judgment, that the very existence of the document is not made known, it evidently means that the identity of the originator cannot be disclosed.

AG97 In addition, the distinction made by the appellant between "information" and "documents" is artificial, as access to a document is obviously only requested in order to gain access to its contents. The Council observes correctly that the identity of the author of a document is itself an element of information contained in it. As the identity of the author may be one of the reasons for maintaining the confidentiality of the document, its disclosure must be subject to the same rules as those regarding the disclosure of the document itself.

AG98 Although this implies that the appellant is denied access to information enabling him to apply to the national authorities concerned, I do not consider that this unduly restricts his right to legal protection. This is adequately guaranteed by the

procedure under Regulation 1049/2001 and the subsequent scrutiny by the Community courts.

AG99 I conclude therefore that the fifth plea in law cannot be upheld.

VII—Conclusion

AG100 In view of the foregoing observations, I would suggest that the court:

—dismiss the application as unfounded in so far as it seeks the annulment of the judgment of the Court of First Instance of April 26, 2005 in Joined Cases T 110, 150 & 405/03;

—dismiss the application as inadmissible in so far as it seeks the annulment of the Council's decisions refusing access to the documents requested;

—order the appellant to pay the costs.

JUDGMENT

1 By his appeal, Mr Sison is asking the court to set aside the judgment delivered by the Court of First Instance of the European Communities on April 26, 2005 in *Sison v Council* (T 110, 150 & 405/03) [2005] E.C.R. II-1429 (hereinafter: the judgment under appeal), by which the Court of First Instance dismissed his applications for annulment of three decisions of the Council of the European Union of January 21, February 27 and October 2, 2003 refusing access to certain documents (hereinafter, respectively, the first decision refusing access, the second decision refusing access and the third decision refusing access and, together, the decisions refusing access).

Legal and factual background

Legal framework

2 The third, fourth, ninth and 11th recitals in the preamble to Regulation 1049/2001 ([2001] O.J. L145/43) are worded as follows:

> "(3) . . . This Regulation consolidates the initiatives that the institutions have already taken with a view to improving the transparency of the decision-making process.
>
> (4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.
>
> . . .
>
> (9) On account of their highly sensitive content, certain documents should be given special treatment . . .
>
> . . .
>
> (11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions . . ."

3 Article 1(a) of Regulation 1049/2001 states that its purpose is:

"... to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission ... documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents".

4 Article 2 of that regulation provides, under the heading "Beneficiaries and scope":

"1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

...

5. Sensitive documents as defined in Article 9(1) shall be subject to special treatment in accordance with that Article ..."

5 Under the heading "Exceptions", Art.4 of Regulation 1049/2001 provides:

"1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:
—public security,
—defence and military matters,
—international relations,
—the financial, monetary or economic policy of the Community or a Member State;

...

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

—commercial interests of a natural or legal person, including intellectual property,
—court proceedings and legal advice,
—the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

...

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released ..."

6 Article 6(1) of Regulation 1049/2001 provides:

"Applications for access to a document shall be made in any written form ... The applicant is not obliged to state reasons for the application."

7 Article 9 of that regulation provides:

"1. Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as 'TRÈS SECRET/TOP SECRET', 'SECRET' or 'CONFIDENTIEL' in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.

. . .

3. Sensitive documents shall be recorded in the register or released only with the consent of the originator.

4. An institution which decides to refuse access to a sensitive document shall give the reasons for its decision in a manner which does not harm the interests protected in Article 4 . . ."

8 Article 11(2) of Regulation 1049/2001 provides:

"For each document the register shall contain a reference number . . . the subject matter and/or a short description of the content of the document . . . References shall be made in a manner which does not undermine protection of the interests in Article 4."

9 Under the heading "Direct access in electronic form or through a register", Art.12(1) and (2) of that regulation provides:

"1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.

2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible."

Background to the dispute

10 The background to the dispute is set out as follows by the Court of First Instance in paras [2] to [8] of the judgment under appeal:

"2 On 28 October 2002, the Council of the European Union adopted Decision 2002/848/EC implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/460/EC (OJ 2002 L 295, p. 12). That decision included the applicant in the list of persons whose funds and financial assets are to be frozen pursuant to that regulation ('the list at issue'). That list was updated, inter alia, by Council Decision 2002/974/EC of 12 December 2002 (OJ 2002 L 337, p. 85) and Council Decision 2003/480/EC of 27 June 2003 (OJ 2003 L 160, p. 81), repealing the previous decisions and establishing a new list. The applicant's name was retained on that list on each occasion.

3 Under Regulation No 1049/2001, the applicant requested, by confirmatory application of 11 December 2002, access to the documents which had led

the Council to adopt Decision 2002/848 and disclosure of the identity of the states which had provided certain documents in that connection. By confirmatory application of 3 February 2003, the applicant requested access to all the new documents which had led the Council to adopt Decision 2002/974 maintaining him on the list at issue and disclosure of the identity of the states which had provided certain documents in that connection. By confirmatory application of 5 September 2003, the applicant specifically requested access to the report of the proceedings of the Permanent Representatives Committee (Coreper) 11 311/03 EXT 1 CRS/CRP concerning Decision 2003/480, and to all the documents submitted to the Council prior to the adoption of Decision 2003/480, which form the basis of his inclusion and maintenance on the list at issue.

4 The Council's response to each of those applications, given by [the first, second and third] decisions [refusing access] respectively . . . was a refusal of even partial access.

5 As regards the first and second decisions refusing access, the Council stated that the information which had led to the adoption of the decisions establishing the list at issue was to be found in the summary reports of the Coreper proceedings of 23 October 2002 (13 441/02 EXT 1 CRS/CRP 43) and 4 December 2002 (15 191/02 EXT 1 CRS/CRP 51) respectively, which were classified as 'CONFIDENTIEL UE'.

6 The Council refused to grant access to those reports, invoking the first and third indents of Article 4(1)(a) of Regulation No 1049/2001. It stated, first, that 'disclosure of [those reports] and of the information in possession of the authorities of the Member States combating terrorism, could give the persons, groups or entities which are the subject of this information the opportunity to prejudice the efforts of these authorities and would thus seriously undermine the public interest as regards public security'. Secondly, in the Council's view, the 'disclosure of the information concerned would also undermine the protection of the public interest as regards international relations because third states' authorities [we]re also involved in the action taken in the fight against terrorism'. The Council refused to grant partial access to that information on the ground that it was 'all . . . covered by the aforesaid exceptions'. The Council also refused to disclose the identity of the states which had provided the relevant information, stating that 'the originating authority(ies) of this information, after consultation in accordance with Article 9(3) of Regulation No 1049/2001, is (are) opposed to the disclosure of the information requested'.

7 As regards the third decision refusing access, the Council first stated that the applicant's request concerned the same document as that in respect of which disclosure had been refused to him by the first decision refusing access. The Council confirmed its first decision refusing access and added that access to report 13 441/02 also had to be refused on the basis of the exception relating to court proceedings (second indent of Article 4(2) of Regulation No 1049/2001). The Council then acknowledged that it had by mistake identified report 11 311/03, relating to Decision 2003/480, as relevant. It explained in

that regard that it had received no further information or documents justifying the revocation of Decision 2002/848 in so far as it concerns the applicant.

8 The applicant brought an action for annulment of Decision 2002/974, which was lodged at the Court Registry under number T-47/03."

Procedure before the Court of First Instance and the judgment under appeal

11 The present appellant brought before the Court of First Instance three successive actions seeking annulment, respectively, of the first decision refusing access (Case T-110/03), of the second decision refusing access (Case T-150/03) and of the third decision refusing access (Case T-405/03). The three cases were joined.

12 By the judgment under appeal, the Court of First Instance dismissed each of those actions.

13 As is apparent from paras [26], [34] and [35] of the judgment under appeal, the action in Case T-405/03 was declared, first, inadmissible in so far as it related to the purely confirmatory refusal of access to report 13 441/02 and, secondly, unfounded in so far as it concerned a refusal of access to other documents, the Court of First Instance having held, in that respect, that the non-existence of such documents had been established by the Council to the requisite legal standard.

14 The action in Case T-150/03 was dismissed as unfounded, the Court of First Instance having concluded, in para.[38] of the judgment under appeal, that the documents sought by the present appellant did not exist.

15 As regards Case T-110/03, the Court of First Instance held, as a preliminary point, in paras [46] and [47] of the judgment under appeal:

"46 With regard to the scope of the court's review of the legality of a decision refusing access, it should be noted that, in [Case T-14/98] *Hautala v Council* [[1999] E.C.R. II-2489; [1999] 3 C.M.L.R. 528], paragraph 71, and [Case T-211/00] *Kuijer v Council* [[2002] E.C.R. II-485; [2002] 1 C.M.L.R. 42], paragraph 53, the court recognised that the Council enjoys a wide discretion in the context of a decision refusing access founded, as in this case, in part, on the protection of the public interest concerning international relations. In *Kuijer v Council*, such a discretion was conferred on an institution when it justifies its refusal of access by reference to the protection of the public interest in general. Thus, in areas covered by the mandatory exceptions to public access to documents, provided for in Article 4(1)(a) of Regulation No 1049/2001, the institutions enjoy a wide discretion.

47 Consequently, the court's review of the legality of decisions of the institutions refusing access to documents on the basis of the exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation No 1049/2001 must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers (see, by analogy, *Hautala v Council*, paragraphs 71 and 72, confirmed on appeal, and *Kuijer v Council*, paragraph 53)."

16 Ruling upon the present appellant's plea in law, to the effect that the refusal of access to the documents sought involves infringement of the right to a fair trial, and

more specifically of the guarantees provided for in Art.6(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950 (hereinafter: the ECHR), as well as infringement of the principle of proportionality, the Court of First Instance held as follows in paras [50] to [55] of the judgment under appeal:

> "50 It should be recalled, first, that, under Article 2(1) of Regulation No 1049/2001, the beneficiaries of the right of access to documents of the institutions are '[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State'. That provision makes it clear that the purpose of the regulation is to guarantee access for everyone to public documents and not only access for the requesting party to documents concerning him.
>
> 51 Second, the exceptions to access to documents, provided for by Article 4(1)(a) of Regulation No 1049/2001, are framed in mandatory terms. It follows that the institutions are obliged to refuse access to documents falling under any one of those exceptions once the relevant circumstances are shown to exist (see, by analogy, Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, paragraph 58, and Case T-20/99 *Denkavit Nederland v Commission* [2000] ECR II-3011, paragraph 39).
>
> 52 Consequently, the particular interest which may be asserted by a requesting party in obtaining access to a document concerning him personally cannot be taken into account when applying the mandatory exceptions provided for by Article 4(1)(a) of Regulation No 1049/2001.
>
> 53 The applicant claims, in essence, that the Council was obliged to grant him access to the documents requested in so far as those documents are necessary in order for him to secure his right to a fair trial in Case T-47/03.
>
> 54 Since the Council relied on the mandatory exceptions provided for by Article 4(1)(a) of Regulation No 1049/2001 in the first decision refusing access, it cannot be accused of not having taken into account any particular need of the applicant to have the requested documents made available to him.
>
> 55 Consequently, even if those documents prove necessary for the applicant's defence in Case T-47/03, which is a question to be considered in that case, that circumstance is not relevant for the purpose of assessing the validity of the first decision refusing access."

17 In order to reject the present appellant's second plea in law, alleging that the first decision refusing access failed to fulfil the institutions' duty under Art.253 EC to state reasons, the Court of First Instance relied on the following grounds:

> "60 In the case of a request for access to documents, where the institution in question refuses such access, it must demonstrate in each individual case, on the basis of the information at its disposal, that the documents to which access is sought do indeed fall within the exceptions listed in Regulation No 1049/2001 (see, by analogy, Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal v Commission* [2000] ECR I-1, paragraph 24). However it may be impossible to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the

content of the document and, thereby, depriving the exception of its very purpose (see, by analogy, *WWF UK v Commission* . . . paragraph 65).

61 Under that case law, it is therefore for the institution which has refused access to a document to provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine.

62 In this case, with regard to report 13 441/02, the Council clearly specified the exceptions on which it was basing its refusal by relying on both the first and third indents of Article 4(1)(a) of Regulation No 1049/2001. It set out in what respects those exceptions were relevant in relation to the documents concerned by referring to the fight against terrorism and to the involvement of third states. Moreover, it provided a brief explanation relating to the need for protection relied on. Thus, as regards public security, it explained that disclosure of the documents would give the persons who were the subject of that information the opportunity to undermine the action taken by the public authorities. As regards international relations, it briefly referred to the involvement of third states in the fight against terrorism. The brevity of that statement of reasons is acceptable in light of the fact that mentioning additional information, in particular making reference to the content of the documents concerned, would negate the purpose of the exceptions relied on.

63 With regard to the refusal of partial access to those documents, the Council expressly stated, firstly, that it had considered that possibility and, secondly, the reason for the rejection of that possibility, namely that the documents in question were covered in their entirety by the exceptions relied on. For the same reasons as before, the Council could not identify precisely the information contained in those documents without negating the purpose of the exceptions relied on. The fact that that statement of reasons appears formulaic does not, in itself, constitute a failure to state reasons since it does not prevent either the understanding or the ascertainment of the reasoning followed.

64 With regard to the identity of the states which provided relevant documents, it must be noted that the Council itself drew attention to the existence of documents from third states in its original decisions refusing access. First, the Council specified the exception put forward in that regard, namely Article 9(3) of Regulation No 1049/2001. Second, it provided the two criteria used for the application of that exception. In the first place, it implicitly but necessarily took the view that the documents in question were sensitive documents. That factor appears comprehensible and ascertainable in the light of the relevant context, and in particular in the light of the classification of the documents in question as 'CONFIDENTIEL UE'. In the second place, the Council explained that it had consulted the authorities concerned and had taken note of their opposition to any disclosure of their identity.

65 Despite the relative brevity of the statement of reasons for the first decision refusing access (two pages), the applicant was fully able to understand the reasons for the refusals given to him and the court has been

able to carry out its review. The Council therefore duly provided statements of reasons for those decisions."

18 By a third plea in law, alleging infringement of the right of access to documents, the present appellant alleged a breach of the second paragraph of Art.1 EU, Arts 6(1) EU and 255 EC, as well as of Art.4(1)(a) and (6) and Art.9(3) of Regulation 1049/2001.

19 Ruling on the first part of that third plea in law, according to which, at the time of the adoption of the first decision of refusal, the Council failed both to conduct a concrete examination of whether the disclosure of the information requested was likely to undermine the public interest and to balance its own interests against those of the then applicant, and disregarded the principle that exceptions to the right of access to documents must be strictly interpreted, the Court of First Instance held, inter alia, as follows in paras [71] to [82] of the judgment under appeal:

"71 It must be pointed out, at the outset, that the Council was not obliged, under the exceptions provided for in Article 4(1)(a) of Regulation No 1049/2001, to take into account the applicant's particular interest in obtaining the documents requested (see paragraphs 52 and 54 above).

. . .

74 With regard, in the first place, to the protection of the public interest as regards public security . . .

. . .

77 . . . it must be accepted that the effectiveness of the fight against terrorism presupposes that information held by the public authorities on persons or entities suspected of terrorism is kept secret so that that information remains relevant and enables effective action to be taken. Consequently, disclosure to the public of the document requested would necessarily have undermined the public interest in relation to public security. In that regard, the distinction put forward by the applicant between strategic information and information concerning him personally cannot be accepted. Any personal information would necessarily reveal certain strategic aspects of the fight against terrorism, such as the sources of information, the nature of that information or the level of surveillance to which persons suspected of terrorism are subjected.

78 The Council did not, therefore, make a manifest error of assessment in refusing access to report 13 441/02 for reasons of public security.

79 With regard, in the second place, to the protection of the public interest as regards international relations, it is obvious, in the light of Decision 2002/848 and Regulation No 2580/2001, that its purpose, namely the fight against terrorism, falls within the scope of international action arising from United Nations Security Council resolution 1373 (2001) of 28 September 2001. As part of that global response, states are called upon to work together. The elements of that international co-operation are very probably, or even necessarily, to be found in the document requested. In any event, the applicant has not disputed the fact that third states were involved in the adoption of

Decision 2002/848. On the contrary, he has requested that the identity of those states be disclosed to him. It follows that the document requested does fall within the scope of the exception relating to international relations.

80 That international co-operation concerning terrorism presupposes a confidence on the part of states in the confidential treatment accorded to information which they have passed on to the Council. In view of the nature of the document requested, the Council was therefore able to consider, rightly, that disclosure of that document could compromise the position of the European Union in international co-operation concerning the fight against terrorism.

81 In that regard, the applicant's argument-to the effect that the mere fact that third states are involved in the activities of the institutions cannot justify application of the exception in question-must be rejected for the reasons set out above. Contrary to what that argument assumes, the co-operation of third states falls within a particularly sensitive context, namely the fight against terrorism, which justifies keeping that co-operation secret. Moreover, read as a whole, the decision makes it clear that the states concerned even refused to allow their identity to be disclosed.

82 It follows that the Council did not make a manifest error of assessment in considering that disclosure of the document requested was likely to undermine the public interest as regards international relations."

20 Ruling on the third part of the third plea in law, to the effect that a strict interpretation of the "authorship rule" would require the Council to disclose the identity of the states which submitted documents relating to Decision 2002/848 as well as the exact nature of those documents in order to enable the then applicant to apply to their authors for access to those documents, the Court of First Instance ruled as follows in paras [91] to [99] of the judgment under appeal:

"91 It should be noted at the outset that the applicant's argument is essentially based on old case law relating to the Code of conduct of 6 December 1993 concerning public access to Council and Commission documents (OJ 1993 L 340, p.41; 'the code of conduct') implemented by Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p.43) and by Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p.58).

92 Under the code of conduct, where the author of the document held by an institution was a third person, the application for access was to be sent direct to that person. The court concluded from this that the institution was required to inform the person concerned of the identity of the author of the document so that he could contact that author directly ([Case C-41/00 P] *Interporc v Commission* [[2003] ECR I-2125], paragraph 49).

93 However, under Article 4(4) and (5) of Regulation No 1049/2001, it is for the institution in question itself to consult the third party who is the author unless the correct response, affirmative or negative, to the request for access is inherently obvious. In the case of the Member States, they may request that their agreement be provided.

94 The authorship rule, as referred to in the code of conduct, therefore underwent a fundamental change in Regulation No 1049/2001. As a result, the identity of the author assumes much less importance than under the previous rules.

95 In addition, for sensitive documents, Article 9(3) of Regulation No 1049/2001 provides that such documents 'shall be recorded in the register or released only with the consent of the originator'. It must therefore be held that sensitive documents are covered by a derogation the purpose of which is clearly to guarantee the secrecy of their content and even of their existence.

96 The Council was therefore not obliged to disclose the documents in question, of which states are the authors, relating to the adoption of Decision 2002/848, including the identity of those authors, in so far as, firstly, those documents are sensitive documents and, secondly, the states responsible for them have refused to agree to their disclosure.

97 It must be observed that the applicant disputes neither the legal basis put forward by the Council, namely Article 9(3) of Regulation No 1049/2001, which implies that the documents concerned are considered to be sensitive, nor the fact that the Council obtained an adverse opinion from the states responsible for the documents concerned.

98 For the sake of completeness, there is no doubt that the documents in question are sensitive documents . . . Moreover, in view of the presumption of legality attaching to any statement of an institution, it should be noted that the applicant has not adduced any evidence that the Council's statement—that it had received an adverse opinion from the states concerned—is erroneous.

99 Consequently, the Council was fully entitled to refuse to disclose the documents in question, including the identity of their authors."

The appeal

21 On his appeal, in support of which he advances five grounds, the appellant claims that the court should set aside the judgment under appeal and itself dispose of the proceedings by granting the forms of order sought at first instance for annulment of the decisions refusing access. The appellant also seeks an order that the Council pay the costs.

22 The Council claims that the court should dismiss the appeal and order the appellant to pay the costs.

The appeal in so far as it relates to Cases T-150/03 and T-405/03

23 It should be recalled at the outset that, according to settled case law, it follows from Art.225 EC, the first paragraph of Art.58 of the Statute of the Court of Justice and Art.112(1)(c) of the court's Rules of Procedure, that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (*Reynolds Tobacco v Commission* (C-131/03 P) [2007] 1 C.M.L.R. 1 at [49] and the case law there cited).

24 In this case, although the appellant seeks, in his notice of appeal, to have the judgment under appeal set aside in so far as it disposes of Cases T-110/03,

T-150/03 and T-405/03, the five grounds of appeal are directed exclusively against the reasons on which the Court of First Instance relied for the purpose of dismissing the application in Case T-110/03. Those grounds of appeal, in contrast, contain no criticism of the grounds on which the Court of First Instance relied in deciding to dismiss the applications in Cases T-150/03 and T-405/03.

25 In those circumstances, the appeal must be dismissed as inadmissible to the extent to which it seeks to have the judgment under appeal set aside in so far as it dismissed the applications in Cases T-150/03 and T-405/03.

The appeal in so far as it relates to Case T-110/03

The first ground of appeal, alleging breach of Arts 220, 225 and 230 EC, as well as of the rights of the defence, the right to a fair hearing and the right to effective judicial protection

—The appellant's arguments

26 By the first part of the first ground of appeal, the appellant submits that, by ruling, in paras [46] and [47] of the judgment under appeal, that the Council enjoys an unlimited discretion to refuse access to documents on the basis of the exceptions relating to the protection of the public interest provided for in Art.4(1)(a) of Regulation 1049/2001 and that the court's review of such discretion is limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers, the Court of First Instance unduly limited the scope of the full legal review incumbent upon it under Art.230 EC. Article 67(3) of the Rules of Procedure of the Court of First Instance also allows that court to base its review on the content of documents to which access has been refused, which also confirms that the Court of First Instance is bound to carry out a full review of the legality of the institutions' decisions in respect of public access to their documents.

27 In the alternative, the appellant submits that such a full review of legality is justified at least in the light of the particular facts of this case, which differs in three respects from the case which gave rise to the judgment in *Hautala v Council*, to which paras [46] and [47] of the judgment under appeal refer. First, the documents requested and the first decision refusing access fall entirely within the scope of the EC Treaty and not within that of the common foreign and security policy set out in Title V of the EU Treaty. Secondly, those documents are not for internal use, but are intended to inform the legislative process, and should therefore be given wider access. Thirdly, the appellant has a legitimate interest in obtaining access to those documents, which concern him personally and have led to his inclusion on the list at issue.

28 By holding, in regard to that third point, in para.[52] of the judgment under appeal, that the particular interest which may be asserted by a requesting party in obtaining access to a document concerning him personally cannot be taken into account when applying the mandatory exceptions provided for by Art.4(1)(a) of Regulation 1049/2001, the Court of First Instance made two errors of law.

29 First, it failed to carry out its review from the point of view of the general principle stated in Art.6(3)(a) of the ECHR, under which:

> "... everyone, charged with a criminal offence has the ... [right] to be informed, promptly ... and in detail, of the nature and cause of the accusation against him",

notwithstanding the fact that the appellant comes within the terms of such provision because of his inclusion on the list at issue. Secondly, by thus ignoring the appellant's particular interest, the Court of First Instance disregarded the rule that the decision relating to an application for access to the institutions' documents should be taken after an examination of the particular facts of each case.

30 By the second part of the first ground of appeal, the appellant maintains that, by failing to examine the legality of the first decision refusing access in the light of the principle set out in Art.6(3)(a) of the ECHR and to address his arguments on that point, the Court of First Instance infringed the rights of the defence and the general principle guaranteeing the right to a fair trial.

31 By the third part of the first ground of appeal, the appellant submits that, by limiting the scope of the review of legality and by failing to uphold the argument alleging failure to comply with the principle set out in Art.6(3)(a) of the ECHR, the Court of First Instance also infringed the right to an effective legal remedy which the appellant has under Art.13 of the ECHR.

—Findings of the court

32 So far as the first part of the first ground of appeal is concerned, it is clear from the court's case law that the scope of the review of legality incumbent on the Community Courts under Art.230 EC can vary according to the matters under consideration.

33 With regard to judicial review of compliance with the principle of proportionality, the court has thus held that the Community legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. It concluded from this that the legality of a measure adopted in those fields can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see, in particular, *IATA and ELFAA* (C-344/04) [2006] E.C.R. I-403; [2006] 2 C.M.L.R. 20 at [80] and the case law there cited).

34 Contrary to the appellant's submission, the Court of First Instance, in line with that case law, correctly held, in para.[46] of the judgment under appeal, as regards the scope of the judicial review of the legality of a decision of the Council refusing public access to a document on the basis of one of the exceptions relating to the public interest provided for in Art.4(1)(a) of Regulation 1049/2001, that the Council must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest. The Court of First Instance also correctly held, in para.[47] of the judgment under appeal, that the Community Court's review of the legality of such a decision must therefore be limited to

verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers.

35 In the first place, it must be accepted that the particularly sensitive and essential nature of the interests protected by Art.4(1)(a) of Regulation 1049/2001, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation.

36 Secondly, the criteria set out in Art.4(1)(a) of Regulation 1049/2001 are very general, since access must be refused, as is clear from the wording of that provision, if disclosure of the document concerned would "undermine" the protection of the "public interest" as regards, inter alia, "public security" or "international relations".

37 In that regard, it is clear from an examination of the preparatory documents which preceded the adoption of that regulation that various proposals intended to define more precisely the scope of the public-interest exceptions to which Art.4(1)(a) of that regulation refers, which would undoubtedly have enabled the opportunities for judicial review in regard to the institution's assessment to be correspondingly increased, were not accepted.

38 That is the case, in particular, with regard to the clarification contained in the proposal of June 27, 2000 for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents ([2000] O.J. C177E/70), a clarification which was intended to restrict the scope of application of those exceptions to cases which could "significantly undermine" the protection of those interests. That is also the case with regard to the 30th amendment to the above-mentioned proposal, contained in the legislative proposal in the Report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs of the European Parliament (A5-0318/2000), where it was suggested that Art.4 be amended in such a way that access would be refused where disclosure of a document could "significantly" undermine public security or a "vital interest" relating to the Union's international relations.

39 Thirdly, and as the Council correctly submits, Art.67(3) of the Rules of Procedure of the Court of First Instance does not cast doubt on the correctness of the principles stated in paras [46] and [47] of the judgment under appeal. That provision, which features in Title II, Ch.3, s.2, of those rules, dealing with measures of inquiry, merely provides in its third sub-paragraph that:

> ". . . [w]here a document to which access has been denied by a Community institution has been produced before the Court of First Instance in proceedings relating to the legality of that denial, that document shall not be communicated to the other parties".

Such a provision is intended, above all, to safeguard the effects of the decision, which has been adopted by an institution, not to disclose a document so long as the Court of First Instance has not decided on the substance of the case, since such non-disclosure is precisely the issue in the dispute submitted to that court. On the

other hand, that procedural provision, even though it shows that the court may, where appropriate, be required to take cognisance of a document to which the public has been denied access, cannot have any relevance whatever for the purpose of defining the limits of the scope of the judicial review incumbent on the Community Courts under the EC Treaty.

40 As regards, fourthly, the appellant's alternative argument based on the alleged particular facts of this case as set out in para.[27] of this judgment, these cannot have any influence on the scope of the judicial review which the Court of First Instance was required to undertake in this case.

41 So far as concerns, first, the appellant's assertion that the documents requested contributed in his case to the adoption of an act of a legislative nature, suffice it to observe that, even were it true, such an allegation cannot affect the question of whether the disclosure of those documents could undermine the interests protected by Art.4(1)(a) of Regulation 1049/2001 or, therefore, the question of whether the access sought to such documents should be refused. It is appropriate, in particular, to point out in that regard that, whilst providing that documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States should be made directly accessible, Art.12(2) of that regulation adds, however, that this is so only subject to Arts 4 and 9 thereof.

42 With regard, secondly, to the argument that the appellant seeks to draw from the claim that the documents requested and the first decision refusing access fall entirely within the scope of the EC Treaty and not within that of the common foreign and security policy, suffice it to point out that that claim has not been substantiated in this case. As the Council has pointed out, Decision 2002/848, which included the appellant on the list at issue, is closely linked to Council Common Position 2002/847/CFSP of October 28, 2002 updating Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Council Common Position 2002/462/CFSP ([2002] O.J. L295/1).

43 As regards, thirdly, the appellant's specific interest in gaining knowledge of the documents, disclosure of which was requested, it is to be noted, as the Court of First Instance correctly observed in para.[50] of the judgment under appeal, that the purpose of Regulation 1049/2001 is to give the general public a right of access to documents of the institutions and not to lay down rules designed to protect the particular interest which a specific individual may have in gaining access to one of them.

44 That is clear from, in particular, Arts 2(1), 6(1) and 12(1) of that regulation, as well as from its title and from the fourth and 11th recitals in its preamble. The first of those provisions guarantees, without distinction, the right of access to any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, the second specifying in that regard that an applicant is not obliged to state reasons for the application. Article 12(1) provides that the institutions are as far as possible to make documents "directly" accessible to the public in electronic form or through a register. The title of Regulation 1049/2001 and the fourth and 11th recitals in its preamble also emphasise that the purpose of the regulation is to make the institutions' documents accessible to the "public".

45 An analysis of the preparatory documents which led to the adoption of Regulation 1049/2001 also reveals that consideration was paid to the possibility of extending the subject matter of that regulation by providing for account to be taken of certain specific interests of which persons could avail themselves in order to obtain access to a particular document. Thus, inter alia, the 31st amendment contained in the legislative proposal in the Report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs of the European Parliament suggested the introduction of a new Art.4(2) in the Commission's Proposal mentioned in para.[38] of this judgment, according to which:

> "[w]hen considering the public interest in the disclosure of the document, the institution shall also take account of the interest raised by a petitioner, complainant or other beneficiary having a right, interest or obligation in a matter".

Similarly, the seventh amendment proposed in the opinion given by the Committee on Petitions of the European Parliament in the same report sought the insertion of a paragraph in Art.1 of the Commission's Proposal to specify that:

> "[a] petitioner, a complainant, and any other person, natural or legal, whose right, interest or obligation in a matter is concerned (a party) shall also have the right of access to a document which is not accessible to the public, but may influence the consideration of his/her case, as described in this Regulation and in implementing provisions adopted by the institutions".

In that regard, however, it must be stated that none of the suggestions thus formulated was incorporated in the provisions of Regulation 1049/2001.

46 Moreover, it is clear from the wording of Art.4(1)(a) of Regulation 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Art.4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests.

47 It follows from the foregoing that the Court of First Instance was correct to hold, in para.[52] of the judgment under appeal, that the particular interest of an applicant in obtaining access to documents cannot be taken into account by the institution called upon to rule on the question of whether the disclosure to the public of those documents would undermine the interests protected by Art.4(1)(a) of Regulation 1049/2001 and to refuse, if that is the case, the access requested.

48 Even assuming that the appellant has, as he maintains, a right to be informed in detail of the nature and cause of the accusation made against him, which led to his inclusion on the list at issue, and even if such right entailed access to documents held by the Council, it is thus sufficient to point out that such a right could not be exercised, as the Court of First Instance correctly held in paras [52] to [55] of the judgment under appeal, by having recourse to the mechanisms for public access to documents implemented by Regulation 1049/2001.

49 In light of all of the foregoing, the first part of the first ground of appeal must be held to be unfounded.

50 The same applies to the second part of the first ground of appeal, which alleges an infringement of the rights of the defence on the ground that the Court of First Instance did not address the appellant's argument that his right to be informed in detail of the nature and cause of the accusation against him had been infringed. In that regard, suffice it to note that, as will already be clear from what has been said in para.[48] of this judgment, that argument was indeed examined and rejected by the Court of First Instance in paras [52] to [55] of the judgment under appeal.

51 By the third part of the first ground of appeal, the appellant alleges infringement of his right to an effective legal remedy against the interference with his right to be informed in detail of the nature and cause of the accusation made against him by reason of his inclusion on the list at issue.

52 In that regard, however, it is appropriate to point out that, as is clear from para.[48] of this judgment, such a right to be informed, assuming it to be established, cannot be exercised by having recourse to the mechanisms for access to documents provided for under Regulation 1049/2001. It follows that no breach of such a right can result from a decision refusing access adopted under that regulation or, therefore, give rise to judicial censure, in favour of an application for annulment against such a decision. Accordingly, the third part of the first ground of appeal must be held to be unfounded.

53 It follows from all the foregoing that the first ground of appeal relied upon by the appellant in support of his appeal is unfounded in all of its three parts and must for that reason be rejected in its entirety.

The second ground of appeal, alleging infringement of the right of access to documents by reason of the misconstruction of the first and third indents of Article 4(1)(a) of Regulation 1049/2001 and the misapplication of Article 4(6)

—The appellant's arguments

54 By the first part of the second ground of appeal, the appellant submits that the Court of First Instance misapplied the exception based on the protection of the public interest as regards public security, provided for in the first indent of Art.4(1)(a) of Regulation 1049/2001, and therefore infringed his right of access to the documents.

55 The analysis by the Court of First Instance in paras [77] to [81] of the judgment under appeal, according to which all information held by the public authorities on persons suspected of terrorism must by definition remain secret, disregards the requirement that exceptions to a rule must be strictly construed and renders the principle of transparency wholly inoperative.

56 By the second part of the second ground of appeal, the appellant argues that the Court of First Instance also misapplied the exception based on the protection of the public interest as regards international relations, provided for in the third indent of Art.4(1)(a) of Regulation 1049/2001.

57 First, the Court of First Instance's interpretation in that connection in para.[79] of the judgment under appeal also disregards the requirement that any exception must be strictly construed.

58 Secondly, by starting from the false premise that the documents in question originated in non-member countries, whereas they in fact emanated from Member States, the Court of First Instance, in paras [80] and [81] of the judgment under appeal, misconstrued the meaning of "international relations" by applying it in respect of information transmitted to the Council by Member States, whereas that concept covers only the relations between the Union and non-member countries.

59 Thirdly, the Court of First Instance's finding that the non-disclosure of the documents requested is justified on the ground that co-operation between the Union and non-member countries must remain secret is mistaken inasmuch as the existence of such co-operation with the Philippines was public knowledge.

60 By the third part of the second ground of appeal, the appellant submits that the Court of First Instance erred in law in holding that the Council was entitled to refuse to disclose the identity of the non-member countries which had submitted documents to that institution, whereas his application and the first decision refusing access obviously related to the identity of Member States. In so doing, the Court of First Instance misconstrued Art.4(6) of Regulation 1049/2001 by failing to examine and to censure the refusal to allow the appellant partial access.

—Findings of the court

61 As is clear from Art.1 of Regulation 1049/2001, read, in particular, in the light of the fourth recital in the preamble, the purpose of the regulation is to give the fullest possible effect to the right of public access to documents held by the institutions.

62 However, it also follows from that regulation, particularly from the 11th recital in its preamble and from Art.4, which provides for a scheme of exceptions in that regard, that the right of access to documents is nonetheless subject to certain limitations based on grounds of public or private interest.

63 As they derogate from the principle of the widest possible public access to documents, such exceptions must, as the appellant has correctly observed, be interpreted and applied strictly (see, to that effect, *Netherlands and van der Wal* at [27]).

64 In that regard, however, it must be pointed out that, as is already clear from para.[34] of this judgment, such a principle of strict construction does not, in respect of the public-interest exceptions provided for in Art.4(1)(a) of Regulation 1049/2001, preclude the Council from enjoying a wide discretion for the purpose of determining whether disclosure of a document to the public would undermine the interests protected by that provision. For the reasons stated by the court in its examination of the first ground of appeal, the review by the Court of First Instance of the legality of a Council decision refusing access to a document on the basis of one of those exceptions is limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of assessment or a misuse of powers.

65 With the benefit of those preliminary considerations, it must be held, as regards the first part of the second ground of appeal, that, contrary to the appellant's submission and as the Council correctly contends, the Court of First Instance did not err in law in paras [77] and [78] of the judgment under appeal.

66 Indeed, the Court of First Instance having found, in para.[77] of the judgment under appeal, that it could readily be accepted that documents held by the public authorities concerning persons or entities suspected of terrorism and coming within the category of sensitive documents as defined by Art.9 of Regulation 1049/2001 must not be disclosed to the public in order not to prejudice the effectiveness of the operational fight against terrorism and thereby undermine the protection of public security, it could correctly conclude therefrom, in para.[78] of the judgment, that the Council did not make a manifest error of assessment in refusing access to the documents requested on the ground that their disclosure would undermine the public interest as regards public security.

67 With regard to the second part of the second ground of appeal, alleging misapplication of the exception relating to international relations provided for in the third indent of Art.4(1)(a) of Regulation 1049/2001, it must, by contrast, be accepted at the outset, without the need to examine the other arguments relied on by the appellant in connection with that part of that ground of appeal, that, by basing its reasoning on the circumstance that documents had been submitted to the Council by non-member countries, whereas it is clear from the case file, as indeed the Council accepts, that such documents emanated from Member States, the judgment of the Court of First Instance is vitiated by a distortion of the facts.

68 It is also clear that such distortion in this instance vitiated, to a very great extent, the reasoning developed in paras [79] to [81] of the judgment under appeal, following which the Court of First Instance concluded, in para.[82], that the Council had not made a manifest error of assessment in taking the view that disclosure of the document in respect of which disclosure was sought was likely to undermine the public interest as regards international relations.

69 It is settled case law that such a distortion of the facts can be relied on as a ground of appeal and may lead to annulment of the judgment vitiated by it.

70 In the present case, however, it must be noted that, as is clear from paras [65] and [66] of this judgment, the Court of First Instance correctly held that the first decision refusing access was validly based on the public-interest exception as regards public security under the first indent of Art.4(1)(a) of Regulation 1049/2001.

71 It must therefore be held that, even if the Court of First Instance had not distorted the facts in the manner described in para.[67] of this judgment, and supposing that it would, in that case, have concluded that the Council had been wrong to base its decision on the public-interest exception as regards international relations, that conclusion could not have led to the annulment by the Court of First Instance of the first decision refusing access, as that decision in fact remains valid in the light of the public-interest exception relating to public security.

72 In view of the foregoing, the distortion of the facts which vitiates the judgment under appeal does not affect the operative part of that judgment, with the result that it need not be annulled on that ground (see, to that effect, *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya v Commission* (C 442 & 471/03 P) not yet reported at [133] & [134]).

73 By the third part of the second ground of appeal, the appellant also alleges distortion of the facts by the Court of First Instance in confusing non-member countries and Member States. He submits that, because of that confusion, the Court

of First Instance failed to censure the refusal of partial access by the first decision refusing access in regard to the identity of the states which had sent documents to the Council.

74 In that regard, it is, however, sufficient to note that, contrary to the appellant's submission, that confusion had no effect on the reasoning which led the Court of First Instance to hold, in para.[99] of the judgment under appeal, that the Council was entitled to refuse to disclose the identity of the states which had drafted the documents in question.

75 As is clear from paras [95] to [97] of the judgment under appeal, the Court of First Instance based its reasoning in that respect on the fact that, under Art.9(3) of Regulation 1049/2001, the provision upon which the Council relied in the first decision refusing access, sensitive documents may be disclosed only with the consent of the originator, which was lacking in this case. As the Advocate General noted in points AG58 and AG59 of his opinion, Art.9(3) applies equally to documents originating in Member States and in non-member countries.

76 It follows from all of the foregoing that the second ground of appeal relied upon by the appellant in support of his appeal is unfounded in all of its parts and must therefore be rejected in its entirety.

The third ground of appeal, alleging infringement of the duty to state reasons

—The appellant's arguments

77 The appellant first of all argues that, so far as concerns both of the exceptions relied upon by the Council to justify the refusal of access to the documents in question, the Court of First Instance was wrong to satisfy itself, as is evident from paras [62] and [65] of the judgment under appeal, with the unduly brief and formulaic reasoning contained in that regard in the first decision refusing access, while at the same time supplementing it with its own reasoning in paras [77], [80] and [81] of that judgment.

78 As regards, next, the refusal of partial access, the Court of First Instance also accepted as sufficient, contrary to Art.253 EC, a statement of reasons in a standard formula, as is clear from para.[63] of the judgment under appeal.

79 Finally, with regard to the refusal to disclose the identity of the states which communicated the information in question, the Court of First Instance's confusion between Member States and non-member countries meant that it completely failed to review the reasoning that disclosure of the identity of the states concerned would threaten the public interest as regards public security or international relations, such failure of review constituting a breach of both Art.253 EC and Art.230 EC.

—Findings of the court

80 As is clear from settled case law, the statement of reasons required by Art.253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of

reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question of whether the statement of reasons meets the requirements of Art.253 EC must be assessed with regard not only to its wording, but also to its context and to all the legal rules governing the matter in question (see, in particular, *Interporc* at [55] and the case law there cited).

81 In the present case, the Court of First Instance correctly applied those principles and did not err in law in deciding that, brief though it may be, as regards both the total refusal of access and the refusal of partial access to the documents in respect of which disclosure was sought, the reasoning of the first decision refusing access was still adequate in the light of the context of the case and sufficient to enable the appellant to ascertain the reasons for the refusal and the Court of First Instance to carry out the review of legality incumbent upon it.

82 As the Court of First Instance correctly held in paras [62] and [63] of the judgment under appeal, and as the Council contends before this court, such brevity is justified, in particular, by the need not to undermine the sensitive interests protected by the exceptions to the right of access established by the first and third indents of Art.4(1)(a) of Regulation 1049/2001 through disclosure of the very information which those exceptions are designed to protect.

83 The need for the institutions to abstain from referring to matters which would thus indirectly undermine the interests which those exceptions are specifically designed to protect is emphasised in particular by Arts 9(4) and 11(2) of Regulation 1049/2001. The first of those provisions states that an institution which decides to refuse access to a sensitive document must give the reasons for its decision in a manner which does not harm the interests protected in Art.4 of Regulation 1049/2001. Article 11(2), for its part, provides in particular that, if a document is the subject of a reference in the register of an institution, such reference must be made in a manner which does not undermine the protection of the interests in Art.4.

84 The fact that, in the course of examining the substance of the dispute, the Court of First Instance took account of matters which do not appear explicitly in the statement of reasons for the first decision refusing access, including those set out in paras [77], [80] and [81] of the judgment under appeal, cannot invalidate the foregoing analysis.

85 As regards the statement of reasons relied upon by the Council in the first decision refusing access in so far as it refuses to disclose the identity of the states which sent documents to the Council, it is appropriate to observe that the Court of First Instance's confusion between Member States and non-member countries did not affect the reasoning followed by that court, in paras [64] and [65] of the judgment under appeal, for the purpose of determining whether that statement of reasons meets the requirements of Art.253 EC and of deciding that there was no breach of that provision.

86 The Court of First Instance referred in that regard, in para.[64], to the fact that the statement of reasons for the first decision refusing access suggests, first, that the

documents concerned are sensitive documents within the meaning of Art.9 of Regulation 1049/2001 and, secondly, that the originators of those documents opposed, under Art.9(3), disclosure of the information requested. It is common ground, in that regard, that the identity of the authorities concerned and, in particular, the question of whether they are authorities of Member States or non-member countries, are irrelevant.

87 It follows from the foregoing that the third ground of appeal relied upon by the appellant is unfounded and must for that reason be rejected.

The fourth ground of appeal, alleging infringement of the presumption of innocence and of the right to an effective legal remedy

—The appellant's arguments

88 The appellant submits that the Court of First Instance arbitrarily limited the scope of his action and, by so doing, failed to apply the presumption of innocence.

89 Contrary to what the Court of First Instance suggests in paras [50] to [56] of the judgment under appeal, the statement made by counsel for the appellant at the hearing, to the effect that the appellant was requesting access only to the documents concerning him, cannot in any way support the conclusion that his application for access sought to obtain disclosure of those documents only for the purposes of enabling him to assert his rights of defence in connection with pending Case T-47/03.

90 The appellant maintains that that application was intended to obtain, both for the public and for himself, access to the documents which justified his inclusion on the list at issue. Such access alone would provide an effective remedy for the infringement of the presumption of innocence of which he was the victim because of such inclusion on, and publication of, that list, by enabling a public reply and debate to be conducted both in general terms and as regards the evidence allegedly used against him.

91 By contrast, any access by the appellant to those documents in connection with Case T-47/03, to which the Court of First Instance refers in para.[55] of the judgment under appeal, would not afford him the effective legal remedy required by Art.13 of the ECHR for any person whose rights and liberties guaranteed by that convention have been infringed.

—Findings of the court

92 The appellant's fourth ground of appeal consists essentially in alleging an infringement of the presumption of innocence by virtue of his inclusion on the list at issue, which was subsequently made public, and in asserting that such infringement can justify access to the documents sought, since disclosure of those documents and the potential public debate concerning them would be the only effective means of securing a remedy for that infringement.

93 It must be stated in that regard that, although presented as ostensibly intended to take issue with an error of assessment by the Court of First Instance in regard to the scope of the action, such a ground of appeal in fact amounts fundamentally to a challenge to the lawfulness of the first decision refusing access on the ground that it

did not make public the documents in question and that, as a result, it deprived the appellant of the effective remedy to which he was entitled by reason of the fact that the presumption of innocence on which he must be able to rely had been infringed.

94 However, since it was not pleaded in support of the action for annulment of that decision brought before the Court of First Instance, such a ground of appeal constitutes a new plea in law which extends the subject matter of the proceedings and cannot therefore be pleaded for the first time at the appeal stage.

95 To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal the jurisdiction of the Court of Justice is confined to review of the findings of law on the pleas argued before the Court of First Instance (see, inter alia, *Commission v Brazzelli Lualdi* (C-136/92 P) [1994] E.C.R. I-1981 at [59]; *VBA v VGB* (C-266/97 P) [2000] E.C.R. I-2135 at [79]; *Henkel v OHIM* (C 456 & 457/01 P) [2004] E.C.R. I-5089 at [50]; and *JCB Service v Commission* (C-167/04 P) [2006] 5 C.M.L.R. 23 at [114]).

96 It follows that the appellant's fourth ground of appeal must be rejected as being inadmissible.

The fifth ground of appeal, alleging infringement of the right of access to documents on the ground of misconstruction of Articles 4(5) and 9(3) of Regulation 1049/2001

—The appellant's arguments

97 By the first part of the fifth ground of appeal, the appellant submits that the Court of First Instance erred in law in holding, in paras [64] and [96] of the judgment under appeal, that Arts 4(5) and 9(3) of Regulation 1049/2001 allow a refusal to disclose, not only the content of documents emanating from Member States unless they consent, but also the identity of those Member States, although the latter information cannot be described as "a document" within the meaning of those provisions. In so doing, the Court of First Instance improperly extended the scope of the exceptions set out in those provisions.

98 Furthermore, by thus preventing the identification of the Member State which holds the documents in question, the Court of First Instance's construction of those provisions deprives of practical effect the right of the party concerned to address the national authorities in order to try to obtain access to those documents under national law or, at least, affects that right adversely and disproportionately by requiring those concerned to launch proceedings in all the Member States which might hold those documents.

99 By the second part of the fifth ground of appeal, the appellant maintains that the Court of First Instance did not address his argument that the Council failed to state the grounds upon which disclosure of the identity of the Member States concerned could damage the public interest relating to public security or international relations.

—Findings of the court

100 As regards the first part of the fifth ground of appeal, it must be pointed out immediately that, as is clear from paras [97] and [98] of the judgment under appeal, it was not disputed before the Court of First Instance, which took it as established, a finding not challenged in the appeal, first, that the documents covered by the first decision refusing access are sensitive documents within the terms of Art.9 of Regulation 1049/2001 and, secondly, that the refusal to disclose the identity of the states in which those documents originated was based on Art.9(3), regard being had to the fact that the states concerned were opposed to the disclosure of such information.

101 In view of the special nature of sensitive documents, Art.9(3) of Regulation 1049/2001 requires the consent of the originating authority before such documents are recorded in the register or released. As the Court of First Instance correctly held in para.[95] of the judgment under appeal, it is clear from those provisions that the originating authority of a sensitive document is empowered to oppose disclosure not only of that document's content but even of its existence.

102 That originating authority is thus entitled to require secrecy as regards even the existence of a sensitive document and, in that regard, as the Council contends before the Court, the Court of First Instance acted correctly in law when it concluded, in para.[96] of the judgment under appeal, that such authority also has the power to prevent disclosure of its own identity in the event that the existence of that document should become known.

103 That conclusion, which is thus inevitable in the light of the wording of Art.9(3) of Regulation 1049/2001, is explicable in the light of the special nature of the documents covered by Art.9(1), the highly sensitive content of which justifies, as stated in the ninth recital in the preamble to that regulation, the requirement that they be given special treatment. That conclusion cannot therefore be held to be disproportionate on the ground that it may give rise, for an applicant refused access to a sensitive document, to additional difficulty, or indeed practical impossibility, in identifying the state of origin of that document.

104 As the legal analysis and findings of fact thus made by the Court of First Instance in paras [95] to [97] of the judgment under appeal are also sufficient in themselves to support the conclusion which that court reached in para.[99] of that judgment, namely that the Council was entitled to refuse to disclose the identity of the states concerned, it is unnecessary to examine the complaint alleging misconstruction of Art.4(5) of Regulation 1049/2001, since such an examination cannot, in any event, cast doubt on that conclusion or, therefore, on the operative part of the judgment under appeal.

105 As to the second part of the fifth ground of appeal, it must be held that, contrary to the appellant's submission, his argument that the Council wrongly failed to state the grounds upon which disclosure of the identity of the states concerned could have harmed the public interest as regards public security and international relations was indeed considered by the Court of First Instance.

106 In that regard, it must be observed that, in paras [64] and [65] of the judgment under appeal, the Court of First Instance held that, by citing Art.9(3) of Regulation

1049/2001 in the first decision refusing access, which necessarily intimated that the documents in question were sensitive documents, and by referring to the opposition of the states concerned to having their identity disclosed, the Council had placed the appellant in a position to understand the grounds of that decision and enabled the Court of First Instance to carry out its review thereof.

107 In para.[64], the Court of First Instance expressly noted that the two criteria for the application of Art.9(3) of Regulation 1049/2001 were, first, the fact that the document in question is a sensitive document and, secondly, the fact that the originating authority opposed disclosure of the information requested. By so doing, the Court of First Instance indicated, in an implicit but nonetheless certain manner, its view that such opposition was sufficient to justify the refusal by the Council of access to that information, without the Council having to carry out an assessment of the grounds for that opposition or, therefore, to state whether, and in what way, disclosure of that identity would undermine the interests protected by Art.4(1)(a) of that regulation.

108 As, therefore, neither of the two parts of the appellant's fifth ground of appeal is well founded, it must be rejected in its entirety.

109 It follows from all of the foregoing that one of the grounds of appeal must be declared inadmissible and the others unfounded and, accordingly, the appeal must be dismissed.

Costs

110 Under Art.69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Art.118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has applied for costs and the appellant has been unsuccessful, the latter must be ordered to pay the costs.

R1 On those grounds, the court (First Chamber)

HEREBY:

1. dismisses the appeal;
2. orders Mr Sison to pay the costs.

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FAMILY LIFE AND FREEDOM OF MOVEMENT AND RESIDENCE: FOCUS ON LGBT RIGHTS

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FAMILY LIFE AND FREEDOM OF MOVEMENT AND RESIDENCE: FOCUS ON LGBT RIGHTS

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

THE 'GLOBALISATION OF LOVE'

The EU is increasingly diverse and citizens are increasingly mobile

Example: in the Republic of Ireland (RoI), in 2011 census, 17% of the population in 2011 had been born outside the State; 12% were not Irish nationals (CSO 2012)

Biggest EU groups:

- England and Wales, Poland, Northern Ireland, Lithuania, Latvia, Romania

THE 'GLOBALISATION OF LOVE'

Civil Partnership (CP) statistics in R of Ireland show significant numbers of non-Irish nationals have entered into CPs; approximately 25% of CPs are not Irish nationals

Of the 2606 people who had entered into CP as of January 2014:

- 130 UK, 113 Brazil, 59 US, 47 Poland, 24 Philippines, 21 Australia, 20 Italy, 19 China, 19 France, 15 Mauritius, 14 Malaysia, 12 South Africa, 10 Venezuela, 9 Germany

C-147/08 *RÖMER V FREIE UND HANSESTADT HAMBURG*

"As a preliminary point, it should be observed that, as European Union law stands at present, legislation on the marital status of persons falls within the competence of the Member States."

That said, the EU arguably has an interest and competence where the recognition or non-recognition of a relationship affects the exercise of a right conferred by EU law – such as, prevent of discrimination in employment or free movement

FAMILY RIGHTS AND RECOGNITION

It has long been recognised that Union citizens are not atomised individuals, but have and form families, and have people who are dependent on them

Free movement rights would be greatly undermined if the EU recognised only the rights of *individuals* exercising free movement rights, and did not make provision for the family members and dependents of those individuals

On the other hand, issues of family recognition have proven to be contentious

The concept of family can differ significantly from member state to member state, depending on deep-seated cultural understandings

There is particular disagreement within the EU over the recognition of same-sex couples and 'rainbow' families

CONTEXT – CHARTER OF FUNDAMENTAL RIGHTS

EU Charter of Fundamental Rights applies to:

- the institutions and bodies of the EU

- the Members States, but only when implementing EU law.

Article 7 Everyone has the right to respect for his or her private and family life, home and communications.

Article 9 The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

CONTEXT – CHARTER OF FUNDAMENTAL RIGHTS

Article 20 Everyone is equal before the law.

Article 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…

Article 45 (1) Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

(2) Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

CONTEXT – TREATY ON EUROPEAN UNION (TEU)

Article 3(2) TEU – "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which **the free movement of persons is ensured** in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime."

CONTEXT –TFEU

Article 10 TFEU – "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age **or sexual orientation**."

Article 18 TFEU "…any discrimination on grounds of nationality shall be prohibited…"

Article 19(1) TFEU "Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or **sexual orientation**. …"

(See, for instance, the Framework Directive on Equal Treatment in Employment Council Directive 2000/78/EC)

CONTEXT –TFEU

Article 20(1) TFEU "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship. 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the **right to move and reside freely within the territory of the Member States;** …. These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder."

Article 21(1) TFEU "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect." …

C-34/09 *ZAMBRANO* [2011] ECR I-1177

Art.20 TFEU prevents an EU citizen being denied "the genuine enjoyment of the substance of the rights conferred by virtue of the status of citizen of the Union" (regardless of free movement)

(Though see C-4343/09 *McCarthy* and C-256/11 *Dereci*)

Non-recognition of same-sex relationships and LGBT families can undermine exercise of free movement rights (Rijpma and Koffeman 2014)

LGBT persons and same-sex couples may be reluctant to go to certain states because of non-recognition or may consciously choose some more liberal states over others

C-415/93 *Bosman* (1995) – national provisions precluding or deterring national from leaving country of origin to exercise free movement restrict the right of free movement (even if they apply equally regardless of nationality)

ECHR CASE LAW

All EU member states are parties to European Convention on Human Rights (ECHR)

ECHR does not require states to extend marriage to same-sex couples (*Schalk and Kopf v Austria* (2010))…

…but same-sex couples have a right to respect for their private and family life

'Family life' under Article 8 ECHR includes that of LGBT people, same-sex couples and their children

Article 14 ECHR precludes discrimination on the basis of sexual orientation in respect of Convention rights

Da Silva Mouta v Portugal (2001) – refusal of custody on basis of sexual orientation of father contravened Article 8 in conjunction with Article 14

See also *EB v France* (2007)

Vallianatos v Greece (2013) – confining civil unions to opposite-sex couples infringed Article 14 in conjunction with Article 8

ECHR CASE LAW

X v Austria (2013) – exclusion of same-sex couples from second parent adoption (when opposite-sex unmarried couples could apply for this option) infringed Article 14 in conjunction with Article 8

(but see *Gas and Dubois v France* (2012) – not a breach to treat married and unmarried couples differently)

Oliari v Italy (2015) – Italy's failure to introduce civil unions for same-sex couples infringed Article 8:

- "in the absence of a prevailing community interest being put forward by the Italian Government, 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 CASE LAW

Pajić v Croatia (2016) – blanket refusal of residence permit to same-sex partner from Bosnia and Herzegovina breached Article 14 ECHR read in conjunction with Article 8. Family reunification denied to same-sex unmarried couples but open to opposite-sex unmarried couples

Taddeucci and McCall v. Italy (2016) Italy's refusal to grant residence permit to non-EU same-sex partner of an Italian national infringed Art.14 read with Art. 8. "In deciding to treat homosexual couples in the same way as heterosexual couples without any spousal status, the State had breached the applicants' right not to be subjected to discrimination based on sexual orientation in the enjoyment of their rights under Art. 8…"

Treating dissimilar situations the same: Heterosexual couples could marry, whereas gay couples could not and did not (at the time) have access to civil unions, and therefore gay couples alone faced insuperable obstacles to recognition

FREE MOVEMENT/CITIZENS' DIRECTIVE

Directive 2004/38/EC 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

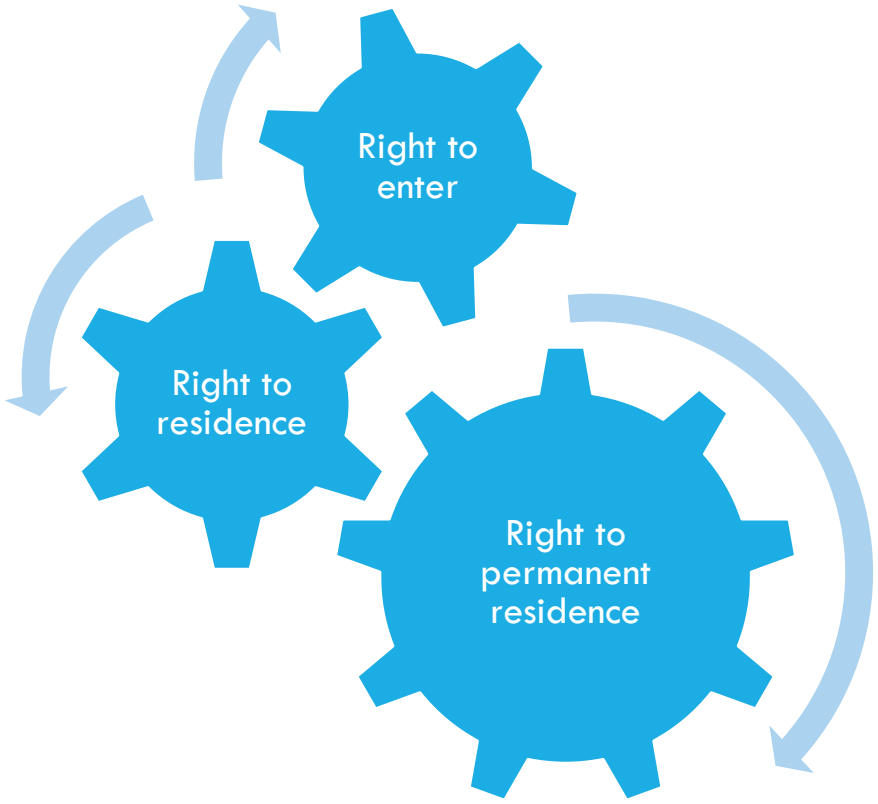
Sometimes called the Citizens' Directive

Allows Union citizens a right to move to other Member States to seek or take up employment, study, or live self-sufficiently

Addresses right of family members to accompany EU nationals

Rights of family members are connected to exercise of free movement by EU national – not independent or free-standing rights; conditional on exercise by EU national family member

FREE MOVEMENT DIRECTIVE



FREE MOVEMENT DIRECTIVE

Art. 5 – right of entry

Art. 6 – right of residence for up to 3 months without conditions

Art. 7 – right of residence for more than 3 months if -

- Union citizen is **a worker or self-employed**; or

- Union citizen is **self-sufficient** (has sufficient resources for themselves and family members), not liable to become a burden on social assistance and has comprehensive sickness insurance or

- Union citizen is **a student**, not liable to become a burden on social assistance and has comprehensive sickness insurance

- Union citizen is a **family member** of any of the above

FREE MOVEMENT DIRECTIVE

Article 16 – right of **permanent residence** for Union Citizen and family members after 5 years' residence (without conditions such as self-sufficiency)

Article 24 – right to **equal treatment**

Chapter VI – restrictions on right of entry and right of residence (very limited) – the more established a person is, the more difficult it is to remove them from the State

Article 27(2) –public policy measures must be proportionate and based on personal conduct of individual involved

RIGHTS OF FAMILY MEMBERS

Recital 5 of Free Movement Directive – “The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of "family member" should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.”

Some considerable resistance at time of drafting of Directive to recognition of same-sex couples – Parliament and NGOs pushed for this, but some member states and Commission resisted.

RIGHTS OF FAMILY MEMBERS

Recital 6 Free Movement Directive – "In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen."

Recital 31 Free Movement Directive – prohibits discrimination in implementation of directive on the basis of (amongst other grounds) **sexual orientation**

RIGHTS OF FAMILY MEMBERS

Rights of family members are contingent on exercise by Union citizen of his or her right of free movement – non-EU national family member has **no free-standing right** to travel independently of the Union citizen

Purpose is to protect family life of Union citizen

Does not apply where Union citizen is not exercising rights of free movement (remains in home state). In such cases, national law applies. (C-64-65/96 *Uecker and Jacquet* (1997)

Only genuine relationships recognised – safeguards against marriages of convenience and other abuses of rights or fraud in Directive (Article 35) (see also Civil Registration (Amendment) Act 2014)

CJEU CASE LAW - C-127/08 *METOCK V MINISTER FOR JUSTICE* (2008)

CJEU - Right to be accompanied by family member **is not contingent on family member having been lawfully resident in EU prior to entry** to the host State

Requirement of prior lawful residence in another member state was found to be unlawful

Irrelevant that couple met or married only after non-EU national entered EU (see 2015 Regulations in Ireland – "becomes a family member while in the State…" (Reg.3(1)(b)(iii))

Possible to travel with Union Citizen from outside EU to EU state other than that of the Union Citizen

Venue of marriage irrelevant – not necessary that couple married before exercising free movement rights

(Metock reversed decision in C-109/01 - *Secretary of State for the Home Department v Hacene Akrich* (2003))

SINGH – FAMILY RIGHTS OF RETURNING CITIZENS

C-370/90 *R v Immigration Appeal Tribunal and Surinder Singh* (1992)

"A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, his conditions were not at least equivalent to those which he would enjoy under Community law in the territory of another Member State. He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of that State under conditions at least equivalent to those granted by Community law in the territory of another Member State….

Consequently, Article 52 of the Treaty and Directive 73/148 …must be construed **as requiring a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone, with that spouse, to another Member State in order to work there as an employed person** as envisaged by Article 48 of the Treaty and returns to establish himself or herself as envisaged by Article 52 of the Treaty in the territory of the State of which he or she is a national. The spouse must enjoy at least the same rights as would be granted to him or her under Community law if his or her spouse entered or resided in the territory of another Member State."

See also C-456/12 O *v The Netherlands*

EIND

C-291/05 *Minister Voor Vreemdelingenzaken en Integratie v Eind* –

- "when a worker returns to the Member State of which he is a national, after being gainfully employed in another Member State, a third-country national who is a member of his family has a right under Art.10(1)(a) of Reg. 1612/68, which applies by analogy, to reside in the Member State of which the worker is a national, even where that worker does not carry on any effective and genuine economic activities. The fact that a third-country national who is a member of a Community worker's family did not, before residing in the Member State where the worker was employed, have a right under national law to reside in the Member State of which the worker is a national has no bearing on the determination of that national's right to reside in the latter State."

RIGHTS OF FAMILY MEMBERS – 2004 DIRECTIVE

Article 2(2): "Family member" under the Directive means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, **if the legislation of the host Member State treats registered partnerships as equivalent to marriage** and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the **direct descendants who are under the age of 21** or are dependants and those of the spouse or partner as defined in point (b);

(d) the **dependent direct relatives** in the ascending line and those of the spouse or partner as defined in point (b);

Article 3(2): more limited provision made for those falling outside Article 2(2) (see below)

RIGHTS OF FAMILY MEMBERS – 2004 DIRECTIVE

To what extent are same-sex couples and their families covered by the Directive?

Issue is complicated by the fact that same-sex unions are not uniformly recognised across the EU

Growing trend towards allowing same-sex unions (including marriage and registered partnership)…

…but there is a significant east-west divide, and a lack of consistency in recognition

RECOGNITION OF SAME-SEX RELATIONSHIPS

Across the EU, the recognition of same-sex relationships is uneven to say the least

- Same-sex marriage in Belgium, Denmark, Finland (from 2017), France, Ireland, Luxembourg, Netherlands, Portugal, Spain, Sweden (spouses)
- Same-sex marriage in England and Wales, and Scotland (all of UK except NI) (spouses)
- Civil partnerships in Northern Ireland, Austria, Croatia, Cyprus, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Malta, Slovenia and in some of jurisdictions that allow same-sex marriage
- Trend is towards recognition but significant east-west divide; some EU states make no provision for same-sex unions

RECOGNITION OF SAME-SEX RELATIONSHIPS

Safradin 2015 – Recognition issue is **'a legal jungle'**

Same-sex couple who marry in Belgium

Couple moves to Dublin for work – treated as married

Travels to Belfast for a week away – now treated as civil partners

Moves to Poland – relationship not recognised at all (though they may have free movement rights)

Even if couples have a right of entry and residence under Free Movement Directive, non-recognition for other purposes may disadvantage same-sex couples, and dissuade them from exercising free movement

1. SPOUSES

Spouse – not defined, but appears to mean the husband or wife of the EU national

Commission view *at time of drafting* – only opposite-sex spouse - but Commission view seems to have evolved since then

One might argue that the term could potentially include a same-sex spouse (term is gender neutral) but **no agreement or consensus on the matter**

- For EU to define autonomously on community-wide basis? Or for individual states to decide?

- Is this a matter for **the host state or home state** to determine?

If the EU national has a same-sex spouse under the law of his or her home state, but the host state does not recognise such a marriage what happens? Nothing in EU law or under ECHR requiring states to permit or recognise same-sex marriage (See *Schalk and Kopf v Austria* (ECHR, 2010)

Issue of private international law – but may have a bearing on free movement of EU nationals

SPOUSES – EARLIER CASES

Netherlands v Reed [1986] ECR 1283 – unmarried partner in a stable relationship is not a spouse – but "a member state which permits the unmarried companions of its nationals, who are not themselves nationals of that member state, to reside in its territory cannot refuse to grant the same advantage to migrant workers who are nationals of other member states." (Principle of equal treatment)

Grant v South-West Trains [1998] ECR I-621 – stable relationships between couples of the same sex not recognised as equivalent to marriage or stable heterosexual unions.

T-264/97 *D v Sweden and Council* [1999] ECH II-1: "Community notions of marriage and partnership exclusively address a relationship founded on civil marriage in the traditional sense of the term." – Marriage is an opposite sex union [28] (See also T-58/08 *Roodhuijzen* [2009] ECR II-3797)

SPOUSES - DIRECTIVE

The definition of family was the subject of some considerable debate at the time of the negotiation of the Free Movement Directive

Reluctance among member states and Commission to adopt a broad, unified approach to family and spouse

Directive represents something of a compromise between Parliament and Council

Unclear whether status of 'spouse' is to be determined by **host state or home state**

- Some argue that there should be mutual recognition (Rijpma and Koffeman 2014)

- Others maintain it is for the host state to determine whether someone is a spouse – matter of public policy (Safradin 2015 – "power lies implicitly in hands of host MS")

Uncertainty leads to a potentially uneven application of citizens' rights and may interfere with free movement decisions – LGBT couples less likely to move to certain states

SPOUSES - DIRECTIVE

Coman/Hamilton Case (Romania) C-673/16 (pending)– referred the question as to whether a same-sex couple are spouses or other family members to CJEU

Several Italian decisions in which Italian courts have recognised same-sex marriages celebrated in other States for the purpose of the Directive (even though such marriages are not recognised in Italy as marriages for general purposes)

This may lead to reverse discrimination (but that is for member state to resolve; not an issue in EU law)

ECtHR - *Hämäläinen v. Finland* [GC] - 37359/09 (2014) – for contracting states to define marriage

SPOUSES - DIRECTIVE

Formation and recognition of marriage generally a matter for member states but…

…may have to be read in light of non-discrimination provisions (cf *Pajić*)

Discrimination on the basis of sexual orientation not permitted

Bell (2005) – "Marriage is a status granted by national law; therefore the EU should not distinguish between legally contracted marriages within the member states."

See also *Windsor v New York* 570 U.S. ___ (2013) – US Supreme Court found federal non-recognition of same-sex marriages recognised by states to be unconstitutional (breach of 5th Amendment)

Safradin (2015) – points to a number of cases where the Italian courts have recognised foreign same-sex marriages and civil partnerships for the purpose of the Directive, citing free movement rights

SPOUSES - DIRECTIVE

Commission COM(2010) 747 final Green Paper

"The legal status acquired by the citizen in the first Member State should not be questioned by the authorities of the second Member State since this would constitute a hindrance and source of objective problems hampering the exercise of the citizens' rights."

SPOUSES - DIRECTIVE

If same-sex spouses are recognised as spouses for free movement purposes, do they have to be recognised for other social purposes?

Can a state simply be required to recognise for purpose of entry and residence, but then deny recognition as spouses for purposes of e.g. tax law, social security, family law?

These latter areas are matters within Member states' jurisdiction but denial of general recognition may also deter or fetter free movement (though general recognition may give rise to reverse discrimination)

Cf Brussels II bis – Council Regulation 2201/2003/EC – might member states be obliged to recognise foreign divorces of same-sex couples?

SPOUSES - DIRECTIVE

Ireland permits and recognises marriage of same-sex couples

Art.41.4 of the Constitution – "Marriage may be contracted in accordance with law by two persons without distinction as to their sex"

Ireland recognises a marriage entered into in a foreign state between a couple of the same-sex, as a marriage in Ireland:

S.12.(1), Marriage Act 2015 – "A marriage under the law of a place other than the State shall not be precluded from being recognised as a marriage by reason of the sex of the parties to the marriage."

No public policy reasons for not recognising a foreign same-sex marriage in Ireland – See also Art.18TFEU – ban on discrimination based on nationality

2. REGISTERED PARTNERS

Registered partnership contracted on basis of legislation of a Member State is recognised - **if the legislation of the host Member State treats registered partnerships as equivalent to marriage** and in accordance with the conditions laid down in the relevant legislation of the host Member State;

Two conditions

- host state must recognise registered partnerships and

- host state must recognise registered partnerships as equivalent to marriage

Some states may have registered partnership, but not recognise it as equivalent to marriage (strong v weak forms of registered partnership)

Ireland treats civil partners and spouses equally for immigration purposes – see SI 548/2015 European Communities (Free Movement of Persons) Regulations 2015

MARUKO, RÖMER, HAY

Framework Directive on Employment Equality 2000/78/EC

Maruko (2008) "… the combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation … under which, after the death of his life partner, the surviving partner does not receive a survivor's benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit."

Direct discrimination on basis of sexual orientation

Based on comparability of union with marriage in relation to specific matter at hand

Hay (2012) – French PaCS comparable – marriage leave and bonus

CIVIL PARTNERSHIP RECOGNITION IN IRELAND

Civil partnerships available to same-sex couples from January 2011 to November 2015 – similar in most respects to marriage

Civil partnerships **closed to new entrants as of 16 November 2015** (with some very rare exceptions) (See Marriage Act 2015)

Existing civil partnerships still recognised

Section 5 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 - Minister for Justice and Equality may designate classes of relationship between same-sex couples from other jurisdictions as civil partnerships in Ireland **provided they were entered into before 16 May 2016 (Marriage Act 2015)**

Not all foreign civil partnerships/registered partnership/civil unions are recognised in Ireland

CIVIL PARTNERSHIP RECOGNITION IN IRELAND

Conditions for recognition: CPCROC Act 2010:

- "S.5.- (1) The Minister may, by order, declare that a class of legal relationship entered into by **two parties of the same sex** is entitled to be recognised as a civil partnership if under the law of the jurisdiction in which the legal relationship was entered into-
  - (a) the relationship is **exclusive** in nature,
  - (b) the relationship is **permanent unless the parties dissolve it through the courts,**
  - (c) the relationship has been **registered** under the law of that jurisdiction, and
  - (d) the rights and obligations attendant on the relationship are, in the opinion of the Minister, sufficient to indicate that the relationship would be **treated comparably to a civil partnership.**"

CIVIL PARTNERSHIP RECOGNITION IN IRELAND

To be recognised as civil partners in Ireland:

- Couple must be **of the same sex –** opposite-sex civil partnerships or similar registered partnerships are not recognised (opposite-sex marriage treated as marriage)

- Couple will **not be recognised** as civil partners if they are **within the prohibited degrees of relationship** for civil partnership, as laid down in Irish law

- Union must be **dissolvable only by court order –** thus French registered partnerships are not recognised in Ireland

- Conditional on ministerial order recognising the class of relationship

- Registered partnership must have been **entered into before 16 May 2016 (Marriage Act 2015)**

CIVIL PARTNERSHIP RECOGNITION IN IRELAND

Several classes of foreign legal relationships entered into abroad before 16 May 2016 are recognised as civil partnerships in Ireland

Same-sex civil unions from Austria, Croatia, Finland, Germany, Malta, Sweden, UK (amongst others) are all recognised as civil partnerships

But some not are recognised as CPs in Ireland- French PaCS not recognised because it can be dissolved without a court order (Greece, Cyprus, Italy, Slovenia, Estonian civil unions not recognised as civil partnerships in Ireland)

3. POSITION OF DE FACTO PARTNERS

Article 3(2), Free Movement Directive

"Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State **shall**, in accordance with its national legislation, **facilitate entry and residence** for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are **dependants or members of the household of the Union citizen** having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen; [SeeC-1/05 *Jia* - 'not in position to support themselves'

(b) the partner with whom the Union citizen **has a durable relationship, duly attested.**

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

CASE C-83/11, *RAHMAN,* [2012] ECR I-0000, PAR. 21

'Whilst it is therefore apparent that Article 3(2) of Directive 2004/38 **does not oblige the Member States to accord a right of entry and residence** to persons who are family members, in the broad sense, dependent on a Union citizen, the fact remains, as is clear from the use of the words 'shall facilitate' in Article 3(2), that that provision **imposes an obligation on the Member States to confer a certain advantage,** compared with applications for entry and residence of other nationals of third States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen.'

Court found that Art.3(2) was imprecise and gave states a 'wide discretion' as regards factors to be taken into account; not required to grant every application

However, criteria cannot render Art.3(2) ineffective

CASE C-83/11, *RAHMAN,* [2012] ECR I-0000, PAR. 21

"1. On a proper construction of Article 3(2) of Directive 2004/38/EC …:

– the Member States are **not required to grant every application for entry or residence** submitted by family members of a Union citizen who do not fall under the definition in Article 2(2) of that directive, even if they show, in accordance with Article 10(2) thereof, that they are dependants of that citizen;

– it is, however, incumbent upon the Member States to ensure that their **legislation contains criteria which enable those persons to obtain a decision on their application for entry and residence that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons;**

– the Member States have a **wide discretion when selecting those criteria,** but the criteria must be consistent with the normal meaning of the term 'facilitate' and of the words relating to dependence used in Article 3(2) and must not deprive that provision of its effectiveness; and

– every applicant is entitled to a judicial review of whether the national legislation and its application satisfy those conditions."

CASE C-83/11, *RAHMAN,* [2012] ECR I-0000, PAR. 21

"2. In order to fall within the category, referred to in Article 3(2) of Directive 2004/38, of family members who are 'dependants' of a Union citizen, the **situation of dependence must exist in the country from which the family member concerned comes, at the very least at the time when he applies to join the Union citizen on whom he is dependent.**

3. On a proper construction of Article 3(2) of Directive 2004/38, the Member States may, in the exercise of their discretion, impose particular requirements relating to the nature and duration of dependence, provided that those requirements are consistent with the normal meaning of the words relating to the dependence referred to in Article 3(2)(a) of the directive and do not deprive that provision of its effectiveness…."

POSITION OF DE FACTO PARTNERS

A much less concrete position – shall, in accordance with its national legislation, **facilitate** entry and residence; not required to grant every application (*Rahman*)

Not an automatic right, but appears to require examination of the circumstances

Relationship must be durable, and duly attested

Must be evidence of relationship

Clear reasons needed to justify refusal

Bell (2005) – "cannot have a total ban on admission of unmarried partners"

Article 21 Charter and Recital 31 of Directive – **cannot discriminate on the basis of sexual orientation**

POSITION OF DE FACTO PARTNERS

Couples and children who do not fall within 'family members' definition may qualify under Art.3(2), but position is more precarious

If registered union or marriage not recognised, arguably, it may still provide sufficient evidence of a durable relationship – Rijpma and Koffeman (2014) –

- "It is submitted that a host Member State that does not provide for any form of legal recognition of same-sex relationships, must accept that the condition that the relationship is duly attested is fulfilled in [cases where] the partners have entered into a registered partnership or marriage in another State". [475]

Non-recognition would potentially impede free movement rights

4. CHILDREN

If Union citizen is a legal parent of child, e.g. child is a biological child or adopted child of citizen, and is under 21 or is a dependant – child is a family member

If Union citizen's spouse or registered partner is a legal parent of child, e.g. child is a biological child or adopted child of spouse or registered partner, and is under 21 or is a dependant – child is a family member

What happens if Union citizen is a social parent, but not a legal parent **and** marriage/registered partnership not recognised in host state – relationship with child might not be recognised

Union citizen would have to fall back on "other family members" provision (Art. 3(2)) – dependants or members of the household of the Union citizen

But rights in such cases are not automatic and much more precarious

RIGHTS OF FAMILY MEMBERS

Right to accompany Union Citizen – rights are dependent on Union citizen's rights

Right to a residence card – Articles 9-11

Article 12 – death or departure of Union citizen – no effect on rights of family members who are nationals of a member state

- Non-EU national family members are not affected by death of Union citizen if family member has been living in state for **at least one year** before Union citizen's death (but must have a job or sufficient resources)

RIGHTS OF FAMILY MEMBERS

Article 13 – divorce, annulment, termination of registered partnership - no effect on rights of family members who are nationals of a member state

- Non-EU national family members are not affected by divorce from a Union citizen provided (but must have a job, be self-employed or have sufficient resources)

- marriage had **lasted at least 3 years,** including **one year in the host state,** or
- non-EU national has custody of Union citizen's children; or
- difficult circumstances (e.g. domestic violence) warrant allowing non-EU national to remain; or
- non-EU national has right of access to child in the host state

RIGHTS OF FAMILY MEMBERS

Permanent Residence after 5 continuous years' residence alongside Union citizen (See Article 16)

Right of permanent residence also extends to family members who are not EU nationals who have legally resided with the Union citizen in the host state for a continuous period of 5 years

Exemptions for retired and incapacitated workers and their families (Article 17)

Once acquired, right of permanent residence can generally be lost only through absence exceeding two consecutive years

FREE MOVEMENT DIRECTIVE IN IRELAND

Transposition - 2006 Regulations (SI No. 656 of 2006), amended in 2008 now replaced by SI No 548/2015 European Communities (Free Movement of Persons) Regulations 2015

Divides family members into

- 'qualifying family members' – spouses, civil partners and descendants ('family members' as defined by the Directive) and
- 'permitted family members' – including partners with whom the citizen has a durable relationship, duly attested

Civil partners and spouses now treated the same – **but** civil partnership defined as a civil partnership recognised in Ireland under s.5 of CPACROC Act 2010 – some registered partnership excluded from recognition

FREE MOVEMENT DIRECTIVE IN IRELAND

Qualifying Family Members – automatically recognised once they produce documentary evidence of relationship

Permitted Family Members – have to provide evidence of relationship and satisfy Minister that they are entitled to be treated as a permitted family member – a much more rigorous examination of their circumstances applies

FREE MOVEMENT DIRECTIVE IN IRELAND

Permitted Family Members (Reg.5 of 2015 Regulations)

May apply to Minister for decision that he or she should be treated as permitted family member

Evidence required that he or she is a member of the Union citizen Family. In particular: “documentary evidence of the existence of a durable relationship with the Union citizen”

Minister “shall cause extensive examination of the personal circumstances of the applicant” to be carried out in order to decide whether person should be treated as a permitted family member

Looks to nature and duration of relationship; ability of Union citizen to support applicant

OTHER MATTERS

Safeguards against Marriages of Convenience and Civil Partnerships of Convenience (see also Civil Registration (Amendment) Act 2014)

Transgender people – recognition varies from State to State but see *Goodwin v UK* (ECHR 2002) – refusal to recognise preferred gender of transgender person breached Articles 8 and 12 ECHR (See Gender Recognition Act 2015)

Family Reunification Directive 2003/86/EC – not applicable in Ireland – spouse and minor children; *may* authorise entry and residence of registered partners and unmarried partners

THANK YOU!

CASE STUDIES

DISCRIMINATION AND FREEDOM OF MOVEMENT AND RESIDENCE

1. John and Luis are a same-sex couple (both male). They live in Cardiff, Wales. John is a UK national and Luis is a Brazilian national. They have been living together for 10 years. They entered into a civil partnership in 2009. They have been married since 2015. They have a child, Mary. Both John and Luis are recognised as the legal parents and guardians of Mary, whom they have adopted under UK law.

   (a) A firm in Spain has offered John a job. Advise John and Luis on their rights to free movement and residence under EU law.

   (b) Would your answer to (a) be different if John and Luis were not married but living together in the UK for 10 years?

   (c) Would your answer to (a) be different if John and Luis wished to move to Bulgaria, where John had been offered a job? Bulgaria does not have civil partnership or marriage for same-sex couples.

2. Beata and Svetlana are a same-sex couple (both female). They live in Poland. Beata is a Polish national and Svetlana is a Russian national. Their relationship is not recognised in Poland. They have been living together for two years. They wish to move to Ireland so that Beata can seek employment.

   (a) Advise Beata and Svetlana on their rights to free movement under EU law.

   (b) Advise Beata and Svetlana on their right to return to Poland and to reside there together after having worked in Ireland for 2 years.

   (c) Would your answer to (b) be any different if Beata and Svetlana married each other while in Ireland?

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ERA SEMINAR (DUBLIN)

Tuesday 14th March 2017

"How to Litigate the Right to Family Life before the European Courts"

Lecturer: Dr. Sarah Fennell BL

ERA Seminar

- Taking a Case to the Court of Justice of the European Union (CJEU) with particular reference to Article 267 TFEU

- Jurisdiction of the General Court

Most Common Types of Cases before the CJEU

1. Enforcing the Law (Infringement Proceedings): Arts. 258-260 TFEU

2. Annulling EU Legal acts (Actions for Annulment): Article 263 TFEU

3. Interpreting the Law (Preliminary Rulings): Article 267 TFEU

Jurisdiction of General Court

- Jurisdiction to hear and determine at first instance actions of proceedings referred to in Articles 263, 265, 268, 270 and 272 with the exception of those assigned to a specialised court and those reserved in the Statute for CJEU
- Jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267 in specific areas laid down by the Statute
- Where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the CJEU for a ruling
- Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the CJEU under the conditions and within the limits laid down by the Statute if there is a serious risk of the unity or consistency of Union law being affected.

Articles 258-260 TFEU

- **Article 258 TFEU:**
- Commission fulfills its watchdog role as guardian of the Treaties
- Types of Breach by Member States of Community law e.g. failure to implement a Directive or inadequate implementation of EU law
- Procedure
- State Defences
- **Article 259 TFEU:**
- Mechanism for one Member State to initiate action against another Member State
- **Article 260 TFEU:**
- Lump sum or penalty payment

Article 263 TFEU

- Central article for challenging acts of Community institutions
- Institutions/Bodies that may have their acts or legislation reviewed
- Acts/legislation that may be challenged - see Case *C-540/03 European Parliament v. Council* [2006] ECR I-5769 on challenge brought to the Family Reunification Directive
- Grounds that form the basis for a challenge - see in particular in the context of family life, the general principles of EU law to include proportionality, legal certainty, legitimate expectations and non-discrimination
- Time limits
- Categories of applicant that may challenge acts
- Related actions: Art. 279 TFEU (Interim measures), Art. 265 TFEU (Failure to act) and Art. 277 TFEU (Plea of Illegality)

- Article 267 TFEU reads:

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 interpretations of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court of tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

The Provisions which can be Referred under Article 267 TFEU

(i) References can be made concerning the interpretation of the Treaties.

(ii) References can be made concerning the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Community.

The Courts or Tribunals to Which Article 267 TFEU Applies

- Question one of Community and not national law
- What is more significant than the label attached is whether the body performs judicial functions
- Case by case determination
- The ECJ in *Dorsch Consult*, Case C-54/96 [1997] ECR I-4961 provided a list of what constitutes a 'judicial function' for the purposes of Article 267 TFEU to include:

(i) Whether the body is established by law;
(ii) Whether it is permanent;
(iii) Whether its jurisdiction is compulsory;
(iv) Whether its procedure is *inter partes*;
(v) Whether it applies rules of law;
(vi) Whether it is independent.

Obligation or Discretion to Make a Preliminary Reference

- Article 267 TFEU draws a distinction between the courts against whose decision there is no judicial remedy in national law and are therefore obliged to refer where this is necessary for the interpretation or validity of EU law (Article 267(3)) and the courts which enjoy a discretion as to whether to make a preliminary reference (Article 267(2)).

- The ECJ established in *Köbler v. Austria*, Case C-224/01, [2003] CMLR 1003, that Member States can be held liable for breaches of EU law committed by their Supreme Courts, with one of the circumstances being non-compliance by the court in question with its obligation to make a preliminary reference under Article 267(3) TFEU.

- 'Concrete theory' and 'Abstract theory' - see *Costa*, Case 6/64, [1964] ECR 585 and *Lyckeskog*, Case C-99/00, [2002] ECR I-4839.

The Circumstances in Which a Preliminary Reference May be Made by National Courts

Broadly speaking, there are three situations which may result in a preliminary reference:

- Where a piece of secondary Community law may be invalid;
- Where national law might be in conflict with EU law;
- Where there is doubt as to how Community law is to be applied.

Exceptions to the Obligation to Refer

1. Facts virtually identical to earlier case law – see *Da Costa*, Cases 28-30/62 [1963] ECR 31.

2. There exists previous case law – see *CILFIT* Case 238/81, [1982] ECR 3415.

3. The answer is obvious – see *CILFIT* Case 238/81, [1982] ECR 3415.

The Circumstances under Which the ECJ may Declare a Reference Inadmissible

1. If it concerns a purely hypothetical question – see *Borker v. Paris Bar* Case 138/80 [1980] ECR 1975.

2. If the ECJ considers that the parties to the dispute had contrived together in the absence of a genuine dispute – see *Foglia v. Novello (No .2)* Case 244/80 [1981] ECR 3045.

3. If the questions raised are not relevant to the resolution of the substantive action in the national court – see *Meilicke* Case C-83/91 [1992] ECR I-4871.

4. If the questions are not articulated clearly enough for the ECJ to be able to give any meaningful legal response.

5. If the facts are insufficiently clear to enable it to apply the relevant legal rules.

Statute of the CJEU

- Title III – Procedure before the CJEU
- Article 20 – the procedure before the CJEU shall consist of two parts: written and oral
- Article 23 – Cases governed by Article 267 TFEU
- Article 23a – Rules of Procedure may provide for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice an urgent procedure.

Rules of Procedure of the CJEU

- Consolidated version of the Rules of Procedure of the Court of Justice of 25th September 2012 (as amended on 18 June 2013 and 19 July 2016)

- Title III – References for a Preliminary Ruling

- Article 94 – Content of the request (i) summary of the subject matter and accounts of facts on which the questions are based (ii) tenor of any national provisions and where, appropriate, the relevant national case-law (iii) statement of reasons which prompted the reference

- Article 96 – Participation in preliminary ruling proceedings

- Article 99 – Reply by reasoned order

Rules of Procedure of the CJEU

- **Chapter 2 – Expedited Preliminary Ruling Procedure**

- Article 105 – Expedited Procedure derogating from the provisions of the Rules
- Ordinary or Standard Procedure - delays of up to 16.8 months and this necessitated introduction of speedier reference mechanisms for limited categories of cases.
- Article 105(1) – statements or written observations may be lodged within a time-limit prescribed by the President which shall not be less than 15 days
- Article 106 – transmission of procedural documents

Rules of Procedure of the CJEU

- **Chapter 3 – Urgent Preliminary Ruling Procedure**

- Scope: areas covered by Title V of Part Three of TFEU

- Decision as to urgency: this is taken by the designated Chamber, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General

- Article 109 – the decision to deal with the reference under the urgent procedure shall prescribe the time-limit within which those parties or entities may lodge statement of case or written observations

-The designated Chamber may, in cases of extreme urgency, decide to omit the written part of the procedure referred to in Article 109(2).

Recommendations to National Courts and Tribunals in relation to the Initiation of Preliminary Ruling Proceedings

- The Recommendations (2016/C439/01) replace the Information Note on references from national courts for a preliminary ruling (OJ C 160, 28.5.2011).

- The following are some of the Recommendations:

- a reference for a preliminary ruling may prove particularly useful when there is a new question of interpretation of general interest for the uniform application of EU law, or where the existing case-law does not appear to be applicable to a new set of facts

- the referring court or tribunal must set out the reasons which prompted it to inquire about the interpretation or validity of provisions of EU law and the relationship between those provisions and the national legislation applicable to the main proceedings

- the request for a preliminary ruling should be drafted simply, clearly and precisely, avoiding superfluous detail.

- Since the CJEU has no jurisdiction to give a preliminary ruling where a legal situation does not come within the scope of EU law, any provisions of the Charter that may be relied upon by the referring court or tribunal cannot, of themselves, form the basis for such jurisdiction.

Recommendations (Ctd).

- About 10 pages is often sufficient to set out in a proper manner the context of a request for a preliminary ruling.

- The request must contain, in addition to the text of the questions:

(i) A summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions referred are based;

(ii) The tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;

(iii) A statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law and the relationship between those provisions and the national legislation applicable to the main proceedings.

The Recommendations also contain an Annex which address the essential elements of a request for a preliminary ruling and include: the referring court or tribunal, the parties and their representatives, the subject matter of the dispute, the grounds for reference, and the questions referred .

Recommendations (Ctd).

- **Conditions for the application of the expedited and urgent procedures**

- Application for expedited procedure must only be sought in particular circumstances that warrant the Court giving its ruling quickly
- Application for urgent procedure must be requested only where it is absolute necessary e.g. proceedings concerning parental authority or custody of young children.
- Request must set out precisely the matters of fact and law which establish the urgency and, in particular, the risks involved in following the ordinary procedure.

Recommendations (Ctd).

- In so far as is possible, the referring court or tribunal must also briefly state its view on the answer to be given to the questions referred

- The request for the application of the expedited or urgent procedure must be submitted in an unambiguous form that enables the Registry to establish immediately that the file has to be dealt with in a particular way

- The order for reference must be concise where the matter is urgent, to help ensure the rapidity of the procedure.

Practice Directions to Parties Concerning Cases brought before the Court (31.1.2014)

- By means of a "working tool" for legal practitioners, the ECJ had published *Notes for the Guidance of Counsel (2009)* which addressed the steps in preliminary reference proceedings before the ECJ. These have now been included in Practice Directions to Parties concerning cases brought before the Court.

- The procedure before the CJEU is to consist as a general rule, of a written and an oral part.

- The purpose of the written part in preliminary reference proceedings is to put before the Court the observations which the interested persons referred to in Article 23 of the Statute intend to submit concerning the questions.

- The oral part is intended to allow the Court to complete its knowledge of the case by the possible hearing of submissions from those parties or interested persons at a hearing, and if appropriate, by hearing the Opinion of the Advocate General.

- In preliminary rulings, it is for the referring court or tribunal to rule on the costs of the proceedings.

Practice Directions to Parties Concerning Cases brought before the Court (31.1.2014)

- Where a party considers it necessary that its identity or certain information concerning it should not be disclosed in a case brought before the Court, it may request that the Court "anonymise" the relevant case, in whole or in part.

- The written part of the procedure in preliminary references is characterised by the absence of adversarial proceedings, the interested persons referred to in Article 23 of the Statute being merely requested to submit any observations they may make on the questions referred by a national court or tribunal, without as a general rule knowing the position adopted by the other interested persons on those questions.

- The written observations must be lodged within a time limit of two months from service of the request for a preliminary ruling (extended on account of distance by a single period of 10 days), that cannot otherwise be extended.

- The written pleadings or observations lodged are presented in a form in which they can be processed electronically by the court and that, in particular, documents can be scanned and character recognition used.

Practice Directions to Parties Concerning Cases brought before the Court (31.1.2014)

- The written pleadings or observations must be drafted in clear, concise language.

- Only the documents expressly provided for by the procedural rules may be lodged at the Registry and must be lodged within the prescribed time-limits and observing the requirements set out in Article 57 of the Rules of Procedure.

- An oral hearing is arranged by the Court whenever it is likely to contribute to a better understanding of the case and the issues raised by it, whether or not a request to that effect has been made by the parties or the interested persons referred to in Article 23 of the Statute.

- Where those parties or interested persons consider that a hearing must be arranged in a case, the onus is on them as soon as they have received notification of the end of the written part of the procedure to inform the Court by letter why they wish to be heard.

- Before the hearing begins, the members of the formation of the Court usually hold a short meeting with the representatives of the parties of interested persons about the organisation of the hearing.

Practice Directions to Parties Concerning Cases brought before the Court (31.1.2014)

- The normal procedure at the hearing:

(i) The oral submissions

- Only the decisive points for the purposes of the Court's decision must be brought to its attention

- As a general rule, the speaking time is fixed at 15 minutes. However, that duration may be made longer or shorter depending on the nature or the specific complexity of the case, the number and procedural status of the participants in the hearing and any measures of organisation of procedure.

- If the parties have a text available, however short, of notes for the oral submissions or an outline of their argument, it should be sent in advance to the interpretation directorate.

(ii) Questions from the members of the Court

- The persons presenting oral argument may be requested, at the end of the oral submissions, to answer additional questions from the members of the court.

(iii) Replies

- After that exchange, the representatives of the parties or the interested persons finally have the opportunity, if they consider it necessary, of replying briefly. Those replies, of a maximum duration of five minutes each, do not constitute a second round of oral submissions.

Selection of Irish Preliminary References in Family and Child Law

- Case C-428/15, *Child and Family Agency v J.D.*, 27th October 2016 – Scope and conditions applicable to Article 15 of BrusselsII*bis*

- Case C-173/16 *M.H. V. M.H.* - Order of the CJEU of 22nd June 2016 – Determination of the time when a court is seised under BrusselsII*bis*

Selection of Irish Preliminary References in Family and Child Law

- Case C-92/12 PPU, *HSE v S.C. And A.C.,* 26th April 2012 – Material scope of Article 56 of BrusselsII*bis*

- Case C-400/10 PPU, *McB v E*, 5th October 2010 Rights of Custody in context of child abduction.