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# The European Union's Charter of Fundamental Rights two years later

by

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## Abstract

After the entry into force of the Lisbon Treaty, the European Union's Charter of Fundamental Rights has found a place among the formal sources of EU law, and has become a standard of review for the validity of EU acts. This article aims to analyse whether this momentous change is reflected in the judgments of the Court of Justice, and more precisely how the Luxembourg judges are dealing with this source. From an analysis of the cases, it emerges that there still are some uncertain issues, such as the extent of the competences of the EU, the paradigmatic function of the case-law of the European Court of Human Rights, the possibility to bypass the limits of the European Convention's direct effect through the application of the Charter's equivalent rights.

## Key-words

European Union's Charter of Fundamental Rights; Court of Justice of the European Union; Fundamental Rights; Competences of the European Union



## Introduction and purpose of the paper

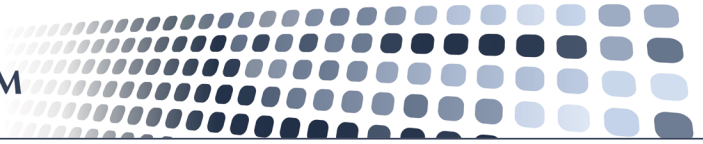
The purpose of this paper is to take stock of how the Charter has been applied since its re-birth in 2009. To do so, I examine the case-law of the Court of Justice to ascertain whether this revitalised instrument contributes to the emancipation of the European Union (EU) from its alleged pro-market bias and facilitates its development into a more constitutionally-mature environment, where competing values are balanced and fundamental rights are, in principle, ensured regardless of their trade-restrictiveness. There have been too few decisions to allow for general remarks or reasonable predictions, but the detection of some trends may be possible; in particular, verification of whether application of the Charter has indeed brought added value to the legal reasoning of the Court.

In the first part of the paper, I summarise those features of the Charter that might trigger this ‘sea-change’ effect (both in terms of normative content and historical impact). The second part comprises a judicial review of the most relevant recent decisions, followed by a few tentative conclusions.

### 1. The Charter and its content

The original purpose of the European Union’s Charter of Fundamental Rights (the Charter)<sup>I</sup> was to consolidate those fundamental rights applicable at the EU level into a single text “*to make their overriding importance and relevance more visible to the Union’s citizens*”<sup>II</sup>. As such, it should have served as a showcase of the achievements of the EU in the field of human rights protection.<sup>III</sup>

This effort was premised on the reassuring assumption that the rights listed would not entail additional State duties; the modest purpose of the Charter, as reflected in the Preamble, was that of “*making those rights more visible*,”<sup>IV</sup> *i.e.* not to create them anew (nor to extend the existing ones).



In fact, this “restatement” approach<sup>V</sup> is not reflected by the final text of the Charter.<sup>VI</sup> Granted, all rights listed in the Charter are traceable either to the common constitutional traditions, the general principles of the EU, the European Convention on Human Rights (ECHR), the European Social Charter or other shared instruments.<sup>VII</sup> However, not all of them were already recognised as fundamental principles of the EU. The Charter did not invent any new rights, but certainly smuggled into the Union some that had not been previously contemplated as Union rights *per se*. The drafters put together civil, political and cultural rights, on the one hand, and a selection of social and economic rights, on the other hand.<sup>VIII</sup>

This approach had been deliberately avoided in previous codification efforts (*e.g.* the ECHR is mostly concerned with the former kind of rights, but consider also the separation of the 1966 UN Covenants<sup>IX</sup>). The classic (and simplistic) view is that civil rights and liberties mostly require that States abstain from acting against them (a negative obligation), whereas economic and social rights impose a positive obligation on States to provide their citizens with tangible benefits, through which the enjoyment of those rights is possible. Accordingly, States are reluctant to enter into commitments.

Instead, the concept that no new State obligations could be derived from the Charter prevented at the outset the trite debate about negative and positive obligations, and defused concerns that positive rights, once written into the Charter, might give rise to obligations enforceable in courts. In fact, the reality now might be a little different, and the issue of enforceability of positive obligations might indeed arise (see the cases analysed below).

Concern about the direct invocability of certain norms is, in fact, visible in the Charter itself, which specifies that its provisions can be either rights or principles (or both).<sup>X</sup> The main purpose of this distinction was clearly to single out those clauses that could not be deemed directly enforceable, and Art. 52(5) – a clause that was introduced at the request of the United Kingdom – tries to make this point painstakingly clear.<sup>XI</sup>

However, in order for this distinction to be relevant a head-count would be necessary: which of the provisions are rules and which are principles? The Charter is silent or ambivalent on this point, and the Presidium’s explanations failed to establish clear distinctions.<sup>XII</sup> Ultimately, it seems to be something for case-law to decide upon; the courts will clarify which principles deserve direct application, *i.e.* which economic rights impose



positive obligations on Member States.<sup>xiii</sup> Below, in the review of case-law, this case-by-case adjustment of the scope and enforceability of the Charter emerges with some clarity.

## 2. Application of the Charter: the horizontal provisions

Together with the allegedly descriptive nature of the Charter, the most important limitation for its applicability, which should have initially reassured recalcitrant Member States to approve the document, is that it is only binding on EU bodies and on Member States when they “*are implementing Union law.*”<sup>xiv</sup> *A contrario*, States have no obligation to comply with the Charter when they are not acting as the EU’s agents,<sup>xv</sup> *i.e.* when acting on purely domestic matters. However, this specification merely shifts the focus to the next question: when is it that States act in the implementation of EU law? In *ERT*, the Court found that EU human rights law applies to Member States not only when they are implementing EU law, but whenever they are “*acting within the scope of Community law.*”<sup>xvi</sup> If this is the criterion, then the Charter applies not only when States directly implement an EU norm, but also when they derogate therefrom,<sup>xvii</sup> maybe even when their acts may simply affect Union law at large.<sup>xviii</sup> The external limits of the Charters’ effects are still to be delineated, admittedly, and will probably remain unresolved unless the Court of Justice of the EU (CJEU) sets up a new test to identify them.<sup>xix</sup>

Indeed, the divide between national and EU legislation, on which the limits to the applicability of the Charter are based, is fated to be blurred, if only due to the combined effects of the principle of non-discrimination and the case-law on citizenship<sup>xx</sup> (see the series of cases culminating with *Zambrano*<sup>xxi</sup>). Also, the incorporation doctrine (whereby the EU has the domain over national regulations affecting the preconditions for the enjoyment of EU rights) might expand the reach of EU competences and, subsequently, that of its human rights scrutiny.<sup>xxii</sup> In a passionate invocation of clarity, AG Sharpston advocated constitutional development of the EU and the Court, and suggested that the “implementation” requirement should be abandoned in favour of a clearer, although admittedly federal-like, criterion; if the EU has a competence, be it shared or exclusive, the Charter applies, regardless of whether the EU has actually exercised its competence on a particular matter.<sup>xxiii</sup>



In summary, it appears that the safeguards provided for in the horizontal clauses of the Charter will hardly suffice to contain the expansive force of EU competences. Granted, this might happen at a faster or slower rate, and this creeping expansion would not necessarily be motivated by a willingness to apply the Charter. However, once the EU has put its stamp on a subject matter, *non regreditur*, the Charter then arguably becomes binding for national regulators (and the CJEU can exercise its jurisdiction accordingly), regardless of how feeble the link is between the EU order and the national action.<sup>xxiv</sup> This aspect is also problematic with respect to the use of general principles (see below).

### 3. The original status of the Charter and the pre-existing HR regime of the Union

Although it purportedly did not add to State obligations already in place, Member States were privy to its potentially innovative nature, and preferred to endorse the Charter as a solemn declaration, deprived of binding force. This was due, among other things, to the fact that some of the social and economic rights of the Charter already existed in the European Social Charter, but these were subject to a very soft system of enforcement and their inclusion into a new, binding Charter was perceived as an unwelcome leap towards a status of effectiveness and justiciability.

Soft as it might have been, the Charter was used as a cultural source for a long time. Advocates General started citing the Charter to support their opinions,<sup>xxv</sup> followed hesitantly by the Court, which seldom drew upon it to reinvigorate the interpretation of other EU legal sources.<sup>xxvi</sup> Before the entry into force of the Lisbon Treaty and the connected strengthening of the Charter, human rights (apart from those arising under the provision of the Treaties) existed in the EU legal order in the form of general principles of law.<sup>xxvii</sup> Their formulation is incumbent on the CJEU, which shapes them by means of a comparative procedure that at times has yielded Delphic results (see *Mangold*) and that is, by definition, subject to a certain degree of uncertainty.<sup>xxviii</sup> In short, the Court is expected to “infer” fundamental rights (a *species* of the category of general principles) either by running a comparative survey of the constitutional traditions of the Member States or by



looking at the international instruments common to the Member States (particularly the European Convention of Human Rights) – or using the two procedures at once.<sup>xxxix</sup>

The ECHR is certainly the priority model to look at for this purpose, particularly in light of its recognised hermeneutic power (EU Courts must inform their human rights interpretation based on the case-law of the European Court of Human Rights, ECtHR).<sup>xxx</sup> After 2000, however, the Charter itself was also deemed to be an optimal arsenal of ready-made general principles, which were the by-product of universal EU endorsement, and its explicitly conservative design reinforced the presumption that the rights listed therein had already attained the status of EU principles.<sup>xxxi</sup> Among the few undisputed effects of the (then) non-binding Charter, is that it represented a privileged instrument for identifying fundamental rights,<sup>xxxii</sup> and certainly for identifying “*a fundamental right as a general principle of Community law.*”<sup>xxxiii</sup> Arguably, the Charter could even be used “*to supplement principles of law already recognized in binding legal norms and contribute to their broader interpretation.*”<sup>xxxiv</sup>

#### 4. Transition/anticipation of the Charter and the *Defrenne* doctrine

This relationship between the Charter and the general principles of the EU was not explicitly recalled in *Mangold*, and was only touched upon in *Küçükdeveci*;<sup>xxxv</sup> two cases where, in fact, a clearer reference to the inspirational value of the Charter might have helped the Court to support the use of a specific general principle (non-discrimination on the grounds of age). Even absent an express reference to the Charter, *de facto* these two cases anticipated its forthcoming effects,<sup>xxxvi</sup> and the Charter’s lack of binding force was found to be compensated temporarily by the general principle; a pre-figuration of the codified right to be. This came at the price of an unprecedented move; the acknowledgment that general principles have at least some horizontal direct effect, which was an aspect that had never been validated by the Court before then.<sup>xxxvii</sup>

To achieve this, the Court applied the *Defrenne* doctrine to the general principle at hand: a norm that is formally (or arguably, in the case of the principle) addressed to public authorities can equally bestow obligations in horizontal relations, as concisely recalled in *Angonese*:



*“..the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down (see Case 43/75 Defrenne v Sabena [1976] ECR 455, par. 31). Such considerations must, a fortiori, be applicable to Article 48 of the Treaty [on discrimination on grounds of nationality], which ... is designed to ensure that there is no discrimination on the labour market.”<sup>XXXVIII</sup>*

Along these lines, the Court found no objection to granting the same horizontal treatment to the general principle of non-discrimination on grounds of age, and indirectly showed the way to treat the post-Lisbon Charter. Indeed, the Charter obtained the “same legal value as the Treaties,”<sup>XXXIX</sup> therefore becoming an integral part of the primary law of the EU and a possible parameter of adjudication for the CJEU and national courts dealing with EU matters. As a consequence, Charter norms would arguably enjoy the *Defrenne* treatment, and acquire horizontal effect, just as the general principle has done in *Mangold* and *Kücükdeveci*.<sup>XI</sup> Or is there something that would hinder this development? As seen above, the Charter itself tries to limit the reach of its application, and vigorously recalls that it is binding only on public bodies of the Union. It has, in other words, an exclusively vertical effect.<sup>XLI</sup>

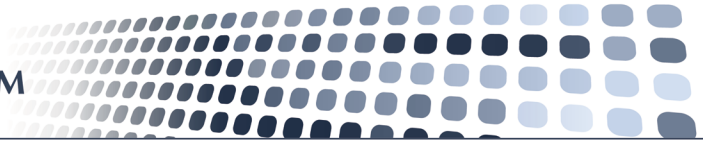
Would that be enough to block the Court from applying *Defrenne* to Charter rights? And if so, would it make any difference, given that general principles of identical content are readily applicable *à la Küçükdeveci*? It would be ironic if the Charter, just after becoming binding, were virtually superseded in the context of horizontal disputes by the general unwritten principles of the EU, which provide for the protection of the same fundamental rights, but enjoy more incisive application.

## 5. The first cases of direct application (vel non) of the Charter

### A. *MCB*

In *MCB*,<sup>XLII</sup> the CJEU was asked whether Art. 7 of the Charter (right to family life) affected the interpretation of the Brussels II bis Regulation<sup>XLIII</sup> as to the wrongfulness of the behaviour of a mother who removes<sup>XLIV</sup> her children from the country of the father,





without his consent. In the main proceedings, the parents were not married, and under Irish law the father did not have the right to custody of the children. Therefore, formally, the mother had the right to choose the place of residence of the children and, when she removed them, the father could not obtain a court judgment declaring the wrongfulness of her conduct. The father assumed that the peculiarity of Irish law disproportionately affected his parental rights and that the Regulation should have been interpreted in light of the Charter (and of Art. 8 ECHR), so as to afford the natural father with custody rights *de jure*. This would have allowed him to seek a court declaration of the wrongfulness of the removal of his children by the mother.

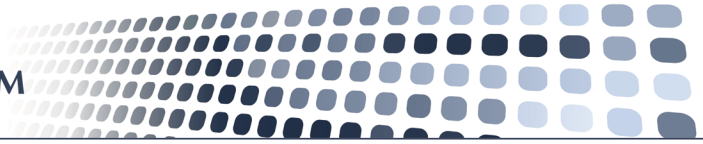
The CJEU confirmed that the Regulation must be construed to allow a parent with custody to invoke the wrongfulness of removal without his consent.<sup>XLV</sup> However, custody rights are conferred exclusively according to domestic law; a subject matter that, under Art. 51(2) of the Charter, is outside the competence of the EU, *i.e.* outside the reach of the Charter.<sup>XLVI</sup> The case-law of the ECtHR was of little help to the father's cause: a similar case was resolved by the Strasbourg court in recognising that national legislation conferring custody rights on only one of the natural parents was legitimate, provided that the other had the right to seek a court order reversing this initial allocation (this being the minimum standard of protection that the Convention ensures).<sup>XLVII</sup>

In its ultimate analysis, the CJEU (in complete agreement with the Advocate General)<sup>XLVIII</sup> rejected the extensive interpretation of the Regulation advocated by the father in the main proceedings, and arguably made clear that, for the time being, it was not keen on abusing any incorporation doctrine in order to expand the competence of the EU.<sup>XLIX</sup>

## **B. *Schecke***

In *Schecke*,<sup>I</sup> the CJEU invalidated some clauses of a regulation for violating a norm of the Charter, and this case marked the first time that the Charter was actually used as a determinative standard of review for the legality of an EU act of secondary legislation.

The CJEU was called to issue a preliminary ruling regarding the validity of a regulation that required Member States to publish the list of all natural persons who had received agricultural subsidies. In the opinion of the referring judge, this obligation was at



variance with the right to protection of private life and personal data under Articles 7 and 8 of the Charter, as well as Art. 8 of the ECHR. The Court recalled that the right to privacy can be subject to limitations<sup>LI</sup> that are provided for by law and are proportionate, as required by Art. 52(1) of the Charter.<sup>LIII</sup> It also recognised its duty, under Art. 52(3), to take into account the jurisprudence of the ECtHR,<sup>LIIII</sup> and actually did so in construing the element of “private life” (that includes professional information).<sup>LIV</sup> The Court verified that the publication requirement was provided for in a legal instrument, and that it was supposed to pursue a legitimate purpose (transparency in the allocation of State aid).<sup>LIV</sup> It then introduced the proportionality test, and significantly cited as authority an ECtHR precedent and one of its own judgments,<sup>LVI</sup> explicitly pointing to the synergy between the case-law of the two courts.

The outcome, however, was reached through a very simple procedure. Since it appeared that the EU legislator had not taken into account the possibility of introducing a transparency measure entailing a less-restrictive effect, the Court took for granted that a better balance could have been struck.<sup>LVII</sup> In other words, the measure failed to pass the balancing test (run by the Court) because it did not incorporate or reflect any balancing at all (by the law-maker). In the end, there was no actual need to balance the two rights. The Commission and Council’s case failed, more because they did not meet the burden of proof than for the weakness of their argument. However, it is still reassuring to observe how the Court took balancing seriously, as required under Art. 52(1). As was noted, quite apart from the final result of the balancing test:

*“...from a constitutional point of view the important point is that the balancing exercise takes place (see Rosas and Armati, EU Constitutional Law, Hart, 2010, at p.190, ...). Going even further, the technique of balancing is also an important tool in realizing the role of the judge. In fact, “[o]pen balancing restrains the judge and minimizes hidden or improper personal preference by revealing every step in the thought process; it maximizes the possibility of attaining collegial consensus by responding to every relevant concern of disagreeing colleagues; and it offers a full account of the decision-making process for subsequent professional assessment and public appraisal” (See Coffin, “Judicial Balancing: The Protean Scales of Justice”, 63 NYU L. Rev., at p. 25 (1988)).”<sup>LVIII</sup>*

Granted, balancing is not a novelty (proportionality has always been a tool for the CJEU, which includes a component of weighing values<sup>LIX</sup>). However, it is under the



Charter that balancing will be consistently carried out, not only between fundamental rights and market freedoms, but also between fundamental rights.

This is all the more necessary because the maxim of this judgment is not conclusive on the legality, in general, of the online publication of personal information of subjects benefitting from subsidies. The Court only declared that the particular provision challenged was invalid, due to its impact on privacy, and its poor design in terms of necessity and proportionality.<sup>LX</sup> In this case, as was noted,<sup>LXI</sup> the Court specified a two-step proportionality test, which did not include the third step of narrow proportionality, or proportionality *stricto sensu*. Granted, the measure failed to meet the second step (necessity) and, therefore, there was no need to perform any balancing. However, it is yet to be seen whether the Court, in its judicial treatment of Charter rights, will stick to this truncated test (somewhat in line with the practice of WTO judicial bodies<sup>LXII</sup>) or will rather ‘dirty its hands’ with some constitutional balancing, thereby trying to ensure respect for the essence of the Charter’s rights and freedoms, as set forth in Art. 52(1).

### *C. DEB*

In the *DEB* case,<sup>LXIII</sup> the Court was called upon to answer a preliminary question: the referring judge had asked whether EU law precluded, in the context of a procedure aimed at obtaining compensation for State liability under EU law, a national rule making the pursuit of a claim subject to an advance payment in respect of costs, without entitling legal persons to benefit from legal aid when they are unable to pay that deposit disbursement.<sup>LXIV</sup> The referring judge pointed to a possible conflict of the domestic rule with the principle of effectiveness, requiring that “the detailed procedural rules governing actions for safeguarding an individual’s rights under EU law must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law.”<sup>LXV</sup>

The Court noted that the principle of effective judicial protection is a general principle of EU law, stemming from the constitutional tradition of Member States and protected under the ECHR (Articles 6 and 13). After recalling that the same principle is also provided for in Art. 47 of the Charter, the Court took cognizance of the equivalence with Art. 6 of the ECHR, as required under Art. 52(3) of the Charter, and deemed it “necessary to recast the question referred so that it relates to the interpretation of the



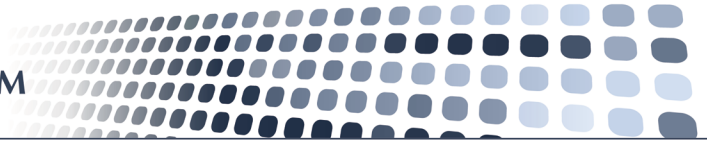
principle of effective judicial protection as enshrined in Article 47 of the Charter.”<sup>LXVI</sup> The decision then detailed an impressive study of ECtHR case-law on legal aid,<sup>LXVII</sup> stemming from the seminal judgment *Airey v. Ireland*.<sup>LXVIII</sup> The analysis confirmed that it is possible for legal persons to receive legal aid, in light of their specific situation and needs, and that it is incumbent on the national court “to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which is sought to achieve.”<sup>LXIX</sup>

In other words, States (national courts) are provided with the margin of appreciation to decide whether to grant such benefit or not – after all, this is the customary approach adopted by the ECtHR when it comes to costly State obligations. However, national authorities acting as EU bodies must justify their decision under certain criteria (of proportionality and non-arbitrariness), in order not to incur a finding of violation (both of the Charter *and* the Convention).

#### ***D. Test-Achats***

In March 2011,<sup>LXX</sup> the Court declared the invalidity of the provision of a Directive<sup>LXXI</sup> whereby States could allow insurance providers to use gender-related statistical data in their risk assessment calculation for the determination of premiums and benefits. This clause had already been designed as an exception to the rule prohibiting the use of sex as a determining factor in the calculation of premiums and benefits,<sup>LXXII</sup> but the Belgian Constitutional Court submitted a preliminary question, raising doubts as to the possible violation of Art. 6(2) of the Treaty on European Union (TEU), in connection with the general principle of non-discrimination (on grounds of sex).

The CJEU immediately reframed the question in light of the new regime of fundamental rights. Granted, Art. 6(2) TEU commands the Union to respect fundamental rights, but there is no longer a need to look far to identify those rights since “fundamental rights are incorporated in the Charter.” In light of the accepted methods to identify general principles of the EU, this move might have been controversial some years ago. Now, it is



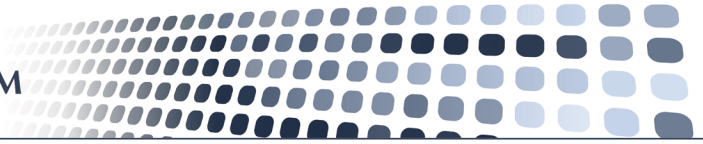
as simple as that, so long and thanks for all the *Mangold* drama. Accordingly, the relevant norms are Articles 21 and 23 of the Charter.<sup>LXXIII</sup>

In this case, the solid EU case-law on non-discrimination on grounds of sex spared the Court from looking at the ECHR: the Court needed no lesson. Moreover, no balancing was needed either; the provision ran counter to the very purpose of the Directive, leaving no room for arguing that it served some general interest of the EU, alternative to that of the elimination of inequalities based on sex.<sup>LXXIV</sup> There was another difficulty in this case: after all, it is reasonable to expect that insurance premiums and benefits are not uniform for all clients, and that their differentiation is based on the analysis of statistical and factorial data. In other words, it would seem acceptable that a different treatment is accorded to persons in different factual situations, and that insured users are grouped into risk-homogeneous (and price-homogeneous) categories.<sup>LXXV</sup>

Intuitively, purely statistical data cannot be imputed a discriminatory intent/effect only because they are broken down by sex; it appears to be objective enough to justify economic differentials in insurance contracts. Moreover, it has not been demonstrated that one sex is discriminated against because of this calculation practice, either directly or *de facto* since statistical data related to sex-sensitive presumptions points at differently increased levels of risk for both sexes.

Even in the absence of a prejudice, however, the very use of sex as a distinctive category is illegal in the EU: "...the use of a person's sex as a kind of substitute criterion for other distinguishing features is incompatible with the principle of equal treatment for men and women."<sup>LXXVI</sup> In other words, to use WTO jargon, even before checking whether the challenged measure had a disparate impact on one of the two sexes and therefore afforded protection to the other, the CJEU struck it down for not treating men and women as "like products" – *absit iniuria verbis*. Sex is not a valid comparator for any other purpose than the adoption of affirmative actions in the EU's legal order.<sup>LXXVII</sup>

An anecdotal note can be added, in retrospect, about the successful challenge to the discriminatory measure by *Test-Achats* (the claimant in the domestic proceedings). In her Opinion, the Advocate General Kokott made this statement:



*“While Test-Achats is of the opinion that [the measure infringes the principle of equality], all the Member States and European Union institutions involved in the proceedings are of the opposite view. The European Union is a union based on the rule of law; neither its institutions nor its Member States can therefore avoid a review of the question whether the measures adopted by them are in conformity with the ‘basic constitutional charter’ of the European Union, as it is set out in the Treaties.” LXXVIII*

This obvious statement is nevertheless a nice illustration of the rule of law in action: an individual can corner all the institutions and the bodies of the Union, if their claim is founded. It also portrays the role of the Charter as an inherent limit to the action of the EU based on the rule of (human rights) law.

### ***E. Hennings***

In September 2011, the Court decided two cases<sup>LXXIX</sup> that were very similar to the infamous *Mangold – Küçükdeveci* couple, only this time all the hurdles relating to the applicability of the legal instruments prohibiting discriminations were conveniently removed: the term for implementation of Directive 2000/78’ had expired, the general principle of non-discrimination on grounds of age was already firmly established in practice, and the Charter had gained a binding nature. Therefore, it is no surprise that the Court focused only on the merits of the issue, *i.e.* whether the provisions being challenged did in fact entail an unjustified or disproportionate discrimination on grounds of age.

The facts were relatively straightforward. Some German employees had challenged the relevant rules of the collective pay agreements stipulated by the social partners and that governed the treatment of the employees working for the public administration. Under these collective agreements, employees were divided into salary groups and basic pay in the salary groups was determined according to age categories. The age-related classification, according to the referring German courts, could represent an instance of discrimination on grounds of age, because it would be comparatively disadvantageous for younger employees whose work experience is analogue to that of older ones.

The Court identified the discriminatory edge of the challenged measures,<sup>LXXX</sup> and carried out the proportionality test to ascertain whether they were justifiable in light of the pursued objective, which was alleged to be the interest of rewarding work experience. Predictably, the Court found that the group classification depending purely on age-related





data could not stand up to scrutiny.<sup>LXXXI</sup> Interestingly, the Court noted that it was not relevant that the challenged provisions were set in collective agreements, and that the right to collective bargaining is protected under Art. 28 of the Charter. Indeed, the fundamental right to collective bargaining must be performed in compliance with EU law,<sup>LXXXII</sup> including the provisions of the Charter. When social partners negotiate with a view to stipulating an agreement affecting the matters covered by Directive 2000/78, their contractual autonomy cannot prevail over EU law.

Incidentally, the Court also allowed the age-related scheme to survive provisionally in order to avoid that the transition to the new one would cause a loss of income for many employees;<sup>LXXXIII</sup> a choice that recalls the rationale of *Test-Achats* (where the discriminatory measure was also struck down because of its potentially permanent nature).

#### **F. *Brüstle v Greenpeace e. V.***

In October 2011, the much-awaited *Bristle* decision was published.<sup>LXXXIV</sup> In a preliminary ruling, the Court ruled that, for the purpose of patentability under a Directive,<sup>LXXXV</sup> the formula “human embryo” encompassed virtually any human ovum (either fertilised or with a transplanted nucleus, or otherwise artificially induced to develop), whereas it would be for national courts to decide whether stem cells obtained from a human embryo at the blastocyst stage qualify as a “human embryo” and, accordingly, are not patentable.

The legal issue was the interpretation of the “human embryo” formula, because the Directive clearly excludes from patentability inventions based on the use of human embryos for commercial purposes, as their commercial exploitation would be contrary to *ordre public* or morality.<sup>LXXXVI</sup> The Charter seems to dictate some relevant principles in Articles 1 and 3,<sup>LXXXVII</sup> and Advocate General Bot recalled them, concluding that in his view not even blastocyst cells could be patented under the Directive.

The Court took a somewhat different view, as seen, but more interestingly took another route to reach it. Rather than listing the Charter among the relevant sources of guidance, the Court mentioned the preamble of the Directive, and in particular recital No. 16 which reads: “... patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person.” In so doing, it made the central issue



of the case internal to the Directive,<sup>LXXXVIII</sup> thereby defusing the risk that such a delicate matter would be decided once and for all under the Charter.

This move was understandable, and yet stopped short of magnifying the synergy between the Directive and the Charter. Consider Advocate General Bot's comment on the inclusion of the reference to human dignity in the preamble of the Directive:

*“These references expediently illustrate that the Union is not only a market to be regulated, but also has values to be expressed. Before it was even enshrined as a fundamental value in Article 2 of the EU Treaty, the principle of human dignity had been recognised by the Court as a general legal principle.”<sup>LXXXIX</sup>*

What the Court did, instead, was to limit the scope of its inquiry to the four corners of the Directive. Respect for human dignity was already detailed therein, so there was no need to look further into the set of primary legislation. In my view, a reference to the Charter would have helped to clarify that the finding would have been the same, even if the preamble had lacked any reference to the protection of human dignity. Moreover, the text of recital No. 16, quoted above, undoubtedly points to a primary source – the “fundamental principles safeguarding the dignity and integrity of the person”. Therefore, the careful obliteration of every reference to the Charter in the judgment seems a little deliberate. It could maybe even be deemed an attempt not to have public opinion “blame it on the Charter” for a decision that is unwelcome to many.

### ***G. NS v SSHD***

In December 2011, the Court of Justice issued a preliminary ruling<sup>XC</sup> on the requests raised by an English and an Irish court. The fact-pattern was similar in the two main proceedings: some Afghani, Iranian, and Algerian citizens had submitted an asylum request to the authorities of the UK and Ireland, after first accessing the territory of the EU through Greece. Under Regulation 343/2003,<sup>XCI</sup> the State in charge of the asylum application was Greece, but Art. 3(2) provides all Member States with the possibility to examine an application from a third country national that is not its responsibility, rather than to transfer them to the responsible State.

The referring judges asked the Court whether the right to examine a third-party request, under Art. 3(2), falls within the reach of EU law, and should accordingly be





exercised with due regard to the primary law of the Union, including the Charter and Art. 6(1) of the TEU. The Court responded in the affirmative, noting that although Art. 3(2) only conferred a discretionary power on Member States, it had to be read in the framework of the Common Asylum Policy and therefore could not escape from the straight-jacket of EU rule of law.<sup>XCII</sup> In so doing, the Court upheld the view of AG Sharpston who, referring to the *Wachauf* precedent (see above, para. 2), equated implementation of EU law to derogation from it, as well as to the exercise of discretionary powers provided by EU law.<sup>XCIII</sup>

Accordingly, the Court noted that national authorities, in their capacity as bodies implementing EU law, must exercise that discretionary power in compliance with the Charter, and in particular with the prohibition of degrading and inhuman treatment. This might lead the national authority to take charge of an application which is not its responsibility if transferring the applicant to the responsible State might expose them to the risk of inhumane and degrading treatment. This seemed to be the case in the main proceedings, due to the difficulties encountered by Greek authorities in dealing with the flow of immigrants and granting them adequate assistance. However, this cannot mean that *any* violation or alleged violation of a fundamental right by the responsible State entitles the third State to exercise its power under Art. 3(2) of the Regulation: an automatism of this kind would be against the basis of reciprocity and mutual trust which is the backbone of the asylum system.<sup>XCIV</sup> Only serious violations reflecting systemic flaws in the country's ability to ensure the dignity of asylum-seekers may, and indeed must, be taken into account for the purpose of the discretionary decision under Art. 3(2).<sup>XCV</sup>

The final issue, therefore, is how to assess one country's record on fundamental rights' protection for the purpose of exercising the power of decision under Art. 3(2). In this respect, the Court turned to the case-law of the ECtHR, not so much looking for normative or judicial guidance, but rather to borrow the set of evidence that had led the Court of Strasbourg some months before to rule that Greece's treatment of asylum seekers was so unsatisfactory that Belgium, merely by complying with the duty to transfer an applicant to the responsible State, committed a violation of Art. 3 of the Convention.

The facts and background of the *MSS* case before the ECtHR<sup>XCVI</sup> were comparable to those in the main proceedings leading to the request for a preliminary ruling, and the ECtHR based its findings on several reports available to the general public. In light of this,



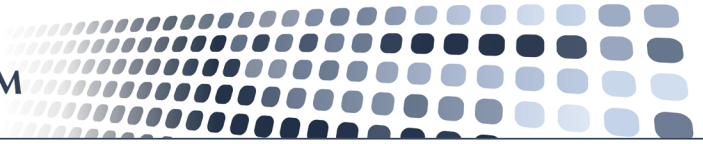
the Court dismissed the arguments of the Italian, Polish and Belgian governments, which had argued that it is not possible for a State to know with reasonable precision to what degree human rights protection is exercised in the responsible State, for the purpose of making a reasoned decision under Art. 3(2) of the Regulation.<sup>XCVII</sup> Ultimately, the Court ruled that a State *must* make use of the discretionary power of taking charge of an asylum request that is not its responsibility, when it cannot ignore that not doing so would result in a likely serious violation of a right protected by the Charter.

Interestingly, this case shows the ‘ECHR-ification’ of the Charter, inasmuch as it clarifies that Member States must not only protect the fundamental rights listed therein, but will also incur responsibility for failure to avoid a serious violation committed by other subjects (in this case, the responsible State). In the framework of the Convention, this has led to a quasi-horizontal effect of the rights and duties derived therefrom, because States have been found liable for not protecting individuals from serious violations committed by other individuals. The same issue is probably occurring in the EU system, maybe even at a faster pace, in light of the *Küçükdeveci* doctrine on the horizontal application of general principles.

## 6. The new life of the Charter – some reflections

The case-law is far too scant to allow for far-reaching predictions. However, it is clear that reference to the ECtHR and its case-law is no longer a matter of nicety and comity but an actual precondition for the application of the Charter. It remains to be seen how the CJEU will choose to treat the doctrine of the margin of appreciation, which appears to run counter to the policy of uniform application of EU law that has always been of special concern for the CJEU.<sup>XCVIII</sup>

The CJEU can certainly borrow some of the balancing that the ECtHR has already made (between rights, or between a right and a general competing interest), and feed it into its own proportionality test, but it is difficult to understand how the margin of appreciation will fit in there. When the ECtHR applies this concept, its findings are premised on the assumption that the State measure must be tolerated, being one of those that does not entail a disproportionate limitation of the protected right.<sup>XCIX</sup> Proportionality in Luxembourg has traditionally had a stricter meaning: if the challenged measure is not the



least restrictive measure (reasonably) available, it should fall.<sup>C</sup> Moreover, the Court made clear that even when EU law accords to Member States some margin of appreciation in the implementation of a norm,<sup>CI</sup> States are not shielded from a judicial scrutiny of their conduct in terms of human rights compliance.<sup>CII</sup>

Another interesting aspect is the role of national courts in the direct application of the Charter. The Italian position might be taken as an example: the Constitutional Court of Italy has prohibited ordinary courts from disapplying domestic norms in conflict with the provisions of the ECHR, and ordered them to raise instead a claim of unconstitutionality. This position was premised on the clear distinction between the legal order of the ECHR and that of the Union.<sup>CIII</sup> Is this approach still tenable? Would it not be easier for national courts to invoke the supremacy and direct effect of the rights of the Charter (as interpreted in light of the Convention) to elude the intervention of the Constitutional Court? Recent decisions have shown that even when ordinary courts try to ensure the direct effect of the Charter,<sup>CIV</sup> the Constitutional Court's position is that the ECHR is still the (only) applicable standard of review, and therefore disapplication is not an option for ordinary courts.<sup>CV</sup>

On the theme of national courts, how will they perform in applying the inextricable set of horizontal provisions of the Charter (Articles 51-53)? In a recent case,<sup>CVI</sup> an English court was called to pronounce on a delicate issue centred on the application of *ratione materiae*<sup>CVII</sup> and *ratione personae*<sup>CVIII</sup> of the Charter. Moreover, the High Court had already taken the opportunity to issue some consequential views: the *Soering* doctrine<sup>CIX</sup> applies to the Charter by virtue of its connection with the Convention. The Italian example, mentioned above, is revealing in this sense; not only is the identification of the boundaries of EU competences difficult, but domestic inter-court dynamics might slow down the direct application of the Charter.

Ultimately, the big change that the Charter has yet to make is to demonstrate that there are not some rights which are more equal than others in the EU (namely, the market freedoms). Since the Court is almost always careful in framing its decisions in terms of proportional reasoning, it is not immediately clear if a pro-market bias is actually (still) there, but cases such as the 2010 *Commission v. Germany*<sup>CX</sup> are hardly convincing in demonstrating that fundamental rights and market freedoms have an equal status, as AG Trstenjak advocated.<sup>CXI</sup> In this sense, it has yet to be seen whether the apparent divergence between the ECtHR and the CJEU on the relative importance of collective action and



collective bargaining<sup>CXII</sup> – and on other issues – will be resolved over time or will create a permanent situation of double standards for equivalent rights.

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<sup>I</sup> OJ C 364, 18 December 2000, at 1-22.

<sup>II</sup> Presidency Conclusions of the Cologne European Council, June 1999, para. 44. For a concise but exhaustive account of the historical process behind the adoption of the Charter see Anderson and Murphy 2011.

<sup>III</sup> An accurate reconstruction of the origin of each right is provided in the Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02), accounting for the “conservative” value of the Charter. We recall that Art. 6(1), subparagraph 3 of the new TEU demands “due regard” to the explanations of the Praesidium, in the interpretation of the Charter (see also Art. 52(7) of the Charter).

<sup>IV</sup> See the Preamble of the Charter.

<sup>V</sup> Here, by “restatement,” I intend to convey the idea of a collection reflecting the established consensus in the legal community on the existence of certain general principles of law.

<sup>VI</sup> As it was noted: “it is possible to argue that some of the charter’s rights are “new” to the extent that the ECJ has yet to explicitly guarantee them as general principles of law” (Groussot and Pech 2010: 5).

<sup>VII</sup> A full list of the sources of the rights included in the Charter is set out in the updated “explanations” of the Praesidium, see OJ 2007 C 303/17.

<sup>VIII</sup> On the different approach adopted during the drafting sessions by the States and EU bodies, see De Burca: 2001.

<sup>IX</sup> Namely, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.

<sup>X</sup> In the Preamble the Charter is said to contain “rights, principles and freedoms.”

<sup>XI</sup> Reading “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.”

<sup>XII</sup> A very accurate appraisal of the Praesidium’s explanations, which also accounts for their ambiguity on the right/principle divide, is provided in Sciarabba: 2005.

<sup>XIII</sup> On the similar duty as undertaken by the ECtHR (through the expansive use of Arts. 2, 3, and 8 of the Convention, and through the development of new safeguards for non-discrimination and procedural fairness (Arts. 6 and 14), see Brems: 2007; Palmer: 2009; Tomuschat: 2007.

<sup>XIV</sup> Art. 51(1).

<sup>XV</sup> Weiler and Lockhart 1995: 73.

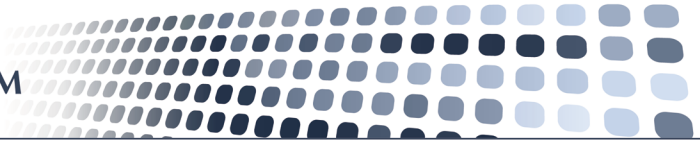
<sup>XVI</sup> Case C-260/89 *ERT* [1991] ECR I-2925, see in particular para. 43.

<sup>XVII</sup> Case C-578/08 *Chakroun v. Minister van Buitenlandse Zaken*, judgment of 4 March 2010. The British courts have taken a similar view: *R (on the application of Zagorski and Baze) v. Secretary of State for Business, Innovation and Skills* [2010] EWHC 3110 (Admin), per Lloyd Jones J. On this last case, see below, in para. 6.

<sup>XVIII</sup> This reading seems validated by the revised commentary prepared by the *Praesidium*. “As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493).”

<sup>XIX</sup> See the Advocates’ perplexity on this point in Case C-108/10 *Ivana Scattolon* (AG Bot, Opinion of 5 April 2011, paras 116-120) and Joined Cases C-483/09 and C-1/10 *Magatte Gueye and Valentín Sánchez Salmerón* (AG Kokott, Opinion of 12 May 2011, para 77), mentioned in Anderson and Murphy, cit. 8.

<sup>XX</sup> See Wind 2009; Hancher and Sauter 2010 and the bibliography referred to therein; Jorgensen 2009. See



also the analysis of the implications of this case-law in Kochenov 2009.

<sup>xxi</sup> Case C-34/09 *Zambrano* (8 March 2011). This development was aptly preconized in Eeckhout 2002: 970 ff. See also De Mol: 2011.

<sup>xxii</sup> See among others Cartabia 2009: 15, recalling the cases Case C-117/01, *K.B.* (7 January 2004); Case C-423/04 *Richards* (26 April 2006), and Case C-267/06 *Maruko* (1 April 2008).

<sup>xxiii</sup> See Opinion of AG Sharpston of 30 September 2010, paras 156-177 (Case C-34/09 *Zambrano*).

<sup>xxiv</sup> Think of the matters previously belonging to the third pillar: their absorption into the general competence of the Union at the same time extends upon them the jurisdiction of the CJEU and the application of the Charter.

<sup>xxv</sup> See accurate account of the case-law and AG's opinions in Bazzocchi 2011.

<sup>xxvi</sup> See for instance Case C-47/07P *Masdar* (ECJ 16 December 2008), par. 50; Case C-402/05P e C-415/05P *Kadi v Council and Commission* (ECJ 3 September 2008), par. 335; Case C-450/06 *Varec* (14 February 2008), par. 48; Case C-275/06 *Promusicae* (ECJ 29 January 2008), par. 69; Case C-341/05 *Laval un Partneri ltd* (ECJ 18 December 2007), par. 90 and 91; Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union, v Viking Line ABP, OÜ Viking Line Eesti* (ECJ 11 December 2007), par. 43 and 44; Case T-194/04 *Bavarian Lager v Commission* (CFI 8 November 2007), par. 14; Case C-303/05 *Advocaten voor de Wereld VZW* (ECJ 3 May 2007), par. 46; Case C-432/05 *Unibet* (ECJ 13 March 2007), par. 37; Case T-228/02 *Organisation des Modjabedines du peuple d'Iran v Council* (CFI 12 december 2006), par. 71; C-540/03 *Parliament v. Council* (2006) ECR I-05769, par. 38; Case 47/07; Case C-244/06 *Dynamic Medien* (2008) ECR I-505, par. 41. More recently, see for example, *Alasimi*, 18 March 2010, C- 317, 318, 319 and 320/08; *Akzo Nobel Chemicals and Akros Chemicals v. Commission*, 14 September 2010, C-550/07 P; *Blanco Pérez and Chao Gómez*, 1 June 2010, C-570 and 571/07; *Chakroun*, C-578/08, 4 March 2010.

<sup>xxvii</sup> *Hauer*, 3 December 1979, Case C-44/79. See also Case C-45/08, *Spector Photo Group NV v. Commissie voor het Bank-, Financie- en Assurantiewezen*, 2009 WL 4927720, par. 40 (Dec. 23, 2009); Case C-402/05, *Kadi v. Council*, 2008 E.C.R. I-6351, par. 283; Case C-305/05, *Ordre des barreaux francophones et germanophone v. Conseil des Ministres*, 2007 E.C.R. I-5305, par. 29; Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, par. 3; Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419.

<sup>xxviii</sup> Weiler and Lockhart 1995: 51-92 and 579-627; Groussot 2006: 10-11 (“principles do not fall from heaven”). See also Rodriguez Iglesias 1999: 1-16. Also Advocate Mazák, in the opinion of Palacios, acknowledged that “it lies in the nature of general principles of law, which are to be sought rather in the Platonic heaven of law than in the law books, that both their existence and their substantive content are marked by uncertainty” (par. 86).

<sup>xxix</sup> Advocate General Léger has proposed a third way to identify a general principle of the EC in his opinion in the *Hautala* case. In particular, he noted that to identify a general principle “[i]t may suffice that Member States have a common approach to the right in question demonstrating the same desire to provide protection, even where the level of that protection and the procedure for affording it are provided for differently in the various Member States.” (par. 69). In the post-Lisbon scenario, the relationship between the three pillars of fundamental rights (common traditions, ECHR and the Charter) is briefly discussed in Ekaradt and Kornack 2010.

<sup>xxx</sup> See joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99/P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij v. Commission* [2002] I-8375, para. 274 and C-301/04 P *Commission v. SGL Carbon* [2006] I-5915, para. 43.

<sup>xxxi</sup> The connection between the Charter and the case-law of the ECtHR is famously regulated by Art. 52(3) of the Charter.

<sup>xxxii</sup> Under this perspective, the conservative content of the Charter accounts for higher reliability: if a right is listed therein it is likely to be undisputedly acknowledged by all Member States. As noted in Groussot 2006: 107, the Charter is deemed to be a “*show case of existing rights.*” See also, for instance, Advocate General Léger’s opinion in the case C-353/99, *Council of the European Union v. Heidi Hautala (Hautala)*, [2001] ECR I-9565, par. 80: “*aside from any consideration regarding its legislative scope, the nature of the rights set down in the Charter of Fundamental Rights precludes it from being regarded as a mere list of purely moral principles without any consequences. It should be noted that those values have in common the fact of being unanimously shared by the Member States, which have chosen to make them more visible by placing them in a charter in order to increase their protection.*”

<sup>xxxiii</sup> See Groussot 2006: 113. See also the statement of the Court, in case C-540/03 *Parliament v. Council* [2006] ECR I-05769, par. 38: “*the principal aim of the Charter, as is apparent from its preamble, is to reaffirm ‘rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the*





*Council of Europe and the case-law of the Court ... and of the European Court of Human Rights.*”

XXXIV See Tridimas 2006: 362.

XXXV See par. 22. The ruling just notices – in passing – that the principle of non-discrimination of grounds of age is enshrined in the Charter (Art. 21, first paragraph), and that under Art. 6(1) of the Treaty on the European Union (TEU) the Charter is as binding as are the Treaties.

XXXVI Kokott and Sobotta 2010: 3. See also Case C-407/08 P *Knauf Gips v Commission* [2010] ECR I-0000, paragraph 91, regarding the general principle of fair trial and effective judicial remedies, as codified in Art. 47 of the Charter.

XXXVII On this, see extensively Fontanelli 2011, and bibliography referred to therein.

XXXVIII Case C-281/98 *Roman Angonese v. Cassa di Risparmio di Bolzano SpA (Angonese)* [2000] ECR I-4139, paragraphs 34-35.

XXXIX See Art. 6(1) TEU.

XL On the horizontal application of general principles, see Wyatt 2008. *Contra*, see Spaventa 2011.

XLI See Art. 51.

XLII Case C-400/10 PPU *McB* (5 October 2010).

XLIII Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1).

XLIV Under Article 2(11)(a) of that Regulation.

XLV Par. 44.

XLVI Paras. 51-52.

XLVII Para. 54, citing cases *Guichard v. France* ECHR 2003-X 714 and *Balbontin v. United Kingdom*, No. 39067/97, 14 September 1999.

XLVIII See the Opinion of Advocate General Jääskinen delivered on 22 September 2010.

XLIX After all, the issue of the right to custody was a pre-condition for the enjoyment of the rights to challenge the wrongfulness of a removal under the Regulation. See above regarding incorporation doctrines, Part 2.

<sup>L</sup> Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*.

<sup>LI</sup> Para. 48, referring to *Schmidberger*.

<sup>LII</sup> Para. 51.

<sup>LIII</sup> Para. 52.

<sup>LIV</sup> Para. 59.

<sup>LV</sup> Paras. 66-71.

<sup>LVI</sup> Para. 72, *Gillow v United Kingdom*, 24 November 1986, § 55, Series A no. 109, and C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989, par. 83.

<sup>LVII</sup> The alternative measures that the CJEU proposes in paras. 81-83 are worded in a very vague fashion. Note that in her Opinion, AG Sharpston had called instead for a careful assessment of the measure in terms of necessity and proportionality, which could only be based on the clear identification of the objective pursued (alternatively, macro-transparency or micro-transparency). See para. 105 of of the Opinion.

<sup>LVIII</sup> See ‘La possibilité d’un juste équilibre and the Charter’, anonymous post on [adjudicatingeurope.eu](http://adjudicatingeurope.eu).

<sup>LIX</sup> See cases *Schmidberger* and *Laval*, cit. On proportionality in the EU, see recently Harbo 2010. For a wider study, see Ellis 1999. For an accurate comment on *Schmidberger* and *Omega*, which explains the Court of Justice’s balancing practice, see Alemanno 2004.

<sup>LX</sup> This is also the point made by Bobek 2011.

<sup>LXI</sup> See *ibid.*, 2018-2019.

<sup>LXII</sup> On this, see extensively Fontanelli and Martinico 2011.

<sup>LXIII</sup> Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH* (22 December 2010).

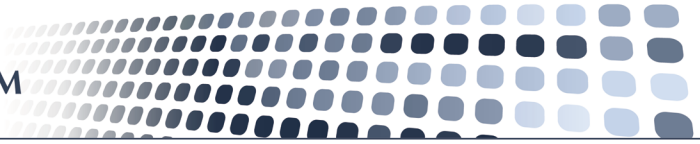
<sup>LXIV</sup> Para. 27.

<sup>LXV</sup> Para. 28 and case-law referred to therein.

<sup>LXVI</sup> Para. 33.

<sup>LXVII</sup> Paras. 45-52.

<sup>LXVIII</sup> *Airey v. Ireland* of 9 October 1979 (Eur. Court H.R., Series A, No 32, p. 11). This is the case in which the ECtHR inaugurated the imposition of positive obligations on States (involving public expenditure) arising out of guarantees laid down in the ECHR, see the bibliography on the protection and implementation of ESCR through the ECHR, above at note XII.



LXIX Para. 60.

LXX Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL*, (1 March 2011). See Tobler 2011.

LXXI Namely, Art. 5(2) of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37).

LXXII Art. 5(1) of the Directive.

LXXIII Concerning, respectively, the prohibition of discrimination based on sex and the right to equality between sexes in all areas.

LXXIV The sense of the challenged clause was that of providing for a transitional period of adaptation prior to the general application of unisex premiums, but it was formulated in a way that left open the possibility to conclude and keep in force sex-sensitive contracts indefinitely, therefore the Court had to rule its invalidity.

LXXV See Advocate General Kokott's Opinion, paras. 44 and 46: "Recourse to prognoses is indispensable in actuarial calculations of premiums and services in order to make that risk calculable and develop the products in such a way as to do justice to the risk ... It is therefore in principle perfectly legitimate with regard to risk evaluation to carry out a group examination instead of – or in addition to – an individual examination."

LXXVI *Ibid.*, para. 66.

LXXVII On the issue of comparability and on the underlying questions, see Tobler 2011: 2051-2053.

LXXVIII Paras. 25-26.

LXXIX Joined cases C-297/10 and C-298/10 *Hennigs v Eisenbahn-Bundesamt, Land Berlin v Mai*, decision of 8 September 2011, nyr.

LXXX See para. 59.

LXXXI See para. 78.

LXXXII As already made clear in the cases Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union ('Viking Line')* [2007] ECR I-10779, paragraph 44, and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 91).

LXXXIII See para. 98.

LXXXIV Case C-34/10 *Oliver Brüstle v Greenpeace e.V.* decision of 18 October 2011, nyr.

LXXXV Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions.

LXXXVI See Art. 6(2)(c).

LXXXVII Art. 1 proclaims the inviolability of human dignity, whereas Art. 3(2) reads: "In the fields of medicine and biology, the following must be respected in particular: ... (c) the prohibition on making the human body and its parts as such a source of financial gain."

LXXXVIII See the precautionary statement at para. 30.

LXXXIX Opinion of AG Bot, issued on 10 March 2011, C-34/10 *Oliver Brüstle v Greenpeace e.V.*, para. 46.

XC Joined cases C-411/10 *N.S. v Secretary of State for the Home Department* and C-493/10 *M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, judgment of 21 December 2011, nyr.

XCI Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

XCII See para. 68-69.

XCIII See in particular para. 80 of the Opinion: "decisions taken by the Member States on the basis of Article 3(2) of Regulation No 343/2003 are also to be regarded as implementing measures, despite the discretion available to them."

XCIV See para. 79.

XCv See para. 86.

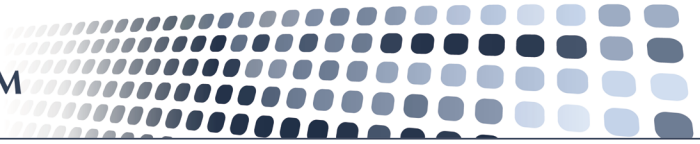
XCVI See *M.S.S. v. Belgium and Greece* (Application no. 30696/09), 21 January 2011; Syring 2011.

XCvII See para. 91.

XCvIII See for instance para. 25 of *Brüstle* cit.

XCIX This description of the margin of appreciation is concededly simplified, and should be accepted only to highlight its difference with the principle of proportionality used by the CJEU. For a complete review of the concept, see Letsas 2006; Yourrow 1996.

C *Volker und Markus Schecke GbR* (C-92/09), *Hartmut Eifert* (C-93/09), par. 74: "It is settled case-law that the principle of proportionality, which is one of the general principles of European Union law, requires that measures implemented by acts of the European Union are appropriate for attaining the objective pursued and



do not go beyond what is necessary to achieve it (Case C-58/08 Vodafone and Others [2010] ECR I-0000, paragraph 51 and the case-law cited.)” Note that the margin of discretion accorded to national authorities by the CJEU (see eg *Schmidberger*, para. 81) must still be subject to a “quite strict “no less restrictive means” test,” see De Burca 2007: 7.

<sup>CI</sup> See *Family Reunion*, cit., para. 62: “the final subparagraph of Article 4(1) of the Directive cannot be regarded as running counter to the right to respect for family life. In the context of a directive imposing precise positive obligations on the Member States, it preserves a limited margin of appreciation for those States which is no different from that accorded to them by the European Court of Human Rights, in its case-law relating to that right, for weighing, in each factual situation, the competing interests.”

<sup>CII</sup> See *Family Reunion*, cit., paras. 22-23.

<sup>CIII</sup> See judgments No. 348 and 349 of 2007 and the comment in Fontanelli and Biondi 2008.

<sup>CIV</sup> See the judgment of the Civil Tribunal of Pisa (Labour section) *Hane v. INPS* of case N. RG. 1080/2008 (hearing and judgment of 27 September 2010).

<sup>CV</sup> See *Corte Costituzionale*, judgment no. 329/2011, available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it), of 16 December 2011.

<sup>CVI</sup> *Zagorski & Baze*, R (on the application of) v Secretary of State for Business, Innovation and Skills & Anor [2010] EWHC 3110 (Admin) (29 November 2010), available at <http://www.bailii.org/ew/cases/EWHC/Admin/2010/3110.html>.

<sup>CVII</sup> See par. 70: “... in deciding whether or not to exercise the power of derogation the Defendant is implementing EU law in the sense of applying it or giving effect to it and he is bound to do so in accordance with the fundamental principles and rights which form part of EU law.”

<sup>CVIII</sup> See par. 74: “I consider that the rights recognised by Articles 2 and 4 of the Charter are co-extensive with the rights in the Convention with which they correspond, not only in terms of their content but also in terms of the scope *ratione personae* of their application. These provisions of the Charter do not confer any rights on these [non-EU] Claimants.”

<sup>CIX</sup> In *Soering v. UK* (1989) 11 EHRR 439 the European Court of Human Rights held that extradition to the United States, with the prospect of being held on death row for 6-8 years, would give rise to a breach of Article 3 ECHR.

<sup>CX</sup> Case C-271/08 *Commission v Federal Republic of Germany*, decision of 15 July 2010.

<sup>CXI</sup> See para. 81 of the Opinion to the case C-271/08 *Commission v Germany* cit., of 14 April 2010: “In the case of a conflict between a fundamental right and a fundamental freedom, both legal positions must be presumed to have equal status. That general equality in status implies, first, that, in the interests of fundamental rights, fundamental freedoms may be restricted. However, second, it implies also that the exercise of fundamental freedoms may justify a restriction on fundamental rights

<sup>CXII</sup> On the “dramatic” distance between the two courts on the same issues, see the exhaustive essay of Ewing and Hendy 2010.

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