

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

# POLICY DEPARTMENT **C**

## CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs

Justice, Freedom and Security

Gender Equality

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Petitions

**Main trends in the recent case law of  
the EU Court of Justice and  
the European Court of Human Rights  
in the field of fundamental rights**

STUDY



**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND**  
**CONSTITUTIONAL AFFAIRS**

**CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS**

**Main trends in the recent case law of  
the EU Court of Justice and  
the European Court of Human Rights  
in the field of fundamental rights**

**STUDY**

**Abstract**

The goal of this study is to offer an overview of the case law from the Luxembourg and Strasbourg Courts regarding fundamental rights over 2010 and 2011. This study identifies the main trends and fields of conflict and focuses on the role played by the Charter of Fundamental Rights of the European Union after the entry into force of the Lisbon Treaty. Furthermore, the study examines the nature and intensity of cross-references between both Courts.

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## LIST OF ABBREVIATIONS

ECJ	Court of Justice
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

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## EXECUTIVE SUMMARY

### Background

The Lisbon Treaty, which entered into force in December 2009, took an important step forward with regard to fundamental rights protection within the EU.

First of all, the Lisbon Treaty granted the EU Charter of Fundamental Rights (hereinafter, Charter) the same legal value as the Treaties (Article 6(1) TEU). Hence, the Charter, which had been proclaimed in Nice in 2000, has finally acquired legally binding force. In addition, Article 6(3) TEU maintains the reference to fundamental rights as general principles of Union's law, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States.

Secondly, the Lisbon Treaty provided for the accession of the EU to the ECHR (Article 6(2) TEU). Protocol No. 8 sets forth that the agreement relating to the accession of the Union to the ECHR provided for in Article 6(2) TEU shall make provision for preserving the specific characteristics of the Union and Union law. The negotiations for the accession started in Spring 2010 and are still underway.

In June 2010, Protocol No. 14 to the ECHR came into force. Protocol No. 14 has provided for the accession of the European Union to the Convention (Article 59(2) ECHR). As stated in its Explanatory Report, this Protocol 'makes no radical changes to the control system established by the Convention. The changes it does make relate more to the functioning than to the structure of the system. Their main purpose is to improve it, giving the Court the procedural means and flexibility it needs to process all applications in a timely fashion, while allowing it to concentrate on the most important cases which require in-depth examination'.

In 2010 the ECtHR delivered 1499 judgments (18 by the Grand Chamber), and in 2011 the ECtHR delivered 1157 judgments (13 by the Grand Chamber). At the end of the year, the number of applications pending before a judicial formation reached a total of 151600. Since the beginning of the century, the Court's excessive caseload is the main problem faced by the Convention system of fundamental rights' protection.

### Aim

The goal of this study is to provide an overview of the case law from the ECJ and the ECtHR regarding fundamental rights over 2010 and 2011. The content is structured in three main parts: first, the analysis of ECJ case law; second, the analysis of ECtHR case law; and third the inquiry about the cross-references between Luxembourg and Strasbourg. As required, the cases on immigration and asylum have been excluded from this Study.

This study aims at answering the following questions: which are the main trends regarding fundamental rights in the case law of the ECJ and the ECtHR over the past two years? What has been the role of the Charter since its entry into force? What has been the interplay between the ECJ and the ECtHR?



## GENERAL INFORMATION

The main findings resulting from the analysis of the recent case law of the ECJ and the ECtHR regarding fundamental rights are the following:

1. The main cases regarding fundamental rights before the ECJ over 2010-2011 concern: private and family life; data protection and the right to access to documents; non-discrimination; citizenship; and effective judicial protection.

Notably, in two occasions, the ECJ has declared EU legal provisions invalid for violating fundamental rights. First, in *Volker*, the ECJ ruled that the obligation to publish personal data of natural persons who were beneficiaries of EU funds infringed Articles 7 and 8 Charter. Hence, Articles 42(8b) and 44a of Regulation No 1290/2005 and Regulation No 259/2008 were declared invalid in so far as, with regard to natural persons, those provisions imposed an obligation to publish personal data relating to each beneficiary without drawing a distinction based on other relevant criteria. Second, in *Test-Achats*, the ECJ declared invalid a provision of Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access and supply of goods and services, for being contrary to Articles 23 and 21 Charter. This provision contained an exemption from the non-discrimination rule and allowed insurance providers to draw distinctions on the basis of gender to calculate insurance premiums and benefits based on statistics that could prove that sex was a relevant factor for the assessment of risk.

In addition to *Volker*, the ECJ has issued several important cases regarding data protection. *Scarlet Extended* concerns the obligations that can be imposed upon internet service providers for the sake of protecting intellectual property rights. The Court balanced the rights to intellectual property (Article 17.2 Charter), freedom to conduct a business (Article 16 Charter), the right to personal data (Article 8 Charter), and freedom of information (Article 11 Charter) to conclude that imposing on an internet service provider the obligation to install a filtering system that would involve monitoring all electronic communications passing via its services, and the collection and identification of users' IP addresses, for an unlimited period of time, was precluded by EU law.

In *ASNEF*, the ECJ was called upon to decide whether Member States were entitled to add extra conditions to those required by Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, with the effect of extending the protection afforded by EU law. The ECJ acknowledged that Recital 10 of the Directive 95/46 sets forth that while the goal of the Directive is ensuring equivalent protection, 'the approximation of the national laws applicable in this area must not result in any lessening of the protection they afford'. Nonetheless, the ECJ ruled that Member States could not add new principles relating to the lawfulness of the processing of personal data or impose additional requirements with the effect of amending the scope of Directive 95/46. In particular, the ECJ ruled that, in the absence of the subject's consent, national law could not exclude the possibility of processing certain categories of personal data in a generalized manner.

The ECJ has issued several judgments about the right of access to documents, as a result of appeals brought against General Court decisions, in which Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents was at stake. In *Bavarian Lager*, the Court annulled the General Court's judgment, and upheld the

Commission decision, which had refused disclosing the names of those who participated in a meeting in the course of infringement proceedings without their consent. In *Sweden*, the ECJ held that judicial activities are excluded from the scope of the right of access to documents, and so are the documents submitted by institutions while court proceedings are still pending. In *Technische Glaswerke*, the ECJ declared the existence of a general presumption according to which disclosing documents in the administrative file in procedures for reviewing State aid undermines the protection of the objectives of investigation activities.

In most of the cases regarding equality that reached the ECJ, the decision was favorable to individuals who alleged to have been discriminated against. As mentioned above, the ECJ invalidated a provision of Directive 2004/113 in *Test-Achats*. Also, in *Danosa*, the ECJ ruled that Directive 92/85 precluded national legislation that permitted the dismissal of the member of a capital company's Board of Directors without restriction, where the person concerned might be regarded as a 'pregnant worker' within the meaning of the Directive. The ECJ declared that even if the person concerned was not considered to be a 'pregnant worker' for the purposes of Directive 92/85, the removal on account of pregnancy can affect only women and thus constitutes direct discrimination on grounds of sex, contrary to Directive 76/207.

Regarding sexual orientation, in *Römer*, the ECJ was called upon to decide whether the differential treatment between marriages and same-sex registered partnerships, regarding the calculation of a supplementary retirement pension, was compatible with the right to non-discrimination. The outcome of this case was protective for registered same-sex couples in Germany. However, it had a limited reach, given the conditions set up by the ECJ to afford protection. The differential treatment in national legislation is considered to be incompatible with Directive 2000/78/EC, establishing a general framework for equal treatment in employment and occupation, as long as, first, Member States provide for some form of registered partnership for same-sex couples. Hence, if the State fails to provide any legal recognition for same-sex couples, the EU principle of equality will not apply given the lack of a term of comparability. Second, marriages and registered partnerships need to be not only factually, but also legally analogous in that State.

In three of the cases regarding discrimination on grounds of age, i.e. *Kücükdeveci*, *Hennings* and *Prigge*, the ECJ held that the respective national measures at stake were not adequate or necessary to achieve the aim pursued, and therefore they lacked proper justification. In *Rosenbaldt* and *Georgiev*, the ECJ admitted the compatibility with EU law of national provisions for the automatic termination of contract on grounds of age. Although *Prigge* concerned the same kind of national provisions, the termination of contracts of airline pilots at the age of 60 was considered to be disproportionate.

With regard to discrimination on grounds of nationality, *Bressol* and *Commission v. The Netherlands* should be highlighted. In *Bressol*, the ECJ ruled that a difference in treatment based upon residence in the access to higher education was precluded by the principle of non discrimination on grounds of nationality (Article 18 TFEU) in connection with the freedom of movement (Article 21 TFEU), unless properly justified. The ECJ provided the national court with specific guidelines to perform that assessment. In *Commission v The Netherlands*, the ECJ ruled that the condition of nationality for becoming a notary in The Netherlands infringed the freedom of establishment (Article 49 TFEU). Additionally, in *Landtová*, the ECJ ruled that a previous interpretation by the Czech Constitutional Court was precluded by the principle of non-discrimination on grounds of nationality. This ruling has been followed by the fierce reaction of the Czech Constitutional Court.

The ECJ has issued several important judgments in the field of citizenship. As is admitted, it is for each Member State to lay down the conditions for the acquisition and loss of nationality. In *Rottmann*, however, the ECJ ruled that when the decision of withdrawing the nationality of a Member State involves losing EU citizenship, account should be taken for the proportionality principle.

Moreover, in *Ruiz Zambrano*, the ECJ ruled that Member States shall recognize the right of residence (and work) to third country nationals whose dependent children are EU citizens. Otherwise, were the father expelled, the EU citizens would be 'forced' to leave the territory of the Union. This was a case in which neither the father nor the children had moved from one Member State to another. Even in those circumstances, in which no cross-border element was present, the ECJ held that Article 20 TFEU precluded national measures 'which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of that status'. Later on, *McCarthy* and *Dereci* limited the potential reach of *Ruiz Zambrano*. In *Dereci*, the ECJ expressly held that the criterion relating to the denial of the substance of the rights attached to EU citizenship refers to situations in which 'a Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole'.

The ECJ issued two preliminary rulings about the ban to leave the territory of the Member State of nationality in light of the right to free movement enshrined in Article 21 TFEU and Directive 2004/38 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. The ECJ recalled that measures taken on grounds of public policy or public security limiting the right to free movement can only be justified if they are based exclusively on the personal conduct of the individual concerned.

Finally, regarding the right to effective judicial protection, in *DEB*, the ECJ contributed to secure the principle of effectiveness of EU law in a case in which a legal person applied for legal aid in order to bring an action to establish State liability under EU law for the delay in the transposition of a Directive. The ECJ concluded that the principle of effective judicial protection (Article 47 of the Charter) must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer. The ECJ indicated that it was for the national court to ascertain whether, in that case, the conditions for granting legal aid constituted an unjustified limitation on the right of access to courts.

The analysis of the recent case law has focused on the role played by the Charter since the Lisbon Treaty has rendered the Charter legally binding. According to the CURIA database, the Charter has been referred to in 86 judgments delivered by the ECJ between 2010 and 2011. From the standpoint of the treatment given to the Charter, the cases might be classified into three groups.

First, cases in which the Charter is taken as the main source for identifying and interpreting fundamental rights. Notably, these are the cases in which the ECJ has declared EU provisions to be invalid: *Test-Achats* and *Volker*, the former concerning the right to non-discrimination on the basis of sex and the latter the right to data protection. In both of them, the ECJ stated that the validity of the contested provisions had to be assessed in the light of the Charter. The Charter also had a prominent place in *Scarlet Extended*, about data protection, and *DEB*, on the right to effective judicial protection. In *DEB*, the ECJ

transformed the question formulated by the national court about the effectiveness of EU law into a question regarding the fundamental right to effective judicial protection, by reference to the Charter.

Second, cases in which the Charter appears as a complementary source. For instance, *Kücükdeveci* and *Prigge*, regarding discrimination on grounds of age, referred to the Charter to confirm the prior existence of the corresponding general principle of EU law. Indeed, the reasoning of the Court focused on Directive 2000/78, establishing a general framework for equal treatment in employment and occupation, which gave expression to this general principle. Also, in *Danosa*, regarding the right to equality of a pregnant woman in the workplace, only in reaching to the end of the reasoning, did the ECJ argue that its conclusion was supported by the principle of equality between men and women enshrined in Article 23 Charter. In *ASNEF*, the reference to the Charter appeared as well at an advanced stage of the reasoning. The ECJ started by reference to Article 1 of Directive 95/46, which requires Member States to ensure the protection of the fundamental rights and freedoms of natural persons, and in particular their privacy, in relation to the handling of personal data. Only when the ECJ argued about the need to balance the disclosure of data with fundamental rights, did the ECJ mention Articles 7 and 8 of the Charter. Likewise, in *PMOI*, regarding the right to be heard before any adverse individual measure is taken, only after reaching the conclusion, did the ECJ hold that this right was expressly affirmed in Article 41(2)(a) Charter.

Third, cases in which the ECJ failed to take the Charter into consideration. In several cases, the ECJ limited the reasoning to the corresponding Directive, such as *Römer*, *Rosenblatt*, and *Georgiev*. In citizenship and free movement cases, such as *Ruiz Zambrano*, *Gaydaraov* and *Aldazhov*, the ECJ failed to give an interpretation of the Charter, although the referring courts had explicitly asked for it. In cases regarding access to documents, such as *Bavarian Lager*, *Sweden* or *Technische Glaswerke*, the ECJ was oblivious of the Charter, which recognizes this right in Article 42. Furthermore, even though one of the main novelties of the Charter was the incorporation of specific provisions referred to the right to the integrity of the person in the fields of medicine and biology (Article 3(2) Charter), the Charter was not mentioned in *Brüstle*, about the interpretation of the concept of 'human embryo'.

2. Over 2010-2011, the largest number of judgments delivered by the ECtHR relate to Article 5 and Article 6 ECHR. In 2011, 261 judgments dealt with the right to liberty and security, while more than 550 referred to the right to a fair trial and the length of proceedings. The ECtHR decided also on important issues concerning the right to life, right to private and family life, freedom of thought, conscience and religion, right to marry and the prohibition of discrimination, among others.

Regarding the right to life, in *Haas v. Switzerland* the Court acknowledged that the right of an individual to decide how and when to end his life, provided that such individual was in a position to make up his own mind in that respect and to take appropriate action, was an aspect covered by the right to respect for private life. In *Al-Saadoon and Mufdhi* the Court reiterated and clarified its case law with regard to capital punishment and concluded that the death penalty, which involved the deliberate and premeditated destruction of a human being by the State authorities, causing physical pain and intense psychological suffering as a result of the foreknowledge of death, could be considered inhuman and degrading and, as such, contrary to Article 3 of the Convention.

In the field of the prohibition of torture and inhuman treatment, the Grand Chamber recalled, in *Gäfgen v. Germany*, that the prohibition of ill-treatment applied irrespective of the victim's conduct or the motivation of the authorities, and admitted no exceptions.

With regard to right to liberty and security, the Grand Chamber reiterated, in *Medvedyev and Others v. France*, the importance of the guarantees provided by Article 5(3) for the arrested person. The Court had already noted that terrorist offences presented the authorities with special problems, but this did not give them *carte blanche*, under Article 5, to place suspects in police custody, free from effective control. The same applied to the fight against drug trafficking on the high seas. The Court has also decided several cases against Germany on the issue of preventive detention, among others *Haidn* (preventive detention ordered retrospectively, following completion of prison term), *Schummer* (retroactive extension of preventive detention not justified), *Schmitz* (indefinite preventive detention ordered by sentencing court) and *Schönbrod* (preventive detention without a court ordering its execution).

As to the right to a fair trial, the Court decided in *Diallo v. Sweden* that the assistance of an interpreter should be provided during the investigating stage, unless it is demonstrated, in the light of the particular circumstances of each case, that there are compelling reasons to restrict this right. In *Al-Khawaja and Tahery v. the United Kingdom*, the Grand Chamber decided on the use during a criminal trial of evidence taken from witnesses who were absent because they had died or owing to fear. The Court held that if a conviction is based solely or decisively on the statement of an absent witness, counterbalancing factors must be in place, including strong procedural safeguards.

Several important cases have been delivered on the interpretation of Article 8, the right to respect for private and family life. In *Gillan and Quinton v. the United Kingdom*, the Court was confronted with the sensitive issue of the power conferred on the police, for the prevention of acts of terrorism, to stop and search individuals in public without plausible reasons for suspecting them of having committed an offence. In *Uzun v. Germany*, the Court examined for the first time the issue of the existence of interference with private life on account of surveillance of movements in public places via a global positioning system (GPS), installed in a vehicle, with regard to a suspected terrorist. The Court found no violation.

Among the cases regarding the protection of family life, in *Moretti and Benedetti v. Italy*, the Court reiterated that this notion was not confined solely to marriage-based relationships, but could also encompass other *de facto* 'family ties', where further elements of dependency were present involving more than emotional ties. For the first time, in *Schalk and Kopf v. Austria*, the ECtHR admitted that a same-sex couple constitutes a family for the purposes of protection of Article 8 ECHR. Noting that over the past decade society's attitudes with regard to same-sex couples had rapidly changed in many Member States, the Court concluded that homosexual couples in a stable relationship qualified as 'family life', in the same way that the relationship between a couple of the opposite sex.

In *A, B and C v. Ireland*, concerning the criteria for access to abortion, the Grand Chamber examined the protection of public morals as a 'legitimate aim'. The Court clarified its case law regarding the role of a European consensus in the interpretation of the Convention and the State's margin of appreciation. Since there is no European consensus on the scientific and legal definition of the beginning of life and as the right of the foetus and mother are inextricably linked, the State's margin of appreciation concerning the question of when life



begins implies a similar margin of appreciation as regards the balancing of the interests of the foetus and the mother.

Medical science, and in particular infertility treatment involving medically assisted procreation techniques, was at the centre of the judgment in *S.H. and Others v. Austria*. The Grand Chamber stated that the right of a couple to conceive a child and to make use of medically-assisted procreation for that purpose was protected by Article 8, since such a choice was an expression of private and family life. As regards the State's margin of appreciation in regulating matters of artificial procreation, the Court observed that there was nowadays a clear trend in the legislation of the Member States of the Council of Europe towards allowing gamete donation for the purpose of in vitro fertilization. Such an emerging European consensus, however, was not based on settled principles, but reflected a stage of development within a particularly dynamic field of law, and thus it did not decisively narrow the margin of appreciation of the State.

Regarding freedom of thought, conscience and religion, the Grand Chamber held in *Bayatyan v. Armenia* that, although Article 9 does not make express reference to the right to conscientious objection, opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of this Article.

In the field of the freedom of expression, the judgment in *Akdaş v. Turkey* developed the case law concerning the balance between freedom of expression and the protection of morals. Acknowledgment of the cultural, historical and religious particularities of the Council of Europe's member States could not go so far as to prevent public access in a particular language to a work belonging to the 'European literary heritage'. The judgment in *RTBF v. Belgium* dealt for the first time with a preventive measure in the sphere of television broadcasting. The case concerned a temporary ban on broadcasting a television documentary.

With regard to the right to marry, in *Şerife Yiğit v. Turkey*, the Grand Chamber found that Article 8 could not be interpreted as imposing an obligation on the State to recognize religious marriage; nor did it require the State to establish a special regime for a particular category of unmarried couples. In *Schalk and Kopf v. Austria*, the Court ruled for the first time on the issue of same-sex marriages, and concluded that Article 12 did not impose an obligation on the State to allow homosexuals to marry.

Regarding the prohibition of discrimination the Grand Chamber further clarified the expression 'other status' mentioned in Article 14. In *Carson and Others v. the United Kingdom* it held that a person's place of residence was to be seen as an aspect of personal status and therefore represented a ground for discrimination that was prohibited by this Article regarding a pension scheme. The case *Ponomaryov v. Bulgaria* concerned the obligation for certain categories of aliens to pay school fees in order to have access to State secondary schools. The Court reiterated that very weighty reasons would have to be put forward before it could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention.

As to the right to education, the Grand Chamber held in *Lautsi v. Italy* that the decision regarding whether crucifixes should be allowed in State schools' classrooms was, in

principle, a matter falling within the State's margin of appreciation, particularly in the absence of any European consensus.

The Strasbourg Court has also decided relevant issues related to the functioning of the conventional system. Protocol No. 14, which came into force in June 2010, introduced a new inadmissibility criterion according to which if the applicant has not suffered significant disadvantage, the Court shall declare inadmissible the application. In *Giusti v. Italy*, the Court summarized its previous case-law on the issue, and held that in order to verify whether the violation of a right reaches the minimum threshold, the following elements should be taken into account: the nature of the right allegedly breached, the seriousness of the impact of the alleged violation for the exercise of the right and/or the consequences of the violation for the personal situation of the defendant.

With regard to the extra-territorial effects of the Convention, in *Al-Skeini and others v. The United Kingdom*, the Court recalled that an extra-territorial act would fall within the State's jurisdiction under Article 1 ECHR only in exceptional circumstances. One such exception established in the Court's case law was when a State bound by the Convention exercised public powers in the territory of another State, which was the case in Iraq when the United Kingdom (together with the United States) assumed the exercise of public powers usually to be exercised by a sovereign government. In those exceptional circumstances, a jurisdictional link existed between the United Kingdom and individuals killed in the course of security operations carried out by British soldiers.

As to the binding force of interim measures, the Court recalled in *Al-Saadoon and Mufdhi v. The United Kingdom* that interim measures under Rule 39 of the Rules of Court (and to which there is not specific provision in the Convention) are indicated only in limited spheres and only if there is an imminent risk of irreparable damage. Requests for interim measures usually concern the right to life (Article 2), the right not to be subject to torture or inhuman treatment (Article 3) and, exceptionally, the right to respect for private and family life (Article 8). The Court insisted that the right to an individual application guaranteed by Article 34 of the Convention will be breached if the authorities of a 'Contracting State fail to take all steps which could reasonably have been taken in order to comply with the interim measure indicated by the Court'.

Finally, regarding the proper execution of ECtHR judgments, in *Emre v. Switzerland (No. 2)* the Court stated that according to the requirements of Article 46 a respondent State found to have breached the Convention or its Protocols is under an obligation to abide by the Court's decision. The State party will be under an obligation not only to pay the sums awarded as just satisfaction, but also to take individual and/or, if appropriate, general measures in its domestic legal order, to put an end to the violation and redress the effects, with the aim of putting the applicant, as far as possible, in the position he would have been, had the requirements of the Convention not been disregarded.

3. Cross-references between Luxembourg and Strasbourg have been increasing over time. Moreover, the need for the ECJ to take into account the Convention for the interpretation of the Charter has been enshrined in Article 52(3) Charter. Over 2010-2011, according to the CURIA database, the ECJ has mentioned the ECHR in 57 judgments.

Among the cases examined, the ECJ has referred to the ECHR mainly in cases regarding the right to privacy (Article 8 ECHR) and the right to a fair trial (Article 6 ECHR). Usually, references to the ECHR are accompanied by references to its case law. Remarkably enough, in *McB*, *Volker*, and *DEB*, the ECJ relied heavily on the ECtHR case law. To the contrary,

references to the Convention are rare in cases regarding the right to non-discrimination or citizenship. In a few cases, such as *Chalkor* and *Bavarian Lager*, the ECJ manifestly showed the preference for the Charter over the Convention, without entering into conflict with the ECHR.

Throughout 2010 and 2011, the Charter has been quoted in eight judgments of the ECtHR and four decisions. The cases in which the role of the Charter has been more prominent are: *Neulinger and Shuruk v. Switzerland*, with regard to the best interests of the child (Article 24.2 Charter). Also, in *Bayatyan v. Armenia*, the ECtHR identified a right to conscientious objection in Article 9 ECHR by reference to Article 10(2) Charter. In these cases, the Charter is quoted to show the existence of a broad consensus. Additionally, in *Schalk and Kopf v. Austria*, Article 9 Charter played a decisive role for the interpretation of article 12 ECHR, with regard to the issue of same-sex marriage. In most of the remaining cases, the quotation to the Charter was made in the section of the judgment regarding 'The Facts', which means that it had no relevance for deciding the case.

Also, the ECtHR has made reference to other provisions of EU law. For instance, in *Ullens de Schooten and Rezabek v. Belgium*, the ECtHR relied on the CILFIT doctrine elaborated by the ECJ case law; free movement provisions have been quoted in *Nalbantski v. Bulgaria*; and Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, in *Shaw v. Hungary*.



## 1. ECJ CASE LAW ON FUNDAMENTAL RIGHTS

This Chapter will offer an overview of the main cases regarding fundamental rights delivered by the ECJ throughout 2010-2011. The cases will be grouped according to the main fundamental rights involved. For the most important cases, a table will be provided identifying the case; the EU law measures at stake and the fundamental rights involved; whether there are references to the ECHR; the procedure, the content of the case, and the final decision. Other cases that have dealt with the same fundamental right will be thereby commented upon.

### 1.1. Human dignity and integrity

<i>Case</i>	C-34/10, <i>Oliver Brüstle v Greenpeace e.V.</i> (18 October 2011)
<i>EU law</i>	Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions
<i>Fundamental Right</i>	Human dignity (Charter not mentioned)
<i>Reference to the ECHR</i>	No
<i>Procedure</i>	Preliminary reference from the Bundesgerichtshof (Germany)
<i>Content of the case</i>	<p>This reference was made in proceedings brought by Greenpeace seeking the annulment of the German patent held by Mr. Brüstle, which relates to neural precursor cells and the processes for their production from embryonic stem cells and their use for therapeutic purposes.</p> <p>At stake in this case was the interpretation of the concept of 'human embryo' for the purpose of ascertaining the scope of the prohibition on patentability laid down by Article 6(2)(c) of the Directive.</p> <p>The ECJ held that, since the Directive did not contain any reference to national laws for the definition of the term, it should be regarded as designating an autonomous concept of EU law, which had to be interpreted in a uniform manner throughout the territory of the Union.</p> <p>The ECJ pointed out that, although, the definition of human embryo is a very sensitive social issue in many Member States, the Court was not called upon to broach questions of a medical or ethical nature, but had to restrict itself to a legal interpretation of the relevant provisions of the Directive.</p> <p>In that regard, the preamble to the Directive states that although it seeks to promote investment in the field of biotechnology, the use of biological material originating from humans must be consistent with regard for</p>

	<p>fundamental rights and, in particular, the dignity of the person.</p> <p>Article 6 of the Directive lists as contrary to <i>ordre public</i> or morality, and therefore excluded from patentability, processes for cloning human beings, processes for modifying the germ line genetic identity of human beings, and uses of human embryos for industrial or commercial purposes. Recital 38 in the preamble to the Directive states that this list is not exhaustive and that all processes the use of which offends human dignity are also excluded from patentability. Thus, the Court held that the concept of 'human embryo' within the meaning of Article 6(2)(c) of the Directive had to be understood in a wide sense.</p>
<i>Decision</i>	<p>In particular, regarding the concept of 'human embryo' the ECJ concluded that:</p> <ul style="list-style-type: none"> <li>– any human ovum after fertilisation, any non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted and any non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis constitute a 'human embryo' within the meaning of Article 6(2)(c) of the Directive;</li> <li>– it is for the referring court to ascertain, in the light of scientific developments, whether a stem cell obtained from a human embryo at the blastocyst stage constitutes a 'human embryo' within the meaning of Article 6(2)(c) of the Directive.</li> </ul>

## 1.2. Right to privacy and family life and the rights of the child

<i>Case</i>	C-400/10, <i>J. McB. v L. E.</i> (5 October 2010)
<i>EU law</i>	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
<i>Fundamental Rights</i>	Articles 7 and 24 Charter
<i>Reference to the ECHR</i>	Article 8 ECHR Case law
<i>Procedure</i>	Preliminary reference from the Supreme Court (Ireland)
<i>Content of the case</i>	<p>Mr. McB, an Irish national, and Ms. E., a British national, lived together as an unmarried couple and had three children. In July 2009, the mother fled from Ireland to England with the children. The father claimed that the children had been removed wrongfully.</p> <p>The referring court asked whether Regulation No 2201/2003 precluded national legislation according to which the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on the father's obtaining a judgment from a national court awarding such rights of custody to him.</p> <p>The ECJ clarified that, for the purposes of applying Regulation No 2201/2003, rights of custody include the right to determine the child's place of residence. Regulation No 2201/2003, however, does not determine who must have such rights of custody, but refers this issue to the law of the Member State where the child was habitually resident immediately before the removal.</p> <p>Under Irish law, the natural father does not have rights of custody in respect of his child, unless those rights are conferred on him by an agreement entered into by the parents or by a court judgment, whereas such rights of custody automatically belong to the mother.</p> <p>Thus, the ECJ held that whether a child's removal is wrongful for the purposes of applying the Regulation is entirely dependent on the existence of rights of custody, conferred by the relevant national law. The question was whether Article 7 Charter affected this interpretation.</p> <p>With reference to Article 51 Charter, the ECJ held that the Charter should be taken into consideration solely for the purposes of interpreting Regulation No 2201/2003, and there should be no assessment of national law as such.</p> <p>Pursuant to Article 52(3) Charter, the ECJ argued that since</p>

	<p>Article 7 Charter contains rights corresponding to those guaranteed by Article 8(1) of the ECHR, Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the ECtHR.</p> <p>The ECJ referred to a previous case, in which the ECtHR held that national legislation granting by operation of law, parental responsibility for a child solely to the child's mother is not contrary to Article 8 of the ECHR, interpreted in the light of the 1980 Hague Convention, provided that it permits the child's father to ask the national court with jurisdiction to revise the award of that responsibility.</p> <p>In addition, the ECJ held that Article 7 Charter had to be interpreted in accordance with the rights of the child (Article 24 Charter), and particularly the right of a child to maintain on a regular basis personal relationships and direct contact with both of his or her parents. The ECJ ruled that Article 24 did not preclude a situation where, for the purposes of applying Regulation No 2201/2003, rights of custody are granted, as a general rule, exclusively to the mother, and a natural father possesses rights of custody only as the result of a court judgment.</p>
<i>Decision</i>	The ECJ concluded that the national legislation at stake was compatible with the Regulation.

In this context, the ECJ has delivered several judgments regarding the interpretation of Regulation No 2201/2003 in cases concerning child abduction: C-211/10 PPU, *Doris Povse v Mauro Alpago* (1 July 2010); and C-491/10, *Joseba Andoni Aguirre Zarraga v Simone Pelz* (22 December 2010). In these cases, the fundamental right at stake was Article 24 Charter, namely, the rights of the child.

*Doris Povse* concerned a situation in which the parents enjoyed joint custody of the child. After their separation, the mother took the child from Italy to Austria. In contrast to *McB*, it was not in dispute that the case amounted to the wrongful removal of a child within the meaning of Article 2(11) of the Regulation. The questions referred by the Austrian court concerned jurisdictional issues. Article 24(3) of the Charter was just mentioned to reinforce the interpretation given to the Regulation, taking into account the best interests of the child and the right to maintain on a regular basis a personal relationship and direct contact with both parents.

In *Aguirre Zarraga*, pursuant to divorce proceedings before Spanish courts, the father was provisionally awarded rights of custody. The mother moved to Germany and settled there. After the summer holidays, the mother kept her daughter in Germany. Spanish courts ordered the return of the child to Spain. The competent German court made a reference to the ECJ asking whether, in circumstances such as those in the main proceedings, a court may exceptionally oppose the enforcement of a judgment ordering the return of a child. The judgment ordering the return had been certified on the basis of Article 42 of Regulation No 2201/2003 by the Spanish court, stating that it had fulfilled its obligation to hear the child before handing down its judgment on the award of rights of custody. The referring

court, however, argued that such hearing had not taken place, which was contrary to Article 42 Regulation, interpreted in accordance with Article 24 of the Charter.

The ECJ responded that the court in the Member State of enforcement may not oppose the judgment ordering the return. The ECJ pointed out that it is a requirement of Article 24(1) of the Charter that children should be able to express their views freely and that the views expressed should be taken into consideration on matters which concern the children, in accordance with their age and maturity. Yet, the ECJ ruled that it was not a requirement of Article 24 Charter or 42(2)(a) Regulation that the court of the Member State of origin obtain the views of the child in every case by means of a hearing, but that the right of the child does require that the legal procedures and conditions are made available to enable the child to express his or her views freely. Eventually, the ECJ stated that it is solely for the national courts of the Member State of origin to examine the lawfulness of that judgment with reference to the requirements imposed by Article 24 Charter and Article 42 Regulation No 2201/2003.

### 1.3. Data protection and access to documents

<i>Case</i>	<i>Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke and Eifert</i> (9 November 2010)
<i>EU law</i>	Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy, as amended by Council Regulation (EC) No 1437/2007 of 26 November 2007 Commission Regulation (EC) No 259/2008 of 18 March 2008 laying down detailed rules for the application of Regulation No 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD)
<i>Fundamental Rights</i>	Articles 7 and 8 Charter
<i>Reference to the ECHR</i>	Article 8 ECHR Case law
<i>Procedure</i>	Preliminary reference from the Verwaltungsgericht Wiesbaden (Germany)
<i>Content of the case</i>	The preliminary reference was raised in the course of proceedings between Volker und Markus Schecke GbR (an agricultural undertaking in the legal form of a partnership) and Mr Eifert (a full-time farmer) and Land Hessen, concerning the publication on the internet site of the Federal Office for Agriculture and Food of personal data relating to them as recipients of funds from the EAGF or the EAFRD.  The ECJ was called upon to decide on the validity of Articles 42(8b) and 44a of Regulation No 1290/2005 and of Regulation No 259/2008 in light of the right to the protection of personal data. The ECJ stated that the validity of those provisions had to be assessed in the light of Article 8(1) Charter, which is closely connected to the right to respect of private life expressed in Article 7 Charter.

	<p>The Court stated that the right to data protection is not an absolute right, as provided for in Article 8(2) Charter, and that limitations may be imposed as long as the conditions set up in Article 52(1) Charter are fulfilled. The Court also referred to Articles 52(3) and 53 of the Charter and quoted the ECHR and its case law.</p> <p>First, the Court confirmed the existence of an interference with the rights enshrined in Articles 7 and 8 Charter. Publication on a website of data naming the beneficiaries and indicating the precise amounts received by them constitutes an interference with their private life.</p> <p>Second, the Court examined whether such interference was justified, by reference to Article 52(1) Charter. The ECJ argued that the interference was 'provided by law'. Also, the interference met an objective of general interest recognized by the EU, namely, enhancing 'transparency in the use of Community funds and improve the sound financial management of these funds, in particular by reinforcing public control of the money used'. Finally, the ECJ examined whether the limitation imposed on the rights of Article 7 and 8 was proportionate to the legitimate end pursued.</p> <p>The Court held that the publication of those data was appropriate to the aim of enhancing transparency. As to the necessity of that measure regarding natural persons, the ECJ held that the EU institutions had not properly balanced the interest in guaranteeing transparency and the protection of the rights of private individuals. In contrast, with regard to legal persons, the ECJ considered that a fair balance had been struck.</p>
<i>Decision</i>	<p>Articles 42(8b) and 44a of Regulation No 1290/2005 and Regulation No 259/2008 were declared invalid in so far as, with regard to natural persons, those provisions impose an obligation to publish personal data relating to each beneficiary without drawing a distinction based on relevant criteria such as the periods during which those persons have received such aid, the frequency of such aid or the nature and amount thereof. The ECJ limited the effects of the declaration of annulment to the date on which this judgment was delivered.</p>

Case	C-468/10 and 469/10, <i>Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) and another v. Administración del Estado</i> (24 November 2011)
EU law	Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data
Fundamental Rights	Articles 7 and 8 Charter
Reference to the ECHR	No
Procedure	Preliminary reference from the Tribunal Supremo (Spain)
Content of the case	<p>The ECJ was asked whether Article 7(f) of Directive 95/46 precluded national rules which, in the absence of the data subject's consent, and in order to allow processing of that data, requires not only that the fundamental rights and freedoms of the data subject be respected, but also that the data should appear in public sources.</p> <p>The ECJ reminded that Directive 95/46 is intended to ensure that the level of protection of the rights and freedoms of individuals with regard to the processing of personal data is equivalent in all Member States. At the same time, Recital 10 adds that the approximation of national laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the EU.</p> <p>In any event, the ECJ held that it followed from the objective of ensuring an equivalent level of protection in all Member States and from the text of Article 7 of Directive 95/46, that this Article sets out an exhaustive and restrictive list of cases.</p> <p>In particular, Article 7(f) sets out two cumulative conditions that must be fulfilled in order for the processing of personal data to be lawful: firstly, the processing of the personal data must be necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed; and, secondly, such interests must not be overridden by the fundamental rights and freedoms of the data subject. Thus, Article 7(f) precludes any national rules which, in the absence of the data subject's consent, impose requirements that are additional to the two cumulative conditions set out in the preceding paragraph.</p> <p>At the same time, the ECJ argued that account must be taken of the fact that the second of those conditions necessitates a balancing of the opposing rights and interests concerned which depends, in principle, on the</p>

	<p>individual circumstances of the particular case.</p> <p>In that context, the person or the institution which carries out the balancing must take account of the significance of the data subject's rights arising from Articles 7 and 8 of the Charter.</p> <p>The ECJ admitted that in relation to the balancing which is necessary pursuant to Article 7(f) Directive, it is possible to take into consideration whether or not the data in question already appear in public sources. However, national rules cannot exclude the possibility of processing certain categories of personal data by definitively prescribing, for those categories, the result of the balancing of the opposing rights and interests.</p> <p>In addition, the ECJ ruled that Article 7(f) Directive had direct effect, since it was deemed to be sufficiently precise and stated an unconditional obligation.</p>
<i>Decision</i>	<p>The ECJ ruled that Article 7(f) of Directive must be interpreted as precluding national rules which, in the absence of the data subject's consent, require not only that the fundamental rights and freedoms of the data subject be respected, but also that the data should appear in public sources.</p>



<i>Case</i>	<i>C-70/10, Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)</i> (24 November 2011)
<i>EU law</i>	<p>Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market</p> <p>Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society</p> <p>Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights</p> <p>Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data</p> <p>Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector</p>
<i>Fundamental Rights</i>	Articles 8, 11, 16, 17.2 Charter
<i>Reference to the ECHR</i>	No
<i>Procedure</i>	Preliminary reference from the cour d'appel de Bruxelles (Belgium)
<i>Content of the case</i>	<p>SABAM is a management company which represents authors, composers and editors of musical works in authorising the use of their copyright-protected works by third parties. Scarlet is an internet service provider ('ISP') which provides its customers with access to the internet without offering other services such as downloading or file sharing. In the course of 2004, SABAM found that internet users using Scarlet's services were downloading works in SABAM's catalogue from the internet, without authorisation and without paying royalties, and asked for an injunction.</p> <p>The referring court asked whether Directives 2000/31, 2001/29, 2004/48, 95/46 and 2002/58, read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction imposed on an ISP to introduce a system for filtering all electronic communications passing via its services, which applies indiscriminately to all its customers as a preventive measure, exclusively at its expense, and for an unlimited period of time.</p> <p>The ECJ proceeded to balance the fundamental rights at</p>

	<p>stake. The protection of the right to intellectual property is enshrined in Article 17(2) of the Charter. As the judgment in Case C-275/06 <i>Promusicae</i> made clear, the protection of the fundamental right to property, including intellectual property, must be balanced against the protection of other fundamental rights.</p> <p>First, the freedom to conduct a business (Article 16 Charter). In the present case, the injunction requiring the installation of the contested filtering system involves monitoring all the electronic communications made through the network of the ISP concerned for an unlimited period of time. Accordingly, such an injunction would result in a serious infringement of the freedom of the ISP concerned to conduct its business, since it would require that ISP to install a complicated, costly, permanent computer system at its own expense.</p> <p>In addition, the contested filtering system might also infringe the fundamental rights of that ISP's customers, namely their right to protection of their personal data and their freedom to receive or impart information (Articles 8 and 11 of the Charter respectively).</p> <p>The ECJ held that the injunction requiring installation of the contested filtering system would involve a systematic analysis of all content and the collection and identification of users' IP addresses from which unlawful content on the network is sent. Those addresses are protected personal data because they allow those users to be precisely identified. Moreover, that injunction could potentially undermine freedom of information since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications.</p>
<i>Decision</i>	<p>The ECJ ruled that Directives 2000/31, 2001/29, 2004/48, 95/46 and 2002/58, read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction made against an ISP which requires it to install the contested filtering system.</p>

In C-543/09, *Deutsche Telekom v. Germany* (5 May 2011), the ECJ was questioned about the interpretation of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services; and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

The question referred by the German court was whether Article 12 of Directive 2002/58 on privacy and electronic communications makes the passing, by an undertaking which assigns telephone numbers, of data in its possession relating to subscribers of a third-party

undertaking, to an undertaking whose activity consists in providing publicly available directory enquiry services and directories, conditional on the consent, or lack of objection, of the third-party undertaking or its subscribers.

The ECJ started its reasoning by reference to Article 8(1) Charter. The ECJ also indicated that the Directive 2002/58 clarifies and supplements Directive 95/46 in the electronic communications sector. At the same time, the ECJ noted that the right to the protection of personal data is not absolute, quoting Article 8(2) Charter and *Volker*.

The ECJ concluded that the consent given under Article 12(2) of Directive 2002/58 on privacy and electronic communications, by a subscriber who has been duly informed, to the publication of his personal data in a public directory, relates to the purpose of that publication and thus extends to any subsequent processing of those data by third-party undertakings active in the market for publicly available directory enquiry services and directories, provided that such processing pursues that same purpose.

<i>Case</i>	Case C-28/08 P <i>Commission v Bavarian Lager</i> (29 June 2010)
<i>EU law</i>	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 Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data
<i>Fundamental Rights</i>	Right to the protection of personal data and right to access to documents (Charter not mentioned)
<i>Reference to the ECHR</i>	Article 8 ECHR
<i>Procedure</i>	Appeal brought by the Commission against a judgment of the General Court in Case T-194/04 <i>Bavarian Lager v Commission</i> (8 November 2007)
<i>Content of the case</i>	By its appeal, the Commission seeks the annulment of a General Courts' judgment, which in turn annulled the Commission's decision of 18 March 2004. The Commission had rejected the request by The Bavarian Lager Co. Ltd for access to the full minutes of a meeting of 11 October 1996, held in the context of a procedure for failure to fulfill obligations.  Pursuant to a complaint lodged by Bavarian Lager, on 12 April 1995, the Commission decided to institute proceedings against the UK under Article 169 EC Treaty (now 226 TFEU). On 11 October 1996, there was a meeting attended by officers of the Directorate-General for the Internal Market and Financial Services, officials of the UK Government Department of Trade and Industry and representatives of the Confederation des Brasseurs du

	<p>Marche Commun. Bavarian Lager had requested the right to attend the meeting, but the Commission refused to grant permission.</p> <p>Subsequently, Bavarian Lager asked to have access to the full minutes of the meeting, within the meaning of Article 7(2) Regulation No 1049/2001. The Commission replied that certain documents of the meeting could be disclosed, but five names of participants had been blanked out following two express refusals by persons to consent to the disclosure of their identity, and the failure to contact the other three.</p> <p>The General Court annulled the Commission's decision. The Court took the view that Bavarian Lager's request was based on Regulation No 1049/2001, which as a general rule states that the public may have access to the documents of the institutions. It also provides for exceptions by reason of certain public and private interests.</p> <p>The General Court held that the exception under Article 4(1)(b) of Regulation No 1049/2001 had to be interpreted restrictively and concerned only personal data that were capable of actually and specifically undermining the protection of privacy and the integrity of the individual. Examination as to whether a person's private life might be undermined had to be carried out in the light of Article 8 ECHR and the case law based thereon.</p> <p>The ECJ considered that the General Court had limited the application of the exception under Article 4(1)(b) Regulation to situations in which privacy or the integrity of the individual would be infringed for the purposes of Article 8 ECHR, without taking into account the legislation of the Union concerning the protection of personal data, particularly Regulation No 45/2001. Hence, the General Court had failed to apply Articles 8(b) and 18 of Regulation No 45/2001, which were essential provisions of the system of protection.</p> <p>Consequently, the ECJ held that the particular and restrictive interpretation that the General Court gave to Article 4(1)(b) Regulation No 1049/2001 did not correspond to the equilibrium which the Union legislature intended to establish between the two Regulations at stake.</p> <p>The ECJ noted that Bavarian Lager was able to have access to all the information concerning the meeting of 11 October 1996, including the opinions expressed in their professional capacity by the participants.</p> <p>Whether under the former system of Directive 95/46 or</p>
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	<p>under the system of Regulations Nos 45/2001 and 1049/2001, the Commission was right to verify whether the subjects had given their consent to the disclosure of personal data concerning them.</p> <p>The ECJ concluded that, by releasing the expurgated version of the minutes of the meeting of 11 October 1996 with the names of five participants removed therefrom, the Commission did not infringe the provisions of Regulation No 1049/2001 and sufficiently complied with its duty of openness.</p>
<i>Decision</i>	<p>The ECJ decided to set aside the judgment of the General Court, in so far as it annulled the Commission's decision of 18 March 2004, and dismissed the action of Bavarian Lager against the Commission.</p>

<i>Case</i>	Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, <i>Sweden v. Association de la presse internationale ASBL (API) and European Commission</i> (21 September 2010)
<i>EU law</i>	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
<i>Fundamental Rights</i>	Right to access to documents (Charter not mentioned) Article 255 EC Treaty (now 15 TFEU)
<i>Reference to the ECHR</i>	No
<i>Procedure</i>	Appeal brought by the Kingdom of Sweden, API, and the Commission against a judgment of the General Court in Case T-36/04 <i>API v Commission</i>
<i>Content of the case</i>	<p>In the judgment under appeal, the General Court annulled in part the decision of the Commission of 20 November 2003 refusing an application by API for access to pleadings lodged by the Commission before the Court of Justice and the General Court in certain court proceedings.</p> <p>The Commission had granted access to pleadings regarding certain cases. But the Commission had refused access to cases that were pending, according to the exception relating to the protection of court proceedings (second indent of Article 4(2) of Regulation No 1049/2001). On the same exception, also refused access to a case closed, but closely connected to a case still pending. In addition, the Commission, refused access to the pleadings of cases that were closed, but concerned actions under Article 226 EC for failure to fulfill Treaty obligations, on the basis of the exception relating to protection of the purpose of inspections, investigations and audits (third indent of Article 4(2) of Regulation No 1049/2001). As regards to the application of the last line of Article 4(2), the Commission found that there was no overriding public interest to justify allowing access to the documents applied for.</p> <p>API brought an action, which was upheld only in part by the General Court, for annulment of the contested decision. The General Court admitted that pleadings related to pending cases were covered by the exception relating to the protection of court proceedings. Nonetheless, the General Court found the refusal to grant access in the other cases unjustified, since those cases were already closed.</p> <p>The ECJ held that Regulation No 1049/2001 is intended to give the fullest possible effect to the right of public access to documents of the institutions. However, that right is subject to certain limitations based on grounds of public or private interest.</p>

	<p>The ECJ argued that it is clear, both from the wording of the relevant provisions of the Treaties and from the broad logic of Regulation No 1049/2001 and the objectives of the relevant EU rules, that judicial activities are as such excluded from the scope of the right of access to documents. First, the ECJ held that it is quite clear from the wording of Article 255 EC, that the Court is not subject to the obligations of transparency laid down in that provision. The purpose of that exclusion emerges even more clearly from Article 15 TFEU, which replaced Article 255 EC and specifies that the Court of Justice is to be subject to paragraph 3 only when exercising its administrative tasks.</p> <p>Article 4 of that Regulation devotes one of the exceptions to the right of access to institutions' documents precisely to the protection of court proceedings. The ECJ 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.</p> <p>The ECJ concluded that it was appropriate to allow a general presumption that disclosure of the pleadings lodged by one of the institutions in court proceedings would undermine the protection of those proceedings, for the purposes of the second indent of Article 4(2) of Regulation No 1049/2001, while those proceedings remain pending.</p> <p>In contrast, the ECJ held that it cannot be presumed that disclosure of pleadings lodged in a procedure that led to the delivery of a judgment on the basis of Article 226 EC undermines investigations which could lead to proceedings being brought under Article 228 EC.</p> <p>Finally, the ECJ held that the disclosure of pleadings relating to court proceedings that are closed but connected to other pending proceedings might create a risk of undermining the later proceedings. Accordingly, only a specific examination of the documents to which access is requested, can enable the Commission to establish whether their disclosure may be refused on the basis of the second indent of Article 4(2) of Regulation No 1049/2001.</p>
<i>Decision</i>	The ECJ dismissed the appeal.

In C-139/07 P, *European Commission v. Technische Glaswerke Ilmenau GmbH* (29 June 2010), the ECJ resolved an appeal brought by the Commission seeking the annulment of the judgment of the General Court in Case T-237/02 *Technische Glaswerke Ilmenau v. Commission* (14 December 2006) whereby that Court annulled the Commission's decision of 28 May 2002, in so far as it refused access to documents concerning procedures for reviewing State aid granted to Technische Glaswerke Ilmenau GmbH (TGI).

The ECJ noted at the outset that the application made by TGI concerned the whole of the administrative file regarding procedures for reviewing the State aid granted to it. The ECJ held that it was apparent that those documents fell within the activity of 'investigation, within the meaning of Article 4(2) Regulation.

The ECJ ruled that the General Court should have acknowledged the existence of a general presumption that disclosure of documents in the administrative file in procedures for reviewing State aid undermines, in principle, the protection of the objectives of investigation activities. That general presumption does not exclude the right of those interested parties to demonstrate that the disclosure of a given document is not covered by that presumption, or that there is a higher public interest justifying the disclosure of the document concerned by virtue of Article 4(2) of Regulation No 1049/2001. Yet, that was not the case. Eventually, the ECJ strike down the judgment under appeal and dismissed the action brought by TGI.

## 1.4. Equality

### 1.4.1. Sex

<i>Case</i>	C-236/09, <i>Association belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres</i> (1 March 2011)
<i>EU law</i>	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
<i>Fundamental Rights</i>	Articles 21 and 23 Charter
<i>Reference to the ECHR</i>	No
<i>Procedure</i>	Preliminary reference from the Belgian Constitutional Court
<i>Content of the case</i>	<p>The ECJ was called upon to decide the validity of Article 5(2) of Council Directive 2004/113, which, by way of derogation from the general rule requiring unisex premiums and benefits established by Article 5(1), granted certain Member States –those in which national law did not yet apply that rule at the time when the Directive was adopted– the option of deciding, before 21 December 2007, to permit proportionate differences in individuals' premiums and benefits where the use of sex is a determining factor in the assessment of risks based on relevant and accurate actuarial and statistical data.</p> <p>The referring Court questioned the validity of this provision in light of Article 6(2) TEU, and more specifically the principle of non-discrimination. The ECJ stated that the validity of Article 5(2) had to be assessed in light of Articles 21 and 23 of the Charter, since recital 4 expressly referred to them. The ECJ also quoted articles 157(1) TFEU and 19(1) TFEU.</p> <p>The ECJ pointed out that the purpose of Directive 2004/113</p>



	<p>in the insurance services sector was, as reflected in Article 5(1) of that Directive, the application of unisex rules on premiums and benefits.</p> <p>The ECJ noted that Member States that had made use of the option provided for in Article 5(2) were permitted to allow insurers to apply the unequal treatment without any temporal limitation. Hence, the ECJ declared that such a provision, which enabled Member States to maintain an exemption from the equal treatment of men and women indefinitely, was incompatible with articles 21 and 23 of the Charter, and against the purpose of the Directive.</p>
<i>Decision</i>	The ECJ declared Article 5(2) of Directive 2004/113 invalid with effect from 21 December 2012.

<i>Case</i>	C-232/09, <i>Dita Danosa v LKB Līzings SIA</i> (11 November 2010)
<i>EU norm</i>	Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)
<i>Fundamental Right</i>	Article 23 Charter
<i>Reference to the ECHR</i>	No
<i>Procedure</i>	Preliminary reference from the Augstākās Tiesas Senāts (Latvia)
<i>Content of the case</i>	<p>Ms. Danosa, the sole member of the Board of Directors of a public limited company (LKB), was dismissed in 2007. According to Article 224(4) of the Latvian Commercial Code, a member of the Board of Directors of a capital company may be dismissed without any restriction. Ms. Danosa, who was 11 weeks pregnant at the time, claimed that her dismissal was unlawful and that she should be treated as a worker for the purposes of EU law.</p> <p>The first question before the ECJ was whether a member of the Board of Directors of a capital company must be regarded as a worker within the meaning of Directive 92/85</p> <p>It is settled case law that the concept of 'worker' for the purposes of Directive 92/85 may not be interpreted differently according to each national law and must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration. This was the case of Ms Danosa.</p> <p>As regards the concept of 'pregnant worker', this is defined in Article 2(a) of Directive 92/85 as 'a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice'. The ECJ indicated that it is for the referring court to ascertain whether LKB had been informed about Ms. Danosa's pregnancy. Nonetheless, regardless of the reference to the national legislation or practice, if, without having been formally informed by the worker in person, the employer learns of her pregnancy, it would be contrary to the spirit and purpose of Directive 92/85 to interpret the provisions of Article 2(a) of that Directive restrictively and to deny the worker concerned the protection against dismissal provided</p>

	<p>for under Article 10.</p> <p>Next, the ECJ argued that during the period from the beginning of pregnancy to the end of maternity leave, Article 10 of Directive 92/85 does not provide for any exception to the prohibition on dismissing pregnant workers, save in exceptional cases not connected with their condition, provided that the employer gives substantiated grounds for the dismissal in writing.</p> <p>The Court held that if the referring court considers that Ms Danosa falls within the concept of 'pregnant worker' for the purposes of Directive 92/85 and that the dismissal decision at issue in the main proceedings was taken for reasons essentially connected with her pregnancy, then such dismissal, whilst taken in accordance with national law, would be incompatible with Article 10 Directive.</p> <p>Otherwise, if the referring Court considers that she is not a 'pregnant worker' for the purposes of the Directive 92/85, it would be necessary to consider whether Ms. Danosa could possibly rely on the protection against discrimination on grounds of sex granted under Directive 76/207. According to the Court, the dismissal of a worker on account of pregnancy can affect only women and therefore constitutes direct discrimination on grounds of sex.</p> <p>Whichever Directive applies, it is important to ensure the protection granted under EU law to pregnant women in cases where the legal relationship has been severed on account of pregnancy. Moreover, the ECJ added that this conclusion was supported by the principle of equality between men and women enshrined in Article 23 of the Charter.</p>
<i>Decision</i>	<p>The ECJ ruled that Directive 92/85 precluded national legislation which permits a member of a capital company's Board of Directors to be removed from that post without restriction, where the person concerned is a 'pregnant worker' within the meaning of that Directive and the decision to remove her was taken essentially on account of her pregnancy. Even if she it not considered to be a 'pregnant worker' within the meaning of Directive 92/85, the fact remains that the removal, on account of pregnancy or essentially on account of pregnancy, can affect only women and therefore constitutes direct discrimination on grounds of sex, contrary to Directive 76/207.</p>

## 1.4.2. Sexual orientation

<i>Case</i>	C-147/08, <i>Jürgen Römer and Freie und Hansestadt Hamburg</i> (10 May 2011)
<i>EU law</i>	Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation Article 141 EC (now Article 157 TFEU)
<i>Fundamental Rights</i>	Non discrimination on grounds of sexual orientation (Charter not mentioned)
<i>Reference to the ECHR</i>	No
<i>Procedure</i>	Preliminary reference from the Arbeitsgericht Hamburg (Germany)
<i>Content of the case</i>	<p>On 15 October 2001, Mr. Römer entered into a registered life partnership with his partner, in accordance with the Law on registered life partnerships of 16 February 2001. Subsequently, Mr. Römer requested that the amount of his supplementary retirement pension be recalculated on the basis of the more favourable deduction under tax category III/0, but he was informed that only married, not permanently separated, pensioners were entitled to that.</p> <p>The ECJ was questioned whether national legislation was compatible with Article 1 in conjunction with Articles 2 and 3(1)(c) of Directive 2000/78, which ban direct or indirect discrimination on grounds of sexual orientation.</p> <p>The ECJ held that supplementary retirement pensions such as those paid in the case, constituted pay within the meaning of Article 157 TFEU, and thus they fell within the material scope of the Directive.</p> <p>In order to determine whether the principle of non discrimination on grounds of sexual orientation was infringed by the differential treatment, the ECJ indicated the need to determine whether marriages and life partnerships were in a comparable situation.</p> <p>The ECJ clarified first, that it was not required that the situations be identical, but only that they be comparable; and, second, that the assessment of that comparability had to be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned.</p> <p>In that regard, on the basis of the information provided by the referring court, the ECJ considered that since 2001, when the Law on Registered Partnerships entered into force, Germany had adapted its legal system to allow persons of the same sex to live in a union of mutual support and assistance formally constituted for life. The</p>

	<p>amendment of national legislation in 2004 contributed to the gradual harmonisation of the regime of registered life partnership with that of marriage.</p> <p>Finally, regarding the date from which the right to equal treatment should be ensured, the ECJ argued that the right to equal treatment could be claimed by an individual at the earliest after the expiry of the period for transposing the Directive, namely from 3 December 2003, and it would not be necessary to wait for any national provision to be made consistent with EU law.</p>
<i>Decision</i>	<p>The ECJ decided that national legislation was not compatible with the Directive if two conditions were met:</p> <ul style="list-style-type: none"><li>– in the Member State concerned, marriage is reserved to persons of different gender and exists alongside a registered life partnership, which is reserved to persons of the same gender, and</li><li>– there is direct discrimination on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension.</li></ul> <p>The ECJ ruled that it was for the referring court to assess the comparability, focusing on the respective rights and obligations of spouses and persons in a registered life partnership, which are relevant taking account of the purpose of and the conditions for the grant of the benefit in question.</p>

## 1.4.3. Age

<i>Case</i>	C-555/07 <i>Seda Küçükdeveci v. Swedex GMBH &amp; Co. KG</i> (19 January 2010)
<i>EU law</i>	Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation
<i>Fundamental Rights</i>	Article 21 Charter
<i>Reference to the ECHR</i>	No
<i>Procedure</i>	Preliminary reference from the Landesarbeitsgericht Düsseldorf (Germany)
<i>Content of the case</i>	<p>National law provided that periods of employment completed before the age of 25 are not to be taken into account in calculating the notice period for dismissal. The ECJ was called upon to decide whether this national provision was compatible with the principle of non-discrimination on grounds of age.</p> <p>The ECJ first ascertained whether the question should be examined by reference to primary EU law or to Directive 2000/78. The Court had acknowledged the existence of a principle of non-discrimination on grounds of age as a general principle of European Union law in <i>Mangold</i> and stated that Directive 2000/78 gave specific expression to that principle. Also, the ECJ noted that Article 6(1) had granted the Charter the same legal value as the Treaties and that under Article 21(1) Charter '[a]ny discrimination based on ... age ... shall be prohibited'.</p> <p>Regarding the scope of EU law, the ECJ noted that the allegedly discriminatory conduct adopted in the present case occurred after the expiry of the period for the transposition of Directive 2000/78, which, for Germany ended on 2 December 2006. Thus, the basis of the examination should be the general principle of EU law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78.</p> <p>The ECJ noted that the national provision introduced a difference of treatment between persons with the same length of service, depending on the age at which they joined the undertaking. Next, it examined whether that difference of treatment was justified. The first subparagraph of Article 6(1) of Directive 2000/78 states that a difference of treatment on grounds of age does not constitute discrimination if, within the context of national law, it is objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.</p>

	<p>The ECJ admitted that the objectives mentioned by the German Government and the referring court clearly belonged to employment and labour market policy within the meaning of Article 6(1) of Directive 2000/78. However, the Court considered that the national provision was not appropriate to achieve those aims.</p> <p>In addition, the referring court asked whether, in proceedings between individuals, in order to disapply a national provision which the courts considers to be contrary to EU law, it must first make a reference to the ECJ.</p> <p>The ECJ recalled that in proceedings between individuals, a Directive cannot of itself impose obligations on them. Nonetheless, the national court is under an obligation to interpret national law, as far as possible, in the light of the wording and the purpose of the Directive in question. In this case, however, because of the clarity and precision of the national provision, it did not admit an interpretation in conformity with the Directive 2000/78.</p> <p>Then, the ECJ recalled that Directive 2000/78 merely gives expression to the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age is a general principle of EU law. Thus, the national court, in order to give individuals the legal protection derived from EU law, could disapply any provision of national legislation contrary to that principle.</p> <p>Finally, the ECJ clarified that a national court is not obliged but is entitled to make a reference to the ECJ before disapplying a provision of national law. The optional nature of such a reference is not affected by the conditions under which a court may disapply a national provision for being contrary to the constitution.</p>
<i>Decision</i>	<p>The ECJ ruled that the principle of non-discrimination on grounds of age as given expression by Directive 2000/78/ must be interpreted as precluding national legislation which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal.</p> <p>The national court must disapply national legislation contrary to that principle. In order to do so, there is no need to make a previous reference to the ECJ, regardless of whether that court may diapply a national provision for being contrary to the constitution.</p>

<i>Case</i>	C-45/09, <i>Gisela Rosenblatt v. Oellerking Gebäudereinigungsges. mbH</i> (12 October 2010)
<i>EU law</i>	Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16)
<i>Fundamental Rights</i>	Principle of non-discrimination on grounds of age (Charter not mentioned)
<i>Reference to the ECHR</i>	No
<i>Procedure</i>	Preliminary reference from the Arbeitsgericht Hamburg (Germany)
<i>Content of the case</i>	<p>Directive 2000/78 was transposed into German law by the General Law on equal treatment of 14 August 2006 ('AGG'). Paragraph 10(5) allowed, as a permissible difference of treatment on grounds of age, 'An agreement which provides for the termination of the employment relationship without notice of termination at a date when the employee may claim an old-age pension'. Article Paragraph 19(8) of the framework collective agreement for employees in the commercial cleaning sector provided that contracts shall be terminated, at the latest, at the end of the month in which the employee reaches the age of 65.</p> <p>The ECJ was questioned about the compatibility of these provisions with Article 6(1) of Directive 2000/78. The Court recalled that the first subparagraph of Article 6(1) states when a difference of treatment on grounds of age may be justified. The second subparagraph of Article 6(2) lists several examples of differences of treatment which may be justified.</p> <p>The ECJ noted that Paragraph 10 AGG essentially incorporates those principles. Point 5 includes examples of differences in treatment on the grounds of age which may be justified. The law does not establish a regime of compulsory retirement but allows employers and employees to agree, by individual or collective agreements, on a means of ending employment relationships on the basis of the age of eligibility for a retirement pension.</p> <p>Article 6(1)(a) of Directive 2000/78 does not include clauses on automatic termination of employment contracts among those appearing on the list of differences of treatment on the grounds of age which may be justified. However, in the exercise of their discretion, Member States may include examples of differences in treatment and aims other than those expressly covered by the Directive, provided that those aims are legitimate and the measures are appropriate and necessary to achieve those aims.</p>



	<p>The Court considered that aims such as those described by the German Government must, in principle, be regarded as 'objectively and reasonably' justifying a difference in treatment on grounds of age. The ECJ also ruled that this national measure was appropriate and necessary within the meaning of Article 6(1) of Directive 2000/78.</p> <p>The ECJ noted that this conclusion does not, however, mean that such clauses in a collective agreement are exempt from any effective review by the courts in the light of the provisions of Directive 2000/78 and of the principle of equal treatment.</p> <p>Regarding the compatibility of Paragraph 19(8) of the collective agreement, which included a clause on automatic termination of employment contract where an employee has reached retirement age, with article 6(1) Directive, the ECJ followed the same reasoning and reached the same conclusion as before.</p>
<i>Decision</i>	<p>The ECJ ruled that the clauses contained in national law and a collective agreement regarding the automatic termination of employment contract on the ground that the employee has reached the age or retirement were compatible with the Directive.</p>

In addition to *Kücükdeveci* and *Rosenbladt*, the ECJ has delivered several cases regarding discrimination on grounds of age: Joined cases C-250/09 and C-268/09, *Vasil Ivanov Georgiev v Tehnicheski universitet – Sofia, filial Plovdiv* (18 November 2010); Joined cases C-297/10, *Sabine Hennigs v Eisenbahn-Bundesamt* and C-298/10, *Land Berlin v Alexander Mai* (8 September 2011); C-447/09, *Reinhard Prigge, Michael Fromm, Volker Lambach v Deutsche Lufthansa AG* (13 September 2011). In all of them the ECJ was asked to interpret Directive 2000/78 regarding the right to non-discrimination on grounds of age.

The Charter was mentioned in *Kücükdeveci* and *Prigge* as a complementary source. Apparently, it acquired more centrality in *Hennigs*, in which it was quoted as the main source of the right to non-discrimination on grounds of age (Article 21). *Rosenbladt* and *Georgiev* did not even mention it. In all these cases, the reasoning of the Court focused on article 6(1) Directive 2000/78.

*Hennigs* and *Prigge* also referred to Article 28 Charter, which enshrines the right to negotiate collective agreements. Following *Rosenbladt*, the Court admitted that the nature of measures adopted by way of a collective agreement differs from the nature of those adopted unilaterally by way of legislation or regulation by the Member States. When exercising their fundamental right to collective bargaining recognised in Article 28 of the Charter, the social partners take care to strike a balance between their respective interests. Nonetheless, social partners must also comply with the Directive and the fact that a measure is adopted in a collective agreement does not change the need to observe the principle of non-discrimination and does not exempt it from review.

In all these cases, the ECJ followed the same reasoning: whether the case was within the scope of application of the Directive; whether there was a differential treatment on grounds of age; and whether the differential treatment was justified. In order to be justified, the

Court examined whether the measure at stake pursued a legitimate aim, and whether the measure was adequate and necessary for reaching that aim.

*Rosenbladt*, *Georgiev* and *Prigge* concerned national provisions providing for the automatic termination of contract on grounds of age. In *Rosenbladt* and *Georgiev*, the ECJ held that those provisions were compatible with EU law. Still, in *Georgiev*, since the aim of the measure had not been clearly specified, the ECJ indicated that it was for the national court to ascertain whether the aim was legitimate and the measure appropriate and necessary.

In contrast, in *Prigge*, the national provision at stake was a collective agreement clause according to which airline pilots' employment relationship terminated at the end of the month in which they turned 60. The ECJ examined whether this measure could be justified in terms of public security and protection of health (Article 2(5) Directive 2000/78) or whether possessing particular physical capabilities may be considered as a 'genuine and determining occupational requirement', within the meaning of Article 4(1) Directive 2000/78. The ECJ argued that while those were legitimate aims, a measure which fixes the age limit from which pilots may no longer carry out their professional activities at 60, whereas usually national and international legislation fixes that age at 65, was disproportionate.

Finally, in *Kücükdeveci* and *Hennings*, the Court ruled that the national measures at stake may have had a legitimate aim, but they were not adequate and necessary to pursue that aim.

#### 1.4.4. Nationality

<i>Case</i>	C-73/08, <i>Nicolas Bressol and Others, Céline Chaverot and Others v. Gouvernement de la Communauté française</i> (13 April 2010)
<i>EU law</i>	Articles 12 and 18(1) EC (now Articles 18 and 21 TFEU)
<i>Fundamental Rights</i>	Non-discrimination on grounds of nationality (Charter not mentioned)
<i>Reference to the ECHR</i>	No
<i>Procedure</i>	Preliminary reference from the Cour constitutionnelle (Belgium)
<i>Content of the case</i>	<p>The ECJ was called upon to decide whether EU law precludes national legislation that restricts the number of non-resident students who may enroll for the first time in medical and paramedical courses at higher education establishments, where that Member State (Belgium) faces an influx of students from a neighboring Member State (France) prompted by the latter Member State's pursuit of a restrictive policy and where the result of that situation is that too few students resident in the first Member State graduate from those courses.</p> <p>The Court's case-law makes clear that every citizen of the Union may rely on Article 18 TFEU, which prohibits any discrimination on grounds of nationality, in all situations falling within the scope <i>ratione materiae</i> of EU law, those situations including the exercise of the freedom conferred by Article 21 TFEU to move and reside within the territory of the Member States.</p> <p>It should be recalled that the principle of non-discrimination prohibits not only direct discrimination on grounds of nationality but also all indirect forms of discrimination.</p> <p>In the case concerned, the decree of 16 June 2006 provided that unrestricted access to the medical and paramedical courses covered was available only to resident students. The students who do not satisfy the conditions laid down by the decree, by contrast, enjoy only restricted access to those institutions. Thus, the national legislation created a difference in treatment between resident and non-resident students. The ECJ argued that a residence condition is more easily satisfied by Belgian nationals, who more often than not reside in Belgium, than by nationals of other Member States.</p> <p>Thus, the ECJ held that such a difference in treatment constituted indirect discrimination on the ground of nationality which is prohibited, unless it is objectively justified.</p>

	<p>In order to be justified, the measure concerned must be appropriate for securing the attainment of the legitimate objective it pursues and must not go beyond what is necessary to attain it.</p> <p>The ECJ ruled that the fear of an excessive burden on the financing of higher education could no justify the unequal treatment.</p> <p>The ECJ held that a difference in treatment may be justified by the objective of maintaining a balanced high-quality medical service open to all, in so far as it contributes to achieving a high level of protection of health. Thus, it had to be determined whether the national legislation was appropriate for securing the attainment of that legitimate objective and whether it went beyond what was necessary to attain it.</p> <p>In that regard, the ECJ ruled that it was ultimately for the national court to determine whether and to what extent such legislation satisfied those conditions. Next, the ECJ provided several guidelines for the national court to perform this assessment.</p>
<i>Decision</i>	<p>Articles 18 and 21 TFEU preclude national legislation that limits the number of non-resident students who may enroll for the first time in medical and paramedical courses at higher education establishments, unless the referring court, having assessed all the relevant evidence submitted by the competent authorities, finds that that legislation is justified in the light of the objective of protection of public health.</p>

In C-306/09, *I.B.* (21 October 2010), the Belgian Constitutional Court also referred a question regarding the interpretation and validity of the Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States in light of the principles of equal treatment and non-discrimination. The ECJ ruled that 'Articles 4(6) and 5(3) of the Framework Decision must be interpreted as meaning that, where the executing Member State has implemented Articles 5(1) and Article 5(3) of that framework decision in its domestic legal system, the execution of a European arrest warrant issued for the purposes of execution of a sentence imposed *in absentia* within the meaning of Article 5(1) of the framework decision, may be subject to the condition that the person concerned, a national or resident of the executing Member State, should be returned to the executing State in order, as the case may be, to serve there the sentence passed against him, following a new trial organized in his presence in the issuing Member State'.

<i>Case</i>	C-399/09, <i>Marie Landtová v. Česká správa sociálního zabezpečení</i> (22 June 2011)
<i>EU law</i>	Article 12 EC Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, and as amended by Regulation (EC) No 629/2006 of the European Parliament and of the Council of 5 April 2006, and point 6 of Annex III(A) to Regulation No 1408/71
<i>Fundamental Rights</i>	Non-discrimination on grounds of nationality (Charter not mentioned)
<i>Reference to the ECHR</i>	No
<i>Procedure</i>	Preliminary reference from from the Nejvyšší správní soud (Czech Republic)
<i>Content of the case</i>	<p>The ECJ was confronted with a previous interpretation of the Czech Constitutional Court regarding Article 20 of the Agreement on Social Security of 29 October 1992 between the Czech Republic and the Slovak Republic. According to the Constitutional Court judgment of 25 January 2005, Article 20 of the Agreement must be interpreted as meaning that the Czech Social Security Authority is obliged, where a Czech national satisfies the statutory conditions for entitlement to a pension and the amount of that pension as set under Czech law is higher than that provided for in the Agreement, to ensure that the amount of the retirement pension actually awarded to that person is of an amount equivalent to the higher entitlement set by national legislation and, consequently, to supplement where necessary, the amount of the retirement pension paid by the other contracting party.</p> <p>The referring court seeks to ascertain whether the Constitutional Court judgment, which allows payment of a supplement to old age benefit solely to individuals of Czech nationality residing in the territory of the Czech Republic, constitutes discrimination on grounds of nationality prohibited by Article 12 EC, and the combined provisions of Articles 3(1) and 10 of Regulation No 1408/71.</p> <p>The ECJ recalls that the object of Article 3(1) of Regulation No 1408/71 is to ensure, in accordance with Article 39 EC, equality of treatment in matters of social security, without distinction based on nationality, for the persons to whom that regulation applies by abolishing all discrimination in that regard deriving from the national legislation of the Member States</p>

	<p>The ECJ held that the Constitutional Court judgment discriminated, on the ground of nationality, between Czech nationals and the nationals of other Member States.</p> <p>As regards the requirement of residence in the territory of the Czech Republic, it recalled that the principle of equality of treatment, as referred to in Article 3(1) of Regulation No 1408/71, prohibits not only overt discrimination based on the nationality of the beneficiaries of social security schemes but also all covert forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result, such as residence. No evidence capable of justifying such discrimination has been adduced before the Court.</p> <p>The ECJ conclude that the Constitutional Court judgment involved direct discrimination based on nationality and indirect discrimination based on nationality, as a result of the residence test, against those who had made use of their freedom of movement.</p>
<i>Decision</i>	<p>The ECJ concluded that the combined provisions of Article 3(1) and Article 10 of Regulation No 1408/71 preclude a national rule that allows payment of a supplement to old age benefit solely to Czech nationals residing in the territory of the Czech Republic.</p>

<i>Case</i>	C-157/09, <i>European Commission v. Kingdom of the Netherlands</i> (1 December 2011)
<i>EU norm</i>	Article 43 and 45 EC Treaty (now Articles 49 and 51 TFEU)
<i>Fundamental Rights</i>	Non-discrimination on grounds of nationality (Charter not mentioned)
<i>Reference to the ECHR</i>	No
<i>Procedure</i>	Infringement action brought by the Commission against The Netherlands
<i>Content of the case</i>	<p>The Commission argued that by imposing a condition of nationality in order to have access to the profession of notary, the Netherlands had infringed Articles 43 and 45 EC Treaty.</p> <p>The ECJ recalled that Article 43 prohibits all discrimination based on nationality since that hinders the freedom of establishment of the nationals of a Member of one State in the territory of another Member State.</p> <p>The Netherlands argued that the activities of notaries are excluded from the scope of Article 43 since they amount to the exercise of 'official authority', in the sense of Article 45 EC Treaty. Hence, the ECJ examined first the notion of 'exercise of official authority', and next whether the activities of notaries in The Netherlands shall be considered as such.</p> <p>First, the ECJ noted that the exemption contained in Article 45 to the freedom of establishment should be interpreted restrictively. The activities under this clause must consist of a 'direct and specific participation' in the exercise of official authority.</p> <p>The ECJ held that the activity of authentication performed by notaries does not amount to a direct and specific participation in the exercise of official authority, even if it was compulsory. Also, even if their intervention pursued an objective of general interest, such as to safeguard the legality and legal certainty of the acts concluded between private individuals, it could not justify the exclusion of non-nationals.</p> <p>The ECJ admitted that this objective could constitute an overriding requirement of general interest that allowed for eventual restrictions on Article 43 EC Treaty, linked to the specificities of this activity, such as the limitation of their number and territorial competencies, regulation of recruitment procedures, independence, and incompatibility.</p>
<i>Decision</i>	The ECJ concluded that the requirement of nationality to have access to the profession of notary in The Netherlands was not compatible with ex Article 43 EC Treaty.

## 1.5. Citizenship and free movement

<i>Case</i>	C-135/08, <i>Janko Rottmann v. Freistaat Bayern</i> (2 March 2010)
<i>EU law</i>	Article 17 EC Treaty (now Article 20 TFEU)
<i>Fundamental Rights</i>	Citizenship (Charter not mentioned)
<i>Reference to the ECHR</i>	No
<i>Procedure</i>	Preliminary reference from the Bundesverwaltungsgericht (Germany)
<i>Content of the case</i>	<p>Mr. Rottmann was by birth an Austrian national. He moved to Germany, and applied for German nationality in February 1998. During the naturalisation procedure, he failed to mention that he was subject to a judicial investigation in Austria. Naturalisation in Germany had the effect, in accordance with Austrian law, of causing him to lose his Austrian nationality. When the German authorities learned that he had obtained German nationality by deception, the naturalisation was withdrawn. Once effective, this decision would have rendered Mr. Rottmann stateless.</p> <p>The ECJ was called upon to decide whether it is contrary to EU law, in particular to Article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation and obtained by deception inasmuch as that withdrawal deprives the person concerned of the status of citizen of the Union by rendering him stateless.</p> <p>First, the ECJ recalled that it is for each Member State to lay down the conditions for the acquisition and loss of nationality. Nevertheless, the fact that a matter falls within the competence of the Member States does not alter the fact that, in situations covered by EU law, the national rules concerned must have due regard to the alter.</p> <p>The ECJ held that the situation of a citizen of the Union who risked losing the status conferred by Article 17 EC and the rights attaching to it falls, by reason of its nature and its consequences, within the ambit of EU law. Thus, the Member States must, when exercising their powers in the sphere of nationality, have due regard to EU law.</p> <p>The ECJ noted that a decision withdrawing naturalisation because of deception corresponds to a reason relating to the public interest. In this regard, it is legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties.</p> <p>The ECJ admitted that those considerations on the</p>



	<p>legitimacy, in principle, of a decision withdrawing naturalisation on account of deception remain, in theory, valid when the consequence of that withdrawal is that the person in question loses, in addition to the nationality of the Member State of naturalisation, citizenship of the Union.</p> <p>In such a case, however, the ECJ held that it is for the national court to ascertain whether the withdrawal decision observes the principle of proportionality. Thus, it is necessary, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by EU citizenship. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.</p> <p>The ECJ did not give an answer as to whether the Member State of origin was obliged to interpret its domestic legislation in such a way as to avoid that loss by allowing him to recover that nationality, since Austrian authorities had not taken yet any decision.</p>
<i>Decision</i>	<p>It is not contrary to European Union law, in particular to Article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality was obtained by deception, on condition that the decision to withdraw observes the principle of proportionality.</p>

<i>Case</i>	C-34/09 <i>Ruiz Zambrano v Office national de l'emploi (ONEm)</i> (8 March 2011)
<i>EU law</i>	Article 20 TFEU (ex Article 17 EC Treaty)
<i>Fundamental Rights</i>	Citizenship
<i>Reference to the ECHR</i>	No
<i>Procedure</i>	Preliminary reference from the Tribunal du travail de Bruxelles (Belgium)
<i>Content of the case</i>	<p>Mr. Ruiz Zambrano, a Colombian national, entered Belgium with a visa, but after its expiry he did not manage to regularize his situation. Although he did not have a working permit, he worked for several periods of time. He had two children, who obtained Belgian nationality.</p> <p>The referring court asked whether the provisions of the TFEU on EU citizenship are to be interpreted as meaning that they confer on the father, upon whom minor EU 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.</p> <p>At the outset, the ECJ held that Directive 2004/38/EC 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, was not applicable since the children had never moved from Belgium.</p> <p>The ECJ held that Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.</p> <p>The ECJ argued that a refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, had such an effect.</p> <p>The refusal of residence and working permits would lead to a situation in which those children would have to leave the territory of the Union in order to accompany their father.</p>
<i>Decision</i>	The ECJ concluded that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing 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 residence and nationality of those children, and from refusing to grant him a work permit, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of EU citizen.

*Rottmann* and *Ruiz Zambrano* expanded the scope of EU law to include what seemed to be 'purely internal situations'. Particularly in *Ruiz Zambrano*, there was no free movement involved. In *Rottman*, the ECJ argued that the fact that a matter falls within the competence of the Member States, such as the conditions for the acquisition and loss of nationality, does not exclude that in situations covered by EU law, the national rules must have due regard to EU law. The risk of losing EU citizenship in *Rottmann*, and the risk of being obliged to leave the territory of the EU in *Ruiz Zambrano* brought these cases within the scope of EU law.

The formula used in *Ruiz Zambrano*, according to which Article 20 TFEU precludes national measures that have the effect of 'depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of that status' embodied a great potential for rights protection within the EU. Which are the rights attached to EU citizenship that need to be respected by Member States in any kind of situation?

The reach of *Ruiz Zambrano*, however, has been very much constrained later on in C-434/09 *Shirley McCarthy v. Secretary of State for the Home Department* (5 May 2011); and C-256/11, *Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduiké, Dragica Stevic v. Bundesministerium für Inneres* (15 November 2011).

Ms. McCarthy was a dual UK-Irish national who had been born and always lived in the UK. On 15 November 2002, Ms. McCarthy married a Jamaican national who lacked leave to remain in the UK under the Immigration Rules of that Member State. They applied for a right of residence for her husband under EU law. Like in *Ruiz Zambrano*, the ECJ held that in so far as the Union citizen concerned had never exercised his right of free movement and had always resided in a Member State of which he is a national, Directive 2004/38 was not applicable to the case.

Quoting *Ruiz Zambrano*, the ECJ reiterated that 'Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status'. Hence, the ECJ held that as a national of at least one Member State, a person such as McCarthy enjoys the status of a Union citizen under Article 20(1) TFEU and may therefore rely on the rights pertaining to that status, including against his Member State of origin, in particular the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States.

However, the ECJ argued that by contrast to *Ruiz Zambrano*, the national measure at issue in the main proceedings did not have the effect of obliging McCarthy to leave the territory of the EU. In other words, even if her husband was expelled, she could choose to remain in the UK. Thus, the ECJ ruled that the genuine enjoyment of the substance of her rights attached to EU citizenship had not been undermined.

*Dereci* concerned several third-country nationals who wished to live with their family members, who were Austrian nationals residing in Austria. It should also be noted that the Union citizens concerned had never exercised their right to free movement and that they were not maintained by the applicants in the main proceedings.

By reference to *Ruiz Zambrano*, the ECJ clarified that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of EU citizen status 'refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole' (par. 66).

The ECJ noted that this conclusion did not preclude the consideration of whether by virtue of the right to the protection of family life, a right of residence could not be refused. The ECJ pointed out that this right is enshrined in Article 7 Charter, which corresponds to the rights guaranteed by Article 8(1) ECHR. However, the ECJ recalled that, pursuant to Article 51(1) Charter the scope of application of the Charter to the States is limited. The ECJ failed to give an interpretation of Article 51(1) Charter in this case and deferred the decision to the national court: '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' (par. 72).

Notably, in *Ruiz Zambrano* and *McCarthy* the Charter was not mentioned at all. Yet, in *Ruiz Zambrano*, the referring court had asked about the interpretation of Articles 21, 24 and 34 of the Charter. Thus, the ECJ purposely eluded the issue about the scope of application of the Charter.

On another note, the ECJ decided a case about the expulsion of a EU citizen from a Member State in which he enjoyed an unlimited residence permit: C-145/09, *Land Baden-Württemberg v Panagiotis Tsakouridis* (23 November 2010). The ECJ was asked about the interpretation of Articles 16(4) and 28(3)(a) of 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.

A Greek national had obtained an unlimited residence permit in Germany. He had been convicted several times and in 28 August 2007, he was convicted for dealing with substantial quantities of narcotics as part of an organized group, and sentenced to six years and six months' imprisonment. By decision of 19 August 2008, the authorities determined that he had lost the right of entry and residence in Germany and informed him that he was subject of an expulsion measure to Greece.

Under Article 28(2) Directive 2004/38, Union citizens or their family members, irrespective of nationality, who have the right of permanent residence in the territory of the host Member State cannot be the subject of an expulsion decision 'except on serious grounds of public policy or public security'. In addition, in the case of Union citizens who have resided in the host Member State for the previous 10 years, Article 28(3) Directive 2004/38 considerably strengthens their protection against expulsion by providing that such a measure may not be taken except where the decision is based on 'imperative grounds of public security, as defined by Member States'.

The ECJ ruled that in order to determine whether a Union citizen has resided in the host Member State for the 10 years preceding the expulsion decision, all the relevant factors had to be taken into account in each individual case. The ECJ concluded that in whatever case, whether the referring court decided that the person concerned had resided for the preceding 10 years in Germany or not, the fight against crime in connection with dealing in narcotics as part of an organized group was capable of being covered by the concept of 'imperative grounds of public security' (Article 28(3) Directive 2004/38), and that was covered by the concept of 'serious grounds of public policy or public security' (Article 28(2) Directive 2004/38).

Finally, the ECJ has dealt with two preliminary references (from the Administrativen sad Sofia-grad, Bulgaria) regarding free movement and the right to leave the State of nationality: C-430/10, *Hristo Gaydarov v Direktor na Glavna direktsia 'Ohranitelna politsia' pri Ministerstvo na vatreshnite rabote* (17 November 2011); and C-434/10, *Petar Aladzhov v Zamestnik direktor na Stolichna direktsia na vatreshnite raboti kam Ministerstvo na vatreshnite rabote* (17 November 2011).

In both, the referring court questioned the compatibility of national measures with Articles 20 and 21 TFEU, Article 45(1) Charter, and Directive 2004/38 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. In none of them the ECJ referred to the Charter in its reasoning.

In *Gaydaraov*, a Bulgarian national was prohibited from leaving the territory of the state on the ground that he had been convicted by a court of another country (Serbia) of a criminal offence of narcotic drug trafficking.

In *Aladzhov*, the prohibition of a Bulgarian national from leaving the State was based upon the ground of non-payment of a tax liability of the company of which he was one of the managers.

In both cases, the ECJ confirmed that as EU citizens they may rely on the rights pertaining to that status, including against their Member State of origin, and in particular the right conferred by Article 21 TFEU to move and reside freely within the territory of the Member States. The ECJ emphasized that the right of freedom of movement includes both the right for EU citizens to enter a Member State other than the one of origin and the right to leave the State of origin.

Also, the ECJ acknowledged that the right of free movement of Union citizens may be subject to the limitations and conditions stemming, in particular, from Article 27(1) of Directive 2004/38, which allows Member States to restrict free movement on grounds of public policy, public security or public health. The ECJ recalled that if measures taken on grounds of public policy or public security are to be justified they must be based exclusively on the personal conduct of the individual concerned and that justifications that are isolated from the particulars of the case in question or that rely on considerations of general prevention cannot be accepted.

In *Gaydaraov*, the ECJ held that a previous criminal conviction of the person concerned is not by itself sufficient to permit the view to be taken, automatically, that he represents a genuine, present and sufficiently serious threat to one of the fundamental interests of society, without any specific assessment of the personal conduct of the person concerned.

In *Aladzhov*, the ECJ admitted that it cannot be ruled out as a matter of principle, as has moreover been recognized by the ECtHR, that non-recovery of tax liabilities may fall within the scope of the requirements of public policy. In the light of EU law, however, that can only be the case in circumstances where there is a 'genuine, present and sufficiently serious threat' affecting one of the fundamental interests of society related, for example, to the amount of the sums at stake or to what is required to combat tax fraud.

In both cases, the ECJ only admitted the compatibility of the national prohibitions with EU law under specific conditions, and mandated the national court to determine whether those conditions were satisfied in the case at hand.

## 1.6. Right to be heard

<i>Case</i>	C-27/09 P, <i>French Republic v. People's Mojahedin Organization of Iran (PMOI)</i> (21 December 2011)
<i>EU law</i>	Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism
<i>Fundamental Rights</i>	Article 41 Charter
<i>Reference to the ECHR</i>	No
<i>Procedure</i>	Appeal brought by the French Republic against Case T-284/08 <i>People's Mojahedin Organisation of Iran v Council</i> (4 December 2008)
<i>Content of the case</i>	<p>The PMOI had been added to the list referred to in Article 2(3) Regulation No 2580/2001 of persons, groups and entities to which the Regulation applies, by Council Decision of 2 May 2002. Subsequently, the PMOI's inclusion in this list was continued by further Council decisions, adopted in accordance with Article 2(3) of Regulation, included the contested Council Decision of 15 July 2008.</p> <p>The General Court upheld the action brought by PMOI and annulled the Council Decision of 15 July 2008. The French Republic brought an appeal before the ECJ to have that judgment set aside.</p> <p>The General Court held that the Council Decision had breached the principles relating to the observance of the rights of defense, since it had been adopted without first informing the PMOI of the new information or new material in the file which, in its view, justified maintaining it in the list of Article 2(3) Regulation and by failing to give it the opportunity of making known its views on the matter.</p> <p>The ECJ confirmed that those principles may also be found in the Court of Justice's case-law. The ECJ recalled that, in the case of an initial decision to freeze funds, the Council is not obliged to inform the person or entity concerned beforehand of the grounds on which that institution intends to rely in order to include that person or entity's name in the list referred to in Article 2(3) of Regulation No 2580/2001. In order to avoid its effectiveness being jeopardized, such a measure must be able to take advantage of a surprise effect and to apply immediately. In such a case, it is enough if the institution notifies the person or entity concerned of the grounds and affords it the right to be heard at the same time as, or immediately after, the decision is adopted.</p> <p>In contrast, in the case of a subsequent decision to freeze funds by which the inclusion of the name of a person or</p>

	<p>entity already appearing in the list referred to in Article 2(3) is maintained, that surprise effect is no longer necessary in order to ensure the effectiveness of the measure. Thus, the adoption of such a decision must, in principle, be preceded by notification of the incriminating evidence and by allowing the person or entity concerned an opportunity of being heard.</p> <p>Thus, the General Court was right to require prior communication of the new incriminatory evidence. The Council was bound to ensure that the PMOI's rights of defense were observed, that is to say, notification of the incriminating evidence against it and the right to be heard, before that decision was adopted.</p> <p>Only after reaching this conclusion, the ECJ held that this right is expressly affirmed in Article 41(2)(a) Charter, recognized by Article 6(1) TEU as having the same legal value as the Treaties.</p>
<i>Decision</i>	The appeal was dismissed

In *C-221/09, AJD Tuna Ltd v Direttur tal-Agricoltura u s-Sajd* (17 March 2011), the ECJ held that the right to be heard enshrined in Article 41(2)(a) Charter did not apply to the process of enacting measures of general application, since this Article proclaims the right for every person to be heard, 'before any individual measure which would affect him or her adversely is taken'.

Regarding the obligation to state reasons laid down in Article 296(2) TFEU, the ECJ noted that, according to settled case-law, 'the statement of reasons 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 Court to exercise its power of review' (par. 58). The ECJ recalled that 'in the case of measures of general application, the statement of reasons may be confined to indicating the general situation which led to its adoption and the general objectives which it is intended to achieve' (par. 59). In that case, the ECJ ruled that the Regulation at stake had given sufficient reasons for its adoption.



## 1.7. Right to an effective judicial protection

<i>Case</i>	C-279/09 <i>DEB Deutsche Energiehandels- und Beratungsgesellschaft</i> (22 December 2010)
<i>EU law</i>	Principle of effectiveness (ECJ case law)
<i>Fundamental Rights</i>	Article 47 Charter
<i>Reference to the ECHR</i>	Articles 6 and 13 ECHR Case law
<i>Procedure</i>	Preliminary reference from the Kammergericht (Germany)
<i>Content of the case</i>	<p>DEB applied for legal aid in order to bring an action to establish State liability under EU law for the delay in the transposition of several Directives concerning common rules for the internal market in natural gas. DEB was unable to make the necessary advance payment of court costs, which amounted to EUR 274 368, and to pay for representation by a lawyer, whose instruction was compulsory in the main proceedings. The Regional Court of Berlin refused to grant legal aid on the ground that the conditions laid down by national legislation were not satisfied.</p> <p>The referring court asked whether, in this context, national legislation was opposed to the principle of effectiveness of EU law. The ECJ recalled that according to well-established case law on the principle of effectiveness, the 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.</p> <p>The ECJ recast this question from the perspective of the principle of effective judicial protection as enshrined in Article 47 Charter. The ECJ referred to the Explanations to the Charter, according to which, the second paragraph of Article 47 Charter corresponds to Article 6(1) ECHR.</p> <p>The ECJ quoted Article 51(1), regarding the scope of application of EU law. With reference to Article 52(3) Charter, the ECJ carefully examined the ECtHR case law regarding the right of access to a court, in particular the right to legal aid in the form of assistance by a lawyer and in the form of dispensation from payment of the costs of proceedings.</p> <p>The ECJ concluded that principle of effective judicial protection (Article 47 of the Charter) must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer.</p>



	<p>The ECJ indicated that it was for the national court to ascertain whether the conditions for granting legal aid constituted a limitation on the right of access to the courts: whether they pursued a legitimate aim; and whether there was a reasonable relationship of proportionality between those conditions and the legitimate aim which it is sought to achieve.</p> <p>The ECJ offered a set of criteria that the national court must take into consideration in making that assessment.</p>
<i>Decision</i>	<p>The ECJ decided that a legal person may rely on the right to effective judicial protection and that legal aid may cover dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer. The ECJ held that it was for the national court to decide whether in this particular case the national conditions for granting legal aid were compatible with this right.</p>

Other cases regarding the right to effective judicial protection decided over this period are: C-317/08 to C-320/08, *Alassini and Others* (18 March 2010); C-243/09, *Günter Fuß v Stadt Halle* (14 October 2010).

In *Alassini* (preliminary reference from Italy), the ECJ was confronted with the question whether national legislation under which the admissibility before courts of actions relating to electronic communications services between end-users and providers of those services, concerning the rights conferred by the Directive 2002/22/EC (Universal Service Directive), is conditional upon the attempt to settle the dispute out of court was compatible with the principles of equivalence and effectiveness and the principle of effective judicial protection.

Next, the ECJ examined the national legislation at stake from the standpoint of the principle of effective judicial protection. The ECJ stated that the principle of effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and which has also been reaffirmed by Article 47 of the Charter. The ECJ considered that the mandatory attempt at settlement might prejudice the principle of effective judicial protection. However, that restriction might be justified if it pursues an objective of general interest and does not involve a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed. The ECJ referred to case law from the ECtHR. After examining the national legislation, the ECJ concluded that the national procedure was compatible with the principle of effective judicial protection.

In *Günter Fuß*, the reference to the Charter only appeared by the end of the case. The ECJ ruled that the fundamental right to effective judicial protection, guaranteed by Article 47 Charter, would be substantially affected if an employer, in reaction to a complaint or to legal proceedings brought by an employee with a view to ensuring compliance with the provisions of Directive 2003/88 intended to protect his safety and health, were entitled to transfer the employee compulsorily to another service. In that case, the worker, a fire-fighter, had requested compliance with the maximum average weekly working time laid down in Article 6(b) Directive 2003/88. The ECJ held that fear of such a reprisal measure

might deter workers, who considered themselves the victims of a measure taken by their employer, from pursuing their claims by judicial process, which would also seriously jeopardise implementation of the aim pursued by the Directive.

Among these cases, by large, *DEB* devoted much more attention to the right to effective judicial protection. In *Alassini* and *Fuß*, this right was only taken into consideration by the end of the reasoning. *Alassini* focused on the principles of equivalence and effectiveness, and *Fuß* on the Directive. In addition, *Alassini* included a brief reference to the ECHR and its case law, and *Fuß* none at all, whereas *DEB* is largely devoted to the analysis of the ECtHR case law. Although it leaves for the national court to decide the final outcome, the ECJ seems favorable to the need to secure legal aid in order to safeguard the right to effective judicial protection. *Fuß* is also protective of the individual interests, whereas in *Alassini*, the specific compulsory non-court settlement procedure was considered to be compatible with the right to effective judicial protection, with certain safeguards.

The previous cases referred to obstacles in bringing an action before a court. In the next two cases, the ECJ dealt with Article 47 Charter from the perspective of the adequate judicial review over actions taken by the Commission.

In C-386/10 P *Chalkor AE Epexergasias Metallon v. European Commission* (8 December 2011), Chalkor challenged before the General Court a fine imposed on it by a Commission decision, and subsequently appealed that judgment before the ECJ. The appellant relied on Article 6 of the ECHR and the Charter to complain about the wide discretion granted to the Commission by the General Court in exercising judicial review. The appellant took the view that competition proceedings were criminal in nature (within the meaning of Article 6 ECHR), and thus full judicial review should be exercised upon Commission decisions.

The ECJ noted that since Article 47 Charter implements in EU law the protection afforded by Article 6(1) ECHR, it was necessary to refer only to Article 47 Charter. The ECJ reminded also that the principle of effective judicial protection was a general principle of EU law to which expression is now given by Article 47 Charter.

The ECJ recalled that in order to determine the amount of a fine, it is necessary to take account of the duration of the infringements and of all the factors capable of affecting the assessment of their gravity. The Court also stated that objective factors, such as the content and duration of the anti-competitive conduct, must be taken into account. The large number of factors requires that the Commission carry out a thorough examination of the circumstances of the infringement.

The ECJ held that 'The review provided for by the Treaties thus involves review by the Courts of the European Union of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine' (para. 67). Eventually, it concluded that the reviewed performed by the General Court was not contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter. The ECJ followed a parallel reasoning and conclusion in another case decided on the same day: C-389/10 P, *KME Germany AG v Commission* (8 December 2011).

## 2. ECTHR CASE LAW ON FUNDAMENTAL RIGHTS

The main cases delivered by the ECtHR during 2010 and 2011 are summarized below. The Annual Reports of the European Court of Human Rights have been taken into account for the selection of these cases.

### 2.1. Prohibition of torture and inhuman and degrading treatment and punishment

<i>Case</i>	<i>Al-Saadoon and Mufdhi v. the United Kingdom</i> , no. 61498/08, 2 March 2010
<i>ECHR Right</i>	Article 3 (prohibition of inhuman or degrading treatment)
<i>Content of the case</i>	<p>The case concerned the complaint by the applicants, accused of involvement in the murder of two British soldiers shortly after the invasion of Iraq in 2003, that their transfer by the British authorities into Iraqi custody put them at real risk of execution by hanging.</p> <p>The Court emphasised that when the Convention was drafted, the death penalty had not been considered to violate international standards. However, there had been a subsequent evolution towards its complete abolition, in law and in practice, within all the Member States of the Council of Europe. Two Protocols to the Convention had thus entered into force, abolishing the death penalty in time of peace (Protocol 6) and in all circumstances (Protocol 13), and the United Kingdom had ratified them both. All but two Member States had signed Protocol 13 and all but three States which had signed it had ratified it. This demonstrated that Article 2 of the Convention had been amended so as to prohibit the death penalty in all circumstances. The Court concluded therefore that the death penalty, which involved the deliberate and premeditated destruction of a human being by the State authorities, causing physical pain and intense psychological suffering as a result of the foreknowledge of death, could be considered inhuman and degrading and, as such, contrary to Article 3 of the Convention.</p>
<i>Decision</i>	Violation

<i>Case</i>	<i>Gäfgen v. Germany</i> , no. 22978/05, 1 June 2010 (Grand Chamber)
<i>ECHR Right</i>	Article 3 (prohibition of torture and inhuman treatment)
<i>Content of the case</i>	<p>The applicant complained that he was threatened with ill-treatment by the police in order to make him confess to the whereabouts of J., abducted and murdered by Mr. Gäfgen. As a result of those threats, the applicant disclosed where he had hidden the child's body.</p> <p>The Court accepted that the police officers had been motivated by the attempt to save a child's life. However, the prohibition on ill-treatment applied irrespective of the conduct of the victim or the motivation of the authorities; it allowed no exception, not even where the life of an individual was at risk. The Court considered that in the present case the immediate threats against the applicant for the purpose of extracting information from him were sufficiently serious (i.e. caused the applicant considerable fear and mental suffering) to be qualified as inhuman treatment falling within the scope of Article 3. Having regard to its case-law and to the views taken by other international human rights monitoring bodies, it found, however, that the method of interrogation to which the applicant had been subjected had not reached the level of cruelty to attain the threshold of torture.</p>
<i>Decision</i>	Violation

<i>Case</i>	<i>Đurđević v. Croatia</i> , no. 52442/09, 19 July 2011
<i>ECHR Right</i>	Article 3 (lack of effective investigation into allegations of ill-treatment) and Article 8 (State's duty to protect the physical and moral integrity of an individual from other persons)
<i>Content of the case</i>	<p>Danijel's parents complained several times to various authorities that their son, fifteen years old, had been constantly insulted and frequently beaten at school. Danijel was interviewed by the police in that connection and, in January 2009, the school authorities issued two reports in reply to those allegations. The reports suggested that Danijel was a pupil who frequently quarrelled with other students and teachers. The applicants made allegations that the authorities had failed to protect Danijel.</p> <p>The Court noted that State authorities had an obligation to act in order to protect people from ill-treatment even by private individuals, and to secure respect for people's private life even in the sphere of relations between individuals. In this case the Court stated that in the absence of more specific allegations about the place, time and nature of the acts complained of, it could not hold the State responsible for not responding adequately to the alleged violence against Danijel at school.</p>
<i>Decision</i>	Inadmissible

## 2.2. Prohibition of slavery and forced labour

<i>Case</i>	<i>Steindel v. Germany</i> , no. 29878/07, 14 September 2010 (decision)
<i>ECHR Right</i>	Article 4 (prohibition of forced labour)
<i>Content of the case</i>	<p>The applicant practices as an ophthalmologist. The Association of Medical Practitioners ordered Mr. Steindel to participate in the medical emergency services organised by the Association of Statutory Health Insurance Physicians (KVSA). Mr Steindel lodged a motion against the Association of Medical Practitioners. He argued that he was not obliged to participate in the emergency service organised by the KVSA, because he did not practice as a statutory health insurance physician. He further alleged that the order lacked a sufficient legal basis. German Courts dismissed the applicant's motion.</p> <p>When deciding whether the service required by the applicant falls within the prohibition of 'forced or compulsory labour', the Court will have regard to all the circumstances of the case in the light of the underlying objectives of Article 4. The paragraph 3 (d), which excludes 'any work or service which forms part of normal civil obligations' from the scope of forced or compulsory labour, is of special significance in the context of the present case.</p> <p>The Court observes that the services to be rendered in the instant case did not fall outside the ambit of a physician's normal professional activities; it cannot be said that the service differed from a physician's usual work. Secondly, it should be noted that the services performed during emergency services are remunerated. A further compensatory factor is to be found in the advantage that the emergency service in principle frees the applicant from the obligation to be available for his patients outside consultation hours. Moreover, the obligation to which the applicant objects is part of a scheme which is devised to unburden all practising physicians from the obligation to be available during night-time and at weekends and to ensure the availability of medical services during these times. To this extent, it is founded on a concept of professional and civil solidarity and is aimed at averting emergencies. Finally, the burden imposed on the applicant is not disproportionate.</p>
<i>Decision</i>	Inadmissible

<i>Case</i>	<i>Stummer v. Austria</i> , no. 37452/02, 7 July 2011 (Grand Chamber)
<i>ECHR Right</i>	Article 4 (prohibition of forced labour)
<i>Content of the case</i>	<p>The applicant is an Austrian national who spent many years of his life in prison, during which he worked for lengthy periods in the prison. As a working prisoner, he was not affiliated to the old-age pension system under the General Social Security Act. Mr Stummer's application for an early retirement pension was dismissed by the Workers' Pension Insurance Office noting that he had failed to accumulate the minimum insurance months required for pension eligibility under domestic social law.</p> <p>The applicant argued that European standards had changed to such an extent that prison work without affiliation to the old-age pension system could no longer be regarded as 'work required to be done in the ordinary course of detention', which was exempt from the term 'slavery and forced labour' prohibited under Article 4. However, having regard to the lack of a European consensus on the issue of the affiliation of working prisoners to the old-age pension system, the practice of the Council of Europe member States did not provide a basis for such an interpretation.</p> <p>The Court observed that the issue of working prisoners' affiliation to the old-age pension system was closely linked to the State's general choice of economic and social policy. In that area, States enjoyed a wide margin of appreciation, being better placed to decide what was in the public interest, and the Court generally respected the legislature's policy choice unless it was without reasonable foundation. There was further no European consensus on social security for prisoners. While an absolute majority of Council of Europe member States provided prisoners with some kind of social security, only a small majority affiliated prisoners to their old-age pension system.</p>
<i>Decision</i>	No violation

### 2.3. Right to liberty and security

<i>Case</i>	<i>Medvedyev and Others v. France</i> , no. 3394/03, 29 March 2010 (Grand Chamber)
<i>ECHR Right</i>	Article 5 (right to liberty and security)
<i>Content of the case</i>	<p>The nine applicants were crew-members of a cargo vessel registered in Cambodia named the <i>Winner</i>. French authorities requested authorisation to intercept the <i>Winner</i>, as it was suspected of carrying significant quantities of narcotics for distribution in Europe. Cambodia consented. On an order from the Maritime Prefect and at the request of the Brest public prosecutor, the French Navy apprehended the vessel off the shores of Cap Verde and the crew were confined to their quarters on board under French military guard. On their arrival in Brest, 13 days later, the applicants were taken into police custody and were brought before investigating judges the same day; three days latter they were charged and remanded in custody. On conclusion of the criminal proceedings against the applicants, three of them were found guilty of conspiracy to import narcotics. The other six applicants were acquitted.</p> <p>The Court was fully aware of the need to combat international drug trafficking and could see why States were so firm in that regard. However, while noting the special nature of the maritime environment, it took the view that this could not justify the creation of an area outside the law. The Court had already noted that terrorist offences presented the authorities with special problems that did not give them <i>carte blanche</i> to place suspects in police custody, free from effective control. The same applied to the fight against drug trafficking on the high seas.</p> <p>The deprivation of liberty to which the applicants had been subjected between the boarding of their ship and its arrival in Brest had not been 'lawful', for lack of a legal basis. The fact that the French authorities had intervened on the basis of the diplomatic note issued by the Cambodian Government, an exceptional cooperation measure, meant that their intervention could not be said to have been clearly defined and foreseeable.</p>
<i>Decision</i>	Violation of Article 5.1

<i>Case</i>	<i>Mangouras v. Spain</i> , 12050/04, 28 September 2010 (Grand Chamber)
<i>ECHR Right</i>	Article 5 (right to liberty and security)
<i>Content of the case</i>	<p>The applicant was the captain of the ship <i>Prestige</i>, which in November 2002, while sailing off the Spanish coast, discharged the 70,000 tonnes of fuel oil it was carrying into the Atlantic Ocean when its hull sprang a leak. The oil caused an ecological disaster. A criminal investigation was opened and the applicant was remanded in custody with the possibility of release on bail of three million euros. Mr Mangouras was detained for 83 days and granted provisional release when his bail was paid by the shipowner's insurers. The Spanish authorities later authorised the applicant's return to Greece, on condition that the Greek authorities enforced compliance with the periodic supervision to which he had been subject in Spain. The applicant alleged, in particular, that the sum set for bail in his case had been excessive and had been fixed without his personal circumstances being taken into consideration.</p> <p>New realities had to be taken into consideration in interpreting the requirements of Article 5. 3, namely the growing and legitimate concern both in Europe and internationally in relation to environmental offences. In addition, the professional environment which formed the setting for the activity in question should be taken into consideration in determining the amount of bail, in order to ensure that the measure was effective.</p> <p>Given the exceptional nature of the applicant's case and the huge environmental damage caused by the marine pollution, which had seldom been seen on such a scale, it was hardly surprising that the judicial authorities should have adjusted the amount required by way of bail in line with the level of liability incurred, so as to ensure that those responsible had no incentive to evade justice and forfeit the security. It was not certain that a level of bail set solely by reference to the applicant's assets would have been sufficient to ensure his attendance at the hearing.</p> <p>In addition, the very fact that payment had been made by the shipowner's insurer appeared to confirm that the Spanish courts, when they had referred to the applicant's 'professional environment', had been correct in finding – implicitly – that a relationship existed between Mr Mangouras and the persons who were to provide the security.</p>
<i>Decision</i>	No violation



<i>Case</i>	<i>Schmitz v. Germany</i> , no. 30493/04, 9 June 2011
<i>ECHR Right</i>	Article 5 (right to liberty and security)
<i>Content of the case</i>	<p>The applicant complained about being kept in preventive detention after having served their prison sentences.</p> <p>In determining whether the applicant was deprived of his liberty in compliance with Article 5. 1, the Court noted that preventive detention was ordered after conviction by the sentencing court. Thus, there has been a sufficient causal connection between his conviction and the deprivation of liberty. The order for the applicant's preventive detention by the sentencing court and the decision of the court responsible for the execution of sentences, were based on the same grounds, namely to prevent the applicant from committing further serious sexual offences on release.</p> <p>The applicant's preventive detention was also lawful in that it was based on a foreseeable application of Article 66 § 1 of the Criminal Code.</p> <p>In its judgement, the Court takes note, in this connection, of the reversal of the Federal Constitutional Court's case-law concerning preventive detention in its leading judgment of 4 May 2011. It welcomes the Federal Constitutional Court's approach of interpreting the provisions of the Basic Law also in the light of the Convention and this Court's case-law, which demonstrates that court's continuing commitment to the protection of fundamental rights not only on national, but also on European level. The Court further observes that the Federal Constitutional Court, in its said judgment, considered, <i>inter alia</i>, Article 66 of the Criminal Code in its version in force since 27 December 2003 not to comply with the right to liberty of the persons concerned. It understands that the applicant's preventive detention, when reviewed in the future, will be prolonged only subject to the strict test of proportionality as set out in the Federal Constitutional Court's judgment. It notes, however, that the applicant's preventive detention here at issue was ordered and executed on the basis of a previous version of Article 66 of the Criminal Code. In any event, Article 66 of the Criminal Code in its version in force since 27 December 2003 was not declared void with retrospective effect, but remained applicable and thus a valid legal basis under domestic law, in particular, for the time preceding the Federal Constitutional Court's judgment. Therefore, the lawfulness of the applicant's preventive detention at issue for the purposes of Article 5 § 1 (a) is not called into question.</p>
<i>Decision</i>	No violation

## 2.4. Right to a fair trial

<i>Case</i>	<i>Diallo v. Sweden</i> , no. 13205/07, 5 January 2010 (decision)
<i>ECHR Right</i>	Article 6.3 (e) (right to an interpreter)
<i>Content of the case</i>	<p>The right to the free assistance of an interpreter applies not only to oral statements made at the trial hearing but also to documentary material and the pre-trial proceedings. This means that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand or to have rendered into the court's language in order to have the benefit of a fair trial. The said provision does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. In that connection, it should be noted that the text of the relevant provisions refers to an 'interpreter', not a 'translator'. This suggests that oral linguistic assistance may satisfy the requirements of the Convention. The fact remains, however, that the interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events. In view of the need for that right to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided.</p> <p>The Court notes that the investigation stage has crucial importance for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered. Moreover, in order to safeguard against ill-treatment and to avoid incriminating statements made during police interrogation without access to a lawyer being used for a conviction, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.</p> <p>In the same line of reasoning, the assistance of an interpreter should be provided during the investigating stage unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.</p>
<i>Decision</i>	Inadmissible

<i>Case</i>	<i>Ullens de Schooten and Rezabek v. Belgium</i> , nos. 3989/07 and 38353/07, 20 September 2011
<i>ECHR Right</i>	Article 6 (right to a fair hearing)
<i>Content of the case</i>	<p>This case concerned the refusal of the Belgian Court of Cassation and the Conseil d'Etat to refer questions relating to the interpretation of European Union (EU) law to the Court of Justice for a preliminary ruling.</p> <p>The Court reiterated that the European Convention on Human Rights did not guarantee any right to have a case referred by a domestic court to another national or international authority for a preliminary ruling. Nonetheless, it observed that Article 6(1) imposed an obligation on the national courts to give reasons for any decision refusing to refer a question, particularly where the applicable law permitted such a refusal only in exceptional circumstances. Accordingly, the Court had to be satisfied that any refusal brought before it was accompanied by such reasons. In the context of the Treaty establishing the European Community (Article 234) [now Article 267 of the Treaty on the Functioning of the European Union], that meant that the highest courts were obliged to give reasons for a refusal to refer, based on the exceptions in the case-law of the Court of Justice.</p> <p>The Court observed that, where a question concerning the interpretation of the Treaty establishing the European Community was raised in proceedings before a national court against whose decisions there was no judicial remedy (in this case the Court of Cassation and the Conseil d'Etat), the court in question was obliged under Article 234 of the Treaty to refer the question to the Court of Justice for a preliminary ruling. However, that obligation was not absolute, as was clear from the Court of Justice's CILFIT case-law. The national courts were not required to refer the question where they had established that it was 'irrelevant' or that the EU provision in question had already been interpreted by the Court of Justice, or where the correct application of EU law was 'so obvious as to leave no scope for any reasonable doubt'. In today's case, the Conseil d'Etat, like the Court of Cassation, had given reasons for its refusal, citing the exceptions under the CILFIT case-law.</p>
<i>Decision</i>	No violation

<i>Case</i>	<i>Nejdet Sahin and Perihan Sahin v. Turkey</i> , no. 13279/05, 20 October 2011 (Grand Chamber)
<i>ECHR Right</i>	Article 6 (right to a fair trial)
<i>Content of the case</i>	<p>This case concerned the divergence between the case-law of the ordinary administrative courts and that of the Supreme Military Administrative Court in cases about requests for supplementary pensions. The Court had already established certain principles in cases concerning divergences of interpretation within a single hierarchical judicial structure. However, as the legal context in issue in this case was different, those principles could not be transposed to it.</p> <p>This case concerned alleged differences between the judgments of two hierarchically unrelated, different and independent types of court. Both courts differed in the application of the law and not in respect of the facts. Thus, diametrically opposite conclusions had been reached by the two types of courts.</p> <p>In a legal system such as the Turkish one, in which several Supreme Courts operated without being subject to a common judicial hierarchy, the absence of a vertical review mechanism for their decisions was not, in itself, in breach of the Convention. Achieving consistency of the law might take time in some cases, and periods of conflicting case-law might therefore be tolerated without undermining legal certainty.</p> <p>The Court emphasised that, just as it was not a court of last instance in respect of legal disputes before national courts, it was not its role to intervene simply because there have been conflicting national court decisions. The judgments in respect of the applicants had been duly reasoned and the interpretation by the Supreme Military Administrative Court had not been arbitrary, unreasonable or capable of affecting the fairness of the proceedings. Responsibility for the consistency of national courts' decisions lied primarily with the national courts and any intervention by the Court had to remain exceptional.</p>
<i>Decision</i>	No violation

<i>Case</i>	<i>Al-Khawaja and Tahery v. the United Kingdom</i> , nos. 26766/05 and 22228/06, 15 December 2011. Grand Chamber
<i>ECHR Right</i>	Article 6(1) in conjunction with Article 6(3)(d) (right to obtain attendance and examination of witnesses)
<i>Content of the case</i>	<p>The applicants complained that their convictions had been based on statements from witnesses who could not be cross examined in court.</p> <p>There has to be a good reason for nonattendance of a witness; a conviction based solely or decisively on the statement of an absent witness is generally considered to be incompatible with the requirements of fairness under Article 6 ('the sole or decisive rule'). But the sole or decisive rule should not be applied in an inflexible way, ignoring the specificities of the particular legal system concerned. To do so would transform the rule into a blunt and indiscriminate instrument that ran counter to the Court's traditional approach to the overall fairness of proceedings, namely to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice. Therefore, the Court found that if a conviction is based solely or decisively on the statement of an absent witness, counterbalancing factors must be in place, including strong procedural safeguards. However, the conviction would not automatically result in a breach of Article 6. 1.</p> <p>The Court considered three issues in each case: first, whether it had been necessary to admit the witness statements; second, whether their untested evidence had been the sole or decisive basis for each applicant's conviction; and third, whether there had been sufficient counterbalancing factors including strong procedural safeguards to ensure that each trial had been fair.</p>
<i>Decision</i>	No violation in respect of Mr. Al-Khawaja; violation in respect of Mr. Tahery

## 2.5. Right to private and family life

<i>Case</i>	<i>Haas v. Switzerland</i> , no. 31322/07, 10 January 2011
<i>ECHR Right</i>	Article 8 (right to respect for private life)
<i>Content of the case</i>	<p>The applicant has been suffering from a serious bipolar affective disorder for around twenty years and considered that as a result, he could no longer live in a dignified manner. After having attempted suicide on two occasions, he undertook to obtain a substance (sodium pentobarbital), the administration of which in a sufficient quantity would have enabled him to end his life in a safe and dignified manner. Since that substance was only available on prescription, he approached several psychiatrists to obtain it, but was unsuccessful. Swiss administrative authorities and courts rejected his application.</p> <p>There is not an European consensus as regards the right of an individual to choose when to end his life. The vast majority of Council of Europe member States place more weight on the protection of an individual's life (Article 2) than on the right to end one's life (Article 8).</p> <p>The Court acknowledged that the right of an individual to decide how and when to end his life, provided that said individual was in a position to make up his own mind in that respect and to take appropriate action, was one aspect of the right to respect for private life. But this application concerned another matter: whether or not under Article 8 the State has the positive obligation to enable Mr. Haas to obtain, without a prescription, a substance enabling him to end his life without pain and without failure.</p> <p>The Court concluded that the States have a wide margin of appreciation in that respect.</p>
<i>Decision</i>	No violation

Case	<i>Gillan and Quinton v. the United Kingdom</i> , no. 4158/05, 12 January 2010
ECHR Right	Article 8 (right to respect for private and family life)
Content of the case	<p>Under the Terrorism Act 2000, a senior police officer may issue an authorisation, if he or she considers it 'expedient for the prevention of acts of terrorism', permitting any uniformed police officer within a defined geographical area to stop any person and search the person and anything carried by him or her. The applicants were stopped and searched by the police acting under the 2000 Act. Mr Gillan was allowed to go on his way after having been detained for about 20 minutes; the record of Ms Quinton's search showed she was stopped for five minutes but she thought it was more like 30 minutes.</p> <p>In the Court's view, the wide discretion conferred on the police under the 2000 Act, both in terms of the authorisation of the power to stop and search and its application in practice, had not been curbed by adequate legal safeguards so as to offer the individual adequate protection against arbitrary interference. The temporal and geographical restrictions provided by Parliament had failed to act as any real check on the issuing of authorisations by the executive, demonstrated by the fact that an authorisation for the Metropolitan Police District had been continuously renewed in a 'rolling programme' since the powers had first been granted.</p> <p>Of still further concern was the breadth of the discretion conferred on the individual police officer. The officer's decision to stop and search an individual was one based exclusively on the 'hunch' or 'professional intuition'. The sole proviso was that the search had to be for the purpose of looking for articles which could be used in connection with terrorism, a very wide category covering many articles commonly carried by people in the streets. Provided the person concerned was stopped for the purpose of searching for such articles, the police officer did not even have to have grounds for suspecting the presence of such articles. The statistics showed that black and Asian persons were disproportionately affected by the powers.</p> <p>Although the powers of authorisation and confirmation exercised by the senior police officer and the Secretary of State respectively were subject to judicial review, the breadth of the discretion involved meant that applicants faced formidable obstacles in showing that any authorisation and confirmation were <i>ultra vires</i> or an abuse of power. Similarly, as shown in the applicants' case, judicial review or an action in damages to challenge the exercise of the stop and search powers by a police officer in an individual case were unlikely to succeed. The absence of any obligation on the part of the officer to show a reasonable suspicion made it almost impossible to prove that that power had been improperly exercised.</p>

	The Court considered that the powers of authorisation and confirmation as well as those of stop and search under sections 44 and 45 of the 2000 Act were neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. They were not, therefore, 'in accordance with the law'.
<i>Decision</i>	Violation

<i>Case</i>	<i>Fawsie v. Greece</i> , no. 40080/07, and <i>Saidoun v. Greece</i> , no. 40083/07, 28 October 2010
<i>ECHR Right</i>	Article 8 (right to respect for private and family life) combined with Article 14 (prohibition of discrimination)
<i>Content of the case</i>	<p>The applicants have both been recognized as political refugees. The social security rejected the applicants' requests for the allowance paid to mothers of large families. The rejection explained that the applicants did not have the status of mother of a large family as neither they nor their children had Greek nationality or the nationality of one of the member States of the European Union or were refugees of Greek origin.</p> <p>The Court reiterated that only very strong considerations could lead it to consider a difference in treatment exclusively based on nationality to be compatible with the Convention.</p> <p>From 1997 onwards, the status of beneficiary of the allowance had been granted to nationals of European Union member States, then from 2000 to nationals of States Parties to the European Economic Area, and finally, from 2008, to refugees such as the applicants. Lastly, under the Geneva Convention on the Status of Refugees, to which Greece was a party, States had to grant to refugees staying lawfully in their territory the same treatment with respect to public relief and assistance as was accorded to their own nationals.</p>
<i>Decision</i>	Violation



<i>Case</i>	<i>Shaw v. Hungary</i> , no. 6457/09, 26 July 2011
<i>ECHR Right</i>	Article 8 (right to protection of private and family life)
<i>Content of the case</i>	<p>The case concerned the failure of the Hungarian authorities to ensure the return from Hungary to Paris of a young girl who had been taken permanently out of France by her mother, making it impossible for the father, who had joint custody, to see his daughter. Mr. Shaw complained to the European Commission in January 2009 claiming a violation of the EC Regulation on the Recognition of Judgments, the EC Regulation on Service of Documents and the Charter of Fundamental Rights of the European Union, as his access rights and custody rights established by the French courts had not been enforced by the Hungarian authorities.</p> <p>The Court recalled that such individual complaints to the European Commission did not qualify as 'another procedure of international investigation or settlement' for the purposes of Article 35(2)(b) of the Convention.</p> <p>The Court reiterated that Article 8 included a parent's right to be reunited with their children and an obligation on behalf of the authorities to facilitate such reunion.</p> <p>The court proceedings in Hungary related to the return of Mr Shaw's daughter had lasted longer than the six weeks authorised by the EC Regulation on the recognition of judgments which was applicable in Hungary. No reasons had been given to justify the delay, and there had not been any exceptional circumstances which could have provided any justification. Consequently, the Hungarian courts had failed to act expeditiously in the proceedings to return the child and the Court concluded that, because of those delays alone, the Hungarian authorities had breached their obligation to act in order to protect the child.</p> <p>Finally, the Court observed that the situation had been aggravated by the fact that, as a result of the Hungarian courts' findings that they could not enforce Mr Shaw's access rights to his daughter, he had not seen the child for three-and-a-half years, despite having been entitled to regular contact with her.</p>
<i>Decision</i>	Violation

<i>Case</i>	<i>S.H. and Others v. Austria</i> , no. 57813/00, 3 November 2011 (Grand Chamber)
<i>ECHR Right</i>	Article 8 (right to respect for private and family life)
<i>Content of the case</i>	<p>The applicants complained that the prohibition of sperm and ova donation for in vitro fertilisation violated their right to respect for family life under Article 8, and that the difference in treatment compared to couples who wished to use medically-assisted procreation techniques, but did not need to use ova or sperm donation for in vitro fertilisation, amounted to a discriminatory treatment, in violation of Article 14 (prohibition of discrimination).</p> <p>It is undisputed that the right of a couple to conceive a child and to make use of medically-assisted procreation for that purpose was protected by Article 8, as such a choice was an expression of private and family life.</p> <p>As regards the State's margin of appreciation in regulating matters of artificial procreation, the Court observed that there was today a clear trend in the legislation of Council of Europe member States towards allowing gamete donation for the purpose of in vitro fertilisation. However, that emerging European consensus was not based on settled principles, but it reflected a stage of development within a particularly dynamic field of law and thus did not decisively narrow the margin of appreciation of the State. The Court therefore considered that the margin of appreciation to be given to Austria had to be a wide one.</p> <p>However, the Court could not overlook the fact that the splitting of motherhood between a genetic mother and the one carrying the child differed significantly from adoptive parent-child relations. The legislature had thus been guided, in particular, by the aim of maintaining a basic principle of civil law, that the identity of the mother is always certain, and of avoiding the possibility that two women could claim to be the biological mother of the same child. The Court further observed that all relevant legal instruments at European level were either silent on the question of ova donation or – in the case of the European Union Directive on safety standards for the donation of human cells – expressly left the decision on whether or not to use germ cells to the State concerned.</p> <p>As regards the prohibition of sperm donation for in vitro fertilisation, it was true that that type of artificial procreation combined two techniques which, taken alone, were allowed under Austrian legislation. However, there remained the basic concerns that the donation of gametes involving the intervention of third persons in a highly technical medical process was a controversial issue in Austrian society, raising complex ethical questions on which there was not yet a consensus.</p> <p>The Court concluded that Austria had not, at the relevant time,</p>

	exceeded the margin of appreciation afforded to it, neither as regards the prohibition of ovum donation for the purposes of artificial procreation nor as regards the prohibition of sperm donation for in vitro fertilisation.
<i>Decision</i>	No violation

<i>Case</i>	<i>Uzun v. Germany</i> , no. 35623/05, 2 September 2010
<i>ECHR Right</i>	Article 8 (right to respect for private and family life)
<i>Content of the case</i>	<p>The prosecutor instituted a criminal investigation against the applicant on charges of terrorism. The investigation included several surveillance means. A GPS receiver was installed in the car of Mr. Uzun's accomplice. The two men were arrested. In the criminal trial opened against the two men, the Düsseldorf Court of Appeal dismissed Mr Uzun's objection to the use of the GPS data as evidence, finding that it was covered by the Code of Criminal Procedure and that no court order had been required.</p> <p>The Court considered that the surveillance at issue had a basis in the German Code of Criminal Procedure. The Court underlined that surveillance via GPS of movements in public places was to be distinguished from other methods of visual or acoustical surveillance in that it disclosed less information on a person's conduct, opinions or feelings and thus interfered less with his or her private life. The Court, therefore, did not see the need to apply the same strict safeguards against abuse it had developed in its case-law on the interception of telecommunications, such as the need to precisely define the limit on the duration of such monitoring or the procedure for using and storing the data obtained. Domestic law moreover set strict standards for authorising GPS surveillance; it could be ordered only against a person suspected of a criminal offence of considerable gravity.</p> <p>Subsequent judicial review allowed for evidence obtained from an illegal GPS surveillance to be excluded and thus constituted an important safeguard, as it discouraged the investigating authorities from collecting evidence by unlawful means. The Court concluded that the interference with Mr Uzun's right to respect for his private life had been in accordance with the law.</p> <p>The GPS surveillance of Mr Uzun had been ordered to investigate several counts of attempted murder for which a terrorist movement had claimed responsibility and to prevent further bomb attacks. It therefore served the interests of national security and public safety, the prevention of crime and the protection of the rights of the victims. It had only been ordered after less intrusive methods of investigation had proved insufficient, for a relatively short period of time – three months – and it had affected Mr Uzun only when he was travelling with his accomplice's car. Therefore, he could not be said to have been subjected to total and comprehensive surveillance.</p> <p>It is the first case concerning GPS surveillance before the European Court of Human Rights.</p>
<i>Decision</i>	No violation

<i>Case</i>	<i>Moretti and Benedetti v. Italy</i> , no. 16318/07, 27 April 2010
<i>ECHR Right</i>	Article 8 (right to respect for private and family life)
<i>Content of the case</i>	<p>The applicants lived with their daughter and a child adopted by Mrs. Benedetti. A newborn baby, A., was provisionally placed with them by court decision for a period of five months that was subsequently extended until nineteen months. In the meantime proceedings were instituted to declare A. free for adoption. On 19 December 2005 a new family was given custody of A. in a decision that was not served on the applicants. On the same day the child was removed from the applicants' home with the assistance of the police</p> <p>The Court reiterated that the notion of 'family life' in Article 8 was not confined solely to marriage-based relationships but could also encompass other <i>de facto</i> 'family ties' where further elements of dependency were present involving more than emotional ties. The determination of the family nature of such a relationship had to take account of a number of factors, such as the length of time the persons in question had been living together, the quality of the relationship and the adult's role in respect of the child. The Court noted that the applicants had lived with A. during the important stages of the first 19 months of her life and that she had been well integrated into the family. This had amounted to family life for the purposes of Article 8.</p> <p>Whilst Article 8 did not guarantee a right to adopt, it did not prevent an obligation arising on States, in certain circumstances, to allow family ties to be formed. In the present case it had been of primary importance that the request for a special adoption order lodged by the applicants be examined carefully and speedily. The Court reiterated that where cases concerning family life were concerned the passage of time could have irremediable consequences. It was regrettable that the request for adoption lodged by the applicants had not been examined before declaring A. free for adoption and that it had been dismissed with no reasons being stated.</p> <p>It was not for the Court to substitute its own reasoning for that of the national authorities, however, the shortcomings observed in the proceedings in question had had a direct impact on the applicants' right to family life, and the authorities had failed to ensure effective respect for that right.</p>
<i>Decision</i>	Violation

<i>Case</i>	<i>Mustafa and Armagan Akin v. Turkey</i> , no. 4694/03, 6 April 2010
<i>ECHR Right</i>	Article 8 (right to respect for private and family life)
<i>Content of the case</i>	<p>The applicants are father and son. When Mustafa Akin and his wife divorced, the civil court awarded custody of their son to him and custody of their daughter to the mother. By the same decision, the parents were to exchange the children during certain fixed periods of time. Mr Akin brought proceedings against his former wife, requesting that the children be able to see each other every weekend. He claimed that the court's custody decision, preventing the two children from seeing each other and him from spending time with both of them, was causing irreversible psychological problems for the children. The request was refused.</p> <p>The absence of reasoning by the domestic court to justify the separation of the children was striking, since the custody arrangements separating the two siblings had been determined by the domestic court of its own motion, as neither parent had requested such an arrangement and the mother had asked for the custody of both children. The domestic court could have considered finding another agreement to ensure the children would see each other on a regular basis.</p> <p>The Court further observed with regret that despite the significance of the case before it, the Court of Cassation had not addressed the detailed submissions by the applicants, which included references to its own decisions concerning the need for siblings to keep in contact. The domestic courts' handling of the case had fallen short of the State's obligation to protect family life.</p>
<i>Decision</i>	Violation

<i>Case</i>	<i>Hajduova v. Slovakia</i> , no. 2660/03, 30 November 2010
<i>ECHR Right</i>	Article 8 (right to private and family life)
<i>Content of the case</i>	<p>The applicant was attacked by her (former) husband, A., both verbally and physically. Rather than imposing a prison sentence, the court ordered that A. be detained for psychiatric treatment. After being released, since the hospital didn't carry out the treatment which he required, A. renewed his threats against the applicant.</p> <p>The Court recalled that States had a duty under Article 8 to protect the physical and psychological integrity of an individual from others, in particular in the case of vulnerable victims of domestic violence, as emphasized in a number of international instruments.</p> <p>Although A's threats had not actually materialized into concrete physical violence, the applicant's fear that they might be carried out had been well-founded, given A's history of physical abuse and menacing behavior. The Court could not overlook the fact that A. had been able to continue to threaten the applicant and her lawyer because of the domestic authorities inactivity and failure to ensure his detention for psychiatric treatment.</p> <p>For the first time, the Court found a failure by the State to fulfill a positive obligation under Article 8 in the absence of concrete physical violence.</p>
<i>Decision</i>	Violation

<i>Case</i>	<i>Dalea v. France</i> , no. 964/07, 9 March 2010 (decision)
<i>ECHR Right</i>	Article 8 (right to respect for private life)
<i>Content of the case</i>	<p>The applicant, a Romanian citizen, was denied the visa to visit Germany on the ground that he had been reported by the French authorities to the Schengen Information System for the purposes of being refused entry.</p> <p>The interference with Mr Dalea's 'private life' as a result of his inclusion in the Schengen Information System had been 'in accordance with the law' and had pursued the legitimate aim of protecting national security. The Court noted that the applicant had not shown how he had actually suffered as a result of his inability to travel in the Schengen area and pointed out that he had in the end gone to Switzerland for his heart surgery. The French authorities' interference with the applicant's right to respect for his private life had not therefore been disproportionate to the aim pursued.</p> <p>Whilst the Court noted the impact for Mr Dalea of his inclusion in the Schengen Information System, barring him access to all countries that applied the Schengen Agreement, it found that States had broad discretion in taking measures to secure the protection against arbitrariness that an individual in such a situation could expect.</p> <p>Further, Mr Dalea had been able to apply for review of the measure at issue, at last instance to the <i>Conseil d'État</i>, which referred the matter back to the French National Data Protection Commission for clarification and verification. Whilst the applicant had not been in a position to challenge the precise grounds for his inclusion in the Schengen database, he had been granted access to all the other data concerning him and had been informed that considerations relating to State security, defence and public safety had given rise to the report by the French Security Intelligence Agency. The Court concluded that the applicant's inability to gain personal access to all the information he had requested could not in itself prove that the interference was unjustified, in view of the national security interests.</p>
<i>Decision</i>	Inadmissible



<i>Case</i>	<i>A, B and C v. Ireland</i> , no.25579/05, 16 December 2010 (Grand Chamber)
<i>ECHR Right</i>	Article 8 (right to private and family life)
<i>Content of the case</i>	<p>The three women, over 18 years of age, complained that the restrictions on abortion in Ireland stigmatized and humiliated them, risked damaging their health and well-being, and, in the case of C, even her life. The three applicants travelled to the UK to have an abortion after becoming pregnant unintentionally.</p> <p>In Irish law, abortion is prohibited under criminal law. Since 1983 Article 40.3.3 of the Irish Constitution acknowledged the right to life of the unborn and, with due regard to the equal right to life of the mother, guaranteed to respect the latter in national laws. Supreme Court held, in a judgment in 1992, that abortion was lawful in Ireland, if there was a real and substantial risk to the life, as distinct from the health, of the mother as a result of her pregnancy. In 1992, a referendum resulted in the Thirteenth Amendment to the Constitution, which lifted the ban on travelling abroad for abortion and allowed information about lawfully available abortions abroad to be disseminated in Ireland.</p> <p>Article 8 could not be interpreted as conferring a right to abortion, but its prohibition in Ireland comes within the scope of the applicants' right to respect for their physical and psychological integrity, hence within their private lives.</p> <p>The Court observed that a consensus existed among the majority of the members States of the Council of Europe allowing broader access to abortion than under Irish law. The Court found that the undisputed consensus among the Council of Europe member States was not sufficient to narrow decisively the broad margin of appreciation the State enjoyed in that context. As there was no European consensus on the scientific and legal definition of the beginning of life and as the right of the foetus and mother were inextricably linked, a State's margin of appreciation concerning the question of when life began implied a similar margin of appreciation as regards the balancing of the conflicting interests of the foetus and the mother.</p> <p>The third applicant had a rare form of cancer and she feared it might relapse as a result of her being pregnant. In this case, the Court concluded that there had been a violation of Article 8 given the failure to implement the existing Constitutional right to lawful abortion in Ireland.</p>
<i>Decision</i>	Violation (in respect of the third applicant)

<i>Case</i>	<i>V.C. v. Slovakia</i> , no. 18968/07, 8 November 2011
<i>ECHR Right</i>	Article 8 (right to respect for private life) and Article 3 (prohibition of inhuman or degrading treatment)
<i>Content of the case</i>	<p>The applicant is a Slovakian national of Roma ethnic origin. She was sterilized during the delivery of her second child at a public hospital. She complained that had been sterilised without her full and informed consent and that the authorities' ensuing investigation into her sterilisation had not been thorough, fair or effective. The applicant referred to a number of publications pointing to a history of forced sterilisation of Roma women which originated under the communist regime in Czechoslovakia in the early 1970s.</p> <p>The Court noted that sterilisation amounted to a major interference with a person's reproductive health status and, involving manifold aspects of personal integrity (physical and mental well-being as well as emotional, spiritual and family life), required informed consent when the patient was an adult of sound mind. The applicant's sterilisation, as well as the way in which she had been requested to agree to it, must therefore have made her feel fear, anguish and inferiority. The suffering that entailed had had long-lasting and serious repercussions on her physical and psychological state of health as well as on her relationship with both her husband and the Roma community. Although there was no proof that the medical staff had intended to ill-treat the applicant, they had nevertheless acted with gross disregard to her right to autonomy and choice as a patient.</p> <p>In addition, Slovakia had failed to fulfil its obligation under Article 8 to respect private and family life in that it did not ensure that particular attention was paid to the reproductive health of the applicant as a Roma. There was a lack of legal safeguards at the time of the applicant's sterilisation giving special consideration to her reproductive health as a Roma.</p> <p>This is the first judgement concerning unconsented sterilization.</p>
<i>Decision</i>	Violation

## 2.6. Freedom of thought, conscience and religion

<i>Case</i>	<i>Bayatyan v. Armenia</i> , no. 23459/03, 7 July 2011 (Grand Chamber)
<i>ECHR Right</i>	Article 9 (freedom of thought, conscience and religion)
<i>Content of the case</i>	<p>The applicant is a Jehovah's Witness convicted in 2003 for his refusal to perform military service. When joining the Council of Europe in 2001, Armenia undertook to introduce civilian service as an alternative to compulsory military service. The Alternative Service Act entered into force in July 2004.</p> <p>The Chamber, following the established case-law of the European Commission of Human Rights, had found that Article 9 had to be read in conjunction with Article 4 (prohibition of slavery and of forced or compulsory labour), which left the choice of recognising conscientious objection to each State which had ratified the European Convention on Human Rights. The Chamber had therefore found that Article 9 did not guarantee a right to refuse military service on conscientious grounds. However, the Grand Chamber reiterated that the Convention was a living instrument which had to be interpreted in the light of prevailing conditions and ideas in democratic States. At the time when the alleged interference with the applicant's rights under Article 9 occurred, in 2002-2003, only four Council of Europe Member States, apart from Armenia, did not provide for the possibility of claiming conscientious objector status, although three of those had already incorporated the right to conscientious objection into their Constitutions but had yet to introduce implementing laws. The Grand Chamber concluded that Article 9 should no longer be read in conjunction with Article 4 § 3 (b). Consequently, the applicant's complaint was to be assessed solely under Article 9.</p> <p>Article 9 did not explicitly refer to a right to conscientious objection. However, the Grand Chamber considered that opposition to military service - where it was motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or deeply and genuinely held religious or other beliefs - constituted a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.</p> <p>The Grand Chamber reiterated that pluralism, tolerance and broadmindedness were hallmarks of a democratic society. Democracy did not simply mean that the views of the majority had always to prevail; a balance had to be achieved which ensured the fair and proper treatment of minorities and avoided any abuse of a dominant position. Respect on the part of the State towards the beliefs of a minority religious group (like the Jehovah's Witnesses) by providing them with the opportunity to serve society as dictated by their conscience might, far from creating unjust inequalities or discrimination as the Government claimed, ensure cohesive and stable pluralism and promote religious harmony and tolerance in society.</p>
<i>Decision</i>	Violation

## 2.7. Freedom of expression

<i>Case</i>	<i>RTBF v. Belgium</i> , no. 50084/06, 29 March 2011
<i>ECHR Right</i>	Article 10 (freedom of expression)
<i>Content of the case</i>	<p>The case concerned an interim injunction ordered by an urgent-applications judge against the Belgian French-language public broadcasting corporation RTBF, preventing the broadcasting of a programme – partly about the rights of patients <i>vis-à-vis</i> doctors –, until the final decision in a dispute between a doctor named in the programme and the RTBF. The Court of Cassation declared inadmissible the appeal lodged by the RTBF against the injunction (violation of Article 6.1).</p> <p>Whilst Article 10 did not, as such, prohibit prior restraints on broadcasting, such restraints required a particularly strict legal framework, ensuring both tight control over the scope of bans and effective judicial review to prevent any abuse, for news was a perishable commodity and to delay its publication, even for a short period, might well deprive it of all its interest.</p> <p>The Court observed that the Belgian Constitution authorised the punishment of offences committed in the exercise of freedom of expression only once they had been committed and not before. As to the Judicial Code and the Civil Code, they did not clarify the type of restrictions authorised, nor their purpose, duration, scope or control. More specifically, whilst they permitted the intervention of the urgent-applications judge, there was some discrepancy in the case-law as to the possibility of preventive intervention by that judge.</p> <p>In Belgian law there was thus no clear and constant case-law that could have enabled the applicant company to foresee, to a reasonable degree, the possible consequences of the broadcasting of the programme in question. The legislative framework, together with the case-law of the Belgian courts, as applied to the applicant company, did not fulfil the condition of foreseeability required by the Convention.</p>
<i>Decision</i>	Violation

<i>Case</i>	<i>Akdas v. Turkey</i> , no. 41056/04, 16 February 2010
<i>ECHR Right</i>	Article 10 (freedom of expression)
<i>Content of the case</i>	<p>The applicant is a publisher and in 1999 published the Turkish translation of the erotic novel <i>Les onze mille verges</i> by the French writer Guillaume Apollinaire. He was convicted under the Criminal Code for publishing obscene or immoral material.</p> <p>The requirements of morals varied from time to time and from place to place, even within the same State. The national authorities were therefore in a better position than the international judge to give an opinion on the exact content of those requirements. Nevertheless, the Court had regard in the present case to the fact that more than a century had elapsed since the book had first been published in France (in 1907), to its publication in various languages in a large number of countries and to the recognition it had gained through publication in the prestigious 'La Pléiade' series. Acknowledgment of the cultural, historical and religious particularities of the Council of Europe's member States could not go so far as to prevent public access in a particular language, in this instance Turkish, to a work belonging to the European literary heritage.</p> <p>Accordingly, the application of the legislation in force at the time of the events had not been intended to satisfy a pressing social need. In addition, the heavy fine imposed and the seizure of copies of the book had not been proportionate to the legitimate aim pursued and had thus not been necessary in a democratic society.</p>
<i>Decision</i>	Violation

## 2.8. Right to marry

<i>Case</i>	<i>O'Donoghue and Others v. the United Kingdom</i> , no. 34848/07, 14 December 2010
<i>ECHR Right</i>	Article 12 (right to marry) and Article 14 (prohibition of discrimination) in conjunction with Articles 9 (freedom of religion) and 12
<i>Content of the case</i>	<p>The case concerned a Certificate of Approval Scheme requiring people subject to immigration control (leave to remain) to pay a fee in order to marry. The scheme did not apply to those couples seeking to marry in accordance with the rites of the Church of England.</p> <p>The Court recalled that a State would not necessarily be acting in violation of Article 12 by imposing reasonable conditions –to prevent the practice of sham marriages- on a foreign national's ability to marry.</p> <p>Nevertheless, there is no justification for imposing a blanket prohibition on marriage that would affect all members of a particular category of the population and/or which was not based on an assessment of the genuineness of the marriage.</p>
<i>Decision</i>	Violation

<i>Case</i>	<i>Schalk and Kopf v. Austria</i> , no. 30141/04, 24 June 2010
<i>ECHR Right</i>	Article 12 (right to marry), Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private life)
<i>Content of the case</i>	<p>The applicants are a same-sex couple. They asked the competent authorities to allow them to contract marriage. According to the Austrian Civil Code, their request was refused.</p> <p>The Court observed that among Council of Europe member States there was no consensus regarding same-sex marriage. Having regard to the Charter of Fundamental Rights of the European Union, to which the Austrian Government had referred in their pleadings, the Court noted that the relevant Article, granting the right to marry, did not include a reference to men and women, which allowed the conclusion that the right to marry must not in all circumstances be limited to marriage between two persons of the opposite sex. Having regard to Article 9 of the Charter, therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants' complaint. The Court underlined that national authorities were best placed to assess and respond to the needs of society in this field, given that marriage had deep-rooted social and cultural connotations differing largely from one society to another. In conclusion, Article 12 did not impose an obligation on States to grant a same-sex couple access to marriage.</p> <p>As to Article 14+8, the Court concluded that the relationship of the applicants, a cohabiting same-sex couple living in a stable partnership, fell within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would.</p> <p>The Court was not convinced by the argument that if a State chose to provide same-sex couples with an alternative means of recognition, it was obliged to confer a status on them which corresponded to marriage in every respect. The fact that the Austrian Registered Partnership Act retained some substantial differences compared to marriage in respect of parental rights corresponded largely to the trend in other member States.</p>
<i>Decision</i>	No violation

<i>Case</i>	<i>Serife Yigit v. Turkey</i> , no. 3976/05, 2 November 2010 (Grand Chamber)
<i>ECHR Right</i>	Article 14 (prohibition of discrimination) in conjunction with Article 1 of Protocol 1 (protection of property) and Article 8 (right to respect for family life)
<i>Content of the case</i>	<p>The applicant married her husband in a religious ceremony. They got six children. When her husband was died, Serife Yigit brought an action to have her marriage recognized and to have the youngest of their children entered in the civil register. The court allowed the second request but rejected the request concerning the marriage.</p> <p>The Court reiterated that Article 14 prohibited, within the ambit of the rights and freedoms guaranteed by the Convention, discrimination based on a personal characteristic by which persons or groups of persons were distinguishable from each other. The nature -civil or religious- of a marriage between two persons undoubtedly constituted such a characteristic. Accordingly, a 'difference in treatment' such as that to which Ms Yiğit had been subjected might be prohibited by Article 14.</p> <p>The Court noted firstly that the decision taken by the Turkish authorities in this case had pursued the legitimate aims of protecting public order (civil marriage being designed, in particular, to protect women) and protecting the rights and freedoms of others. The Court considered decisive that, in view of the relevant Turkish legal rules, Ms Yiğit could not have had any legitimate expectation of obtaining benefits on the basis of her partner's entitlement. That aspect clearly distinguished the present case from another recent case, in which a woman married solely in accordance with Roma rites had been recognised by the Spanish authorities as her partner's spouse (among other things, she had been awarded social-security benefits as a spouse and had been issued with a family record book).</p> <p>The Court observed that Ms Yiğit and her partner had been able to live peacefully as a family, free from any interference with their family life by the domestic authorities. The fact that they had opted for the religious form of marriage and had not contracted a civil marriage had not entailed any penalties such as to prevent Ms Yiğit from leading an effective family life for the purposes of Article 8.</p> <p>The Court pointed out that Article 8 could not be interpreted as imposing an obligation on the State to recognise religious marriage; nor did it require the State to establish a special regime for a particular category of unmarried couples. For that reason, the fact that Ms Yiğit did not have the status of heir did not in itself imply that there had been a breach of her rights under Article 8.</p>
<i>Decision</i>	No violation



## 2.9. Prohibition of discrimination

<i>Case</i>	<i>Andrle v. the Czech Republic</i> , no. 6268/08, 17 February 2011
<i>ECHR Right</i>	Article 14 (prohibition of discrimination) in conjunction with Article 1 (protection of property) of Protocol 1
<i>Content of the case</i>	<p>Mr Andrle complained about the current pension scheme in the Czech Republic whereby women and men who care for children are eligible for a pension at different ages. Adopted in 1964 that measure pursued a legitimate aim as it was designed to compensate for the inequality and hardship generated by the expectations of women under the family model founded at the time, and which persists today: that of working on a full-time basis as well as taking care of the children and the household. The amount of salaries and pensions awarded to women was also generally lower in comparison to men.</p> <p>The perception of the roles of the sexes has evolved and the Czech Government is progressively modifying its pension system to reflect social and demographic change. The Court emphasised that the national authorities were the best placed to determine such a complex issue relating to economic and social policies, which depended on manifold domestic variables and direct knowledge of the society concerned.</p> <p>The State's approach concerning its pension scheme was reasonably and objectively justified and would continue to be so until such time as social and economic change in the country removed the need for special treatment of women.</p>
<i>Decision</i>	No violation

<i>Case</i>	<i>Genovese v. Malta</i> , no. 53124/09, 11 October 2011
<i>ECHR Right</i>	Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect of private and family life)
<i>Content of the case</i>	<p>The applicant, a British citizen whose father is Maltese, complained that he was prevented from obtaining Maltese citizenship because he had been born out of wedlock.</p> <p>While it was true that the denial of citizenship could not be said to have acted as an impediment to establishing family life – given that his father did not wish to build or maintain a relationship with him – its impact on Mr Genovese’s private life, a concept which was wide enough to embrace aspects of a person’s social identity, was such as to bring it within the general scope and ambit of Article 8.</p> <p>Mr Genovese was in an analogous situation to other children with a father of Maltese nationality and a mother of foreign nationality. The only distinguishing factor, which had rendered him ineligible to acquire citizenship, was the fact that he had been born out of wedlock. The Court was not convinced by the Government’s argument that children born in wedlock had a link with their parents resulting from their parents’ marriage, which did not exist in cases of children born out of wedlock. It was precisely a distinction in treatment based on such a link which Article 14 prohibited, unless it was otherwise objectively justified.</p> <p>The Maltese Government submitted that in 2007 the domestic law had been amended; now making Mr Genovese eligible for citizenship.</p>
<i>Decision</i>	Violation

Case	<i>Kozak v. Poland</i> , no. 13102/02, 2 March 2010
ECHR Right	Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life)
Content of the case	<p>For several years, the applicant lived together with his partner in a homosexual relationship. They shared a municipality flat rented by the applicant's partner. After his partner had died, the applicant applied to the municipality to succeed to the tenancy of the flat. The municipal buildings department denied the request, claiming that the applicant had not lived in the flat before his partner's death, and ordered the applicant to move out. Relying on the housing act in force at the time, he brought forward that he had a right to succession, as he had run a common household with his partner for many years and had thus lived with him in <i>de facto</i> marital cohabitation. The claim was dismissed by the courts, holding in particular that Polish law recognised <i>de facto</i> marital relationships only between partners of different sex.</p> <p>The Court observed that in establishing whether the applicant fulfilled the conditions of the housing act the domestic courts had focused on the homosexual nature of the relationship with his partner. National courts had rejected his claim on the grounds that under Polish law only a relationship between a woman and a man could qualify for <i>de facto</i> marital cohabitation.</p> <p>The Court accepted that the protection of the family founded on a union of a man and a woman, as stipulated by the Polish Constitution, was in principle a legitimate reason which might justify a difference in treatment. However, when striking the balance between the protection of the family and the Convention rights of sexual minorities, States had to take into consideration developments in society including the fact that there was not just one way of leading one's private life. The Court could not accept that a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy was necessary for the protection of the family.</p>
Decision	Violation

<i>Case</i>	<i>Ponomaryovi v. Bulgaria</i> , no. 5335/05, 21 June 2011
<i>ECHR Right</i>	Article 14 (prohibition of discrimination) in conjunction with Article 2 of Protocol 1 (right to education)
<i>Content of the case</i>	<p>The case concerned the requirement that two Russian boys, living in Bulgaria with their mother who was married to a Bulgarian, pay school fees for their secondary education, unlike Bulgarian nationals and aliens with permanent residence permits. Bulgarian legislation, the 1991 National Education Act, stipulated that foreigners who did not have permanent residence permits would have to pay fees for their secondary education.</p> <p>The Court emphasised that its role was not to decide whether States were allowed to charge fees for education, but only whether, once a State had voluntarily decided to provide free education, it could exclude a group of people without justification.</p> <p>The applicants had been living lawfully in Bulgaria. The authorities had had no objection to them remaining in the country nor had they ever seriously intended to deport them. In addition, at the time Anatoliy and Vitaliy had taken steps to obtain permanent residence permits. They had not attempted to abuse the Bulgarian educational system in any way, given that they had ended up living and studying in Bulgaria because they had followed their mother who had married there. They were fully integrated into Bulgarian society and spoke fluent Bulgarian. The Bulgarian authorities had not taken any of the above elements into account when deciding to impose school fees on the boys. Indeed, the relevant law did not allow for an exemption from the payment of school fees.</p>
<i>Decision</i>	Violation

<i>Case</i>	<i>Losonci Rose and Rose v. Switzerzland</i> , no. 664/06, 9 November 2010
<i>ECHR Right</i>	Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to private and family life)
<i>Content of the case</i>	<p>The applicants, who were intending to get married, asked to keep their own surnames rather than choose a double-barrelled surname for one of them. After their request and their subsequent appeal were rejected, the applicants decided that, in order to be able to marry, they would take the wife's surname as the 'family name'.</p> <p>A consensus was emerging within the Council of Europe's member States as regards equality between spouses in the choice of family name. In the instant case, the first applicant had been prevented from keeping his own surname after marriage, which he could have done had the applicants' sexes been reversed. The Court reiterated that a person's name, as the main means of personal identification within society, was one of the core aspects to be taken into consideration in relation to the right to respect for private and family life.</p>
<i>Decision</i>	Violation

<i>Case</i>	<i>Carson and others v. the United Kingdom</i> , no. 42184/05, 16 March 2010 (Grand Chamber)
<i>ECHR Right</i>	Article 14 (prohibition of discrimination) taken in conjunction with Article 1 of Protocol No. 1 (protection of property)
<i>Content of the case</i>	<p>This application was brought by 13 British nationals who spent some of their working lives in the United Kingdom, paying National Insurance Contributions, before emigrating or returning to South Africa, Australia or Canada.</p> <p>Before this judgment the Court has established in its case-law that only differences in treatment based on a personal characteristic (or 'status') by which persons or groups of persons are distinguishable from each other are capable of amounting to discrimination within the meaning of Article 14. However, the list set out in Article 14 is illustrative and not exhaustive, as is shown by the words 'any ground such as' (in French '<i>notamment</i>'). It further recalls that the words 'other status' (and <i>a fortiori</i> the French '<i>toute autre situation</i>') have been given a wide meaning so as to include, in certain circumstances, a distinction drawn on the basis of a place of residence. Thus, in previous cases the Court has examined under Article 14 the legitimacy of alleged discrimination based, <i>inter alia</i>, on domicile abroad and registration as a resident. In addition, the Commission examined complaints about discrepancies in the law applying in different areas of a single Contracting State. It is true that regional differences of treatment, resulting from the application of different legislation depending on the geographical location of an applicant, have been held not to be explained in terms of personal characteristics. However, the present case, involves the different application of the same pensions legislation to persons depending on their residence and presence abroad. In conclusion, the Court considers that place of residence constitutes an aspect of personal status for the purposes of Article 14.</p> <p>The Court did not consider that the applicants, who live outside the United Kingdom in countries which are not party to reciprocal social security agreements with the United Kingdom providing for pension up-rating, were in a relevantly similar position to residents of the United Kingdom or of countries which were party to such agreements.</p>
<i>Decision</i>	No violation

## 2.10. Right to education

<i>Case</i>	<i>Lautsi v. Italy</i> , no. 30814/06, 18 March 2011 (Grand Chamber)
<i>ECHR Right</i>	Article 2 of Protocol 1 (right to education)
<i>Content of the case</i>	<p>The case concerned the presence of crucifixes in State-school classrooms in Italy, which, according to the applicants, was incompatible with the obligation on the State to respect the right of parents to ensure such education and teaching in accordance with their own religious and philosophical convictions.</p> <p>The Court found that, while the crucifix was above all a religious symbol, there was no evidence before the Court that the display of such a symbol on classroom walls might have an influence on pupils. Furthermore, whilst it was nonetheless understandable that the first applicant might see in the display of crucifixes in the classrooms of the State school formerly attended by her children a lack of respect on the State's part for her right to ensure their education and teaching in conformity with her own philosophical convictions, her subjective perception was not sufficient to establish a breach of Article 2 of Protocol 1.</p> <p>The States enjoyed a margin of appreciation in their efforts to reconcile the exercise of the functions they assumed in relation to education and teaching with respect for the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. The Court had a duty in principle to respect the States' decisions in those matters, including the place they accorded to religion, provided those decisions did not lead to a form of indoctrination. The decision whether crucifixes should be present in classrooms was, in principle, a matter falling within the margin of appreciation of the State, particularly where there was no European consensus.</p> <p>By prescribing the presence of crucifixes in State-school classrooms, the Italian regulations conferred on the country's majority religion preponderant visibility in the school environment. The Court had already held in its earlier case-law that having regard to the preponderance of one religion throughout the history of a country the fact that the school curriculum gave it greater prominence than other religions could not in itself be viewed as a process of indoctrination. The Court also considered that the presence of crucifixes was not associated with compulsory teaching about Christianity, and that there was nothing to suggest that the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions.</p>
<i>Decision</i>	No violation

## 2.11. Right to free elections

<i>Case</i>	<i>Alajos Kiss v. Hungary</i> , no. 38832/06, 20 May 2010
<i>ECHR Right</i>	Article 3 (right to free elections) of Protocol 1
<i>Content of the case</i>	<p>The applicant was diagnosed with a psychiatric condition and in 2005 he was placed under partial guardianship on the basis of the civil code. In February 2006, the applicant realised that he had been omitted from the electoral register drawn up in view of the upcoming legislative elections. The district court dismissed his case observing that under the Hungarian Constitution persons placed under guardianship did not have the right to vote. When legislative elections took place in April 2006, the applicant could not participate.</p> <p>The Court could not accept an absolute bar on voting rights applied to any person under partial guardianship irrespective of his or her actual faculties. The State had to provide weighty reasons when applying a restriction on fundamental rights to a particularly vulnerable group in society, such as the mentally disabled. Having suffered considerable discrimination and social exclusion in the past, this group was at a risk of being subject to legislative stereotyping.</p> <p>The applicant had lost his right to vote as a result of the imposition of an automatic, blanket restriction on the franchise of those under partial guardianship. The Court could not speculate as to whether he would have been deprived of the right to vote even if a more limited restriction in compliance with Article 3 of Protocol No. 1 had been imposed. The Court further considered that treating persons with mental disabilities as a single group was a questionable classification. Demanding strict scrutiny of the curtailment of their rights was in accordance with other instruments of international law, including the United Nations Convention on the Rights of Persons with Disabilities.</p>
<i>Decision</i>	Violation



<i>Case</i>	<i>Scoppola v. Italy</i> (no. 3), no. 126/05, 18 January 2011 (referred to the Grand Chamber, not yet decided)
<i>ECHR Right</i>	Article 3 of Protocol 1 (right to free elections)
<i>Content of the case</i>	<p>The applicant was sentenced to life imprisonment. Under Italian law, prison sentences of at least five years or life sentences entailed a permanent ban on the right to vote.</p> <p>The Court reiterated that a blanket ban on the right of prisoners to vote during their detention constituted an 'automatic and indiscriminate restriction on a vitally important Convention right [...] falling outside any acceptable margin of appreciation, however wide that margin may be'. It had held that a decision on disenfranchisement should be taken by a court and should be duly reasoned.</p> <p>While it was not disputed that the permanent voting ban imposed on the applicant had a legal basis in Italian law, the application of that measure was automatic since it derived as a matter of course from the main penalty imposed on him (life imprisonment).</p> <p>That general measure had been applied indiscriminately, having been taken irrespective of the offence committed and with no consideration by the lower court of the nature and seriousness of that offence. The possibility that the applicant might one day be rehabilitated by a decision of a court did not in any way alter that finding.</p>
<i>Decision</i>	Violation

## 2.12. Freedom of movement

<i>Case</i>	<i>Nalbantsky v. Bulgaria</i> , no. 30943/04, 10 February 2011
<i>ECHR Right</i>	Article 2 of Protocol 4 (freedom of movement)
<i>Content of the case</i>	<p>The applicant complained about three bans on his leaving Bulgaria, two imposed while the criminal proceedings against him were pending and one imposed after his conviction became final.</p> <p>The measure was based on the express terms of section 76(2) of a 1998 (Bulgarian Identity Papers) Act. Until 1 January 2007 the measure had had a legal basis. However, the applicant maintained that after that date, on which Bulgaria joined the European Union, the legal basis for the measure had become problematic, because section 76(2) ran against Article 27 of Directive 2004/38/EC. In October 2009 section 76(2) was repealed by reference to the Directive. The Court does not find it necessary to determine whether the measure against the applicant was 'accordance with law', as, it considers that it was incompatible with Article 2 of Protocol No. 4 in other respects.</p> <p>The Court considers that in certain cases restrictions on the ability of convicted offenders to travel abroad may be justified, for instance by the need to prevent them from re-engaging in criminal conduct. It has countenanced much more serious restrictions on the freedom of movement of individuals suspected of being members of the Mafia, even in the absence of a criminal conviction.</p> <p>In the instant case, the authorities, apart from referring to the applicant's conviction and lack of rehabilitation, did not give any reasons for taking away his international passport, and apparently did not consider it necessary to examine his individual situation or explain the need to impose such a measure on him. They thus failed to carry out the requisite assessment of the proportionality of the restriction of the applicant's right to travel abroad and provide sufficient justification for it.</p>
<i>Decision</i>	Violation

### 3. INTERACTION BETWEEN LEGAL SYSTEMS

This section will analyze the intensity and nature of mutual cross-references between Luxembourg and Strasbourg in order to ascertain how each court deals with the law coming from the other system.

#### 3.1. Cross-references from the ECJ to the ECHR

Most of the references from the ECJ to the ECHR are found in cases regarding the right to privacy (Article 8 ECHR) and the right to a fair trial (Article 6 ECHR). Usually, the quotation to the corresponding Convention Article is followed by specific references to ECtHR case law.

In *McB*, by reference to Article 52(3) Charter, the ECJ expressly stated that 'Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights' (par. 53).

Indeed, the ECJ relied upon previous ECtHR judgments in order to elucidate whether national law automatically granting rights of custody to the mother was compatible with the right to private and family life. According to this case law, national legislation granting, by operation of law, parental responsibility to the mother was not contrary to Article 8 ECHR, as long as the father was allowed to claim before a court to vary the award of custody. To the contrary, national legislation that did not allow the natural father any possibility of claiming for rights of custody constituted unjustified discrimination against the father, in breach of Article 14 ECHR taken together with Article 8 ECHR.

On the basis of the ECtHR case law, the ECJ held that national legislation granting rights of custody exclusively to the mother was not opposed to Article 7 Charter, since that was not opposed to Article 8 ECHR either, and that no such rights for the father could be derived from the Regulation No 2201/2003.

In *Volker*, regarding the right of data protection (Article 8 Charter), the ECJ made reference to Articles 52(3) and also 53 Charter. The ECJ stated that according to the latter, 'nothing in the Charter is to be interpreted as restricting or adversely affecting the rights recognised inter alia by the Convention' (par. 51).

Next, the ECJ quoted several cases from the ECtHR to sustain that the right to respect for private life with regard to the processing of personal data, enshrined in Articles 7 and 8 Charter, 'concerns any information related to an identified or identifiable individual' (par. 52).

Besides, the ECJ added that the limitations, which 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' (par. 52). In the analysis of whether the interference with the rights recognized in Article 7 and 8 Charter was justified, the ECJ referred again to ECtHR case law with regard to the proportionality test (par. 72).

In *DEB*, at the outset, the ECJ expressly stated that, according to the explanations to the Charter, the second paragraph of Article 47 Charter corresponds to Article 6(1) ECHR (par. 32). The ECJ also referred to the explanations to the Charter for interpreting Article 52(3) Charter, and confirmed the need to take into account ECtHR case law: 'According to the

explanation of that provision, the meaning and the scope of the guaranteed rights are to be determined not only by reference to the text of the ECHR, but also, *inter alia*, by reference to the case-law of the European Court of Human Rights' (par. 35).

In this case, the Court referred profusely to ECtHR case law. In setting the criteria that national courts need to take into account in order to decide whether national legislation on the access to legal aid conforms with the right to an effective judicial remedy, the ECJ replicated the criteria obtained from the analysis of the ECtHR case law.

In *Alassini*, also about the right to effective judicial protection, the ECJ quoted Articles 6 and 13 ECHR. Regarding the possibility to restrict this right, the ECJ made reference to ECtHR case law after stating that rights are not absolute, and that they may be restricted 'provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed' (par. 63).

Notably, in a few cases, the ECJ manifestly expressed the preference for the Charter over the Convention, without entering into conflict with the ECHR.

In *Chalkor*, the appellant before the ECJ claimed that the General Court had failed to adequately review a Commission decision imposing a fine, in violation of the duty to perform a full review, encapsulated in Articles 47 and 49 of the Charter. Furthermore, the appellant argued that according to the explanations relating to the Charter, Article 47 implements the protection afforded by Article 6(1) ECHR, and that competition proceedings were criminal in nature, for the purposes of Article 6 ECHR. Hence, full judicial review should be exercised with regard to Commission decisions in this domain.

The ECJ declared that since Article 47 Charter implements in EU law the protection afforded by Article 6(1) ECHR, it was necessary to refer only to Article 47 Charter (para. 51). Also, The ECJ reminded that the principle of effective judicial protection was a general principle of EU law to which expression was now given by Article 47 of the Charter (par. 52).

In *Bavarian Lager*, the ECJ decided an appeal against a prior judgment by the General Court in a case regarding the conflict between the right to access to documents and the right to privacy. According to Article 4(1)(b) Regulation No 1049/2001, the institutions shall refuse access to a document where disclosure would undermine the protection of 'privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data'.

The General Court had argued that the exception of Article 4(1)(b) had to be interpreted restrictively and that examination as to whether a person's private life might be undermined had to be carried out in the light of Article 8 ECHR and its case law. The General Court ruled that this exception did not apply in the case at hand and that the Commission should have granted full access to the documents required by Bavarian Lager.

In contrast, the ECJ held that the General Court had limited the application of the exception under Article 4(1)(b) to situations in which privacy or the integrity of the individual would be infringed for the purposes of Article 8 ECHR, without taking into account the legislation of the Union concerning the protection of personal data and particularly Articles 8(b) and 18 of Regulation No 45/2001, which were essential for the system of data protection within the EU. Thus, the ECJ concluded that the restrictive interpretation given by the General

Court to Article 4(1)(b) of Regulation No 1049/2001 did not correspond to the intended balance by the Union legislature between these two Regulations.

Finally, in several cases, the ECJ confines the analysis exclusively to the Charter or other EU law provisions. For instance, in *ASNEF*, a case regarding the right to data protection and privacy, there was no reference to the ECHR. In *Scarlet Extended* and *Deutsche Telekom*, regarding the right to data protection in the domain of the internet and electronic communications, the ECJ did not refer to the ECHR either. In *Sweden* and *Techniske Glaswerke*, regarding the right of access to documents, the ECJ referred neither to the ECHR nor to the Charter. In these cases, the right to privacy was not involved, and the ECJ decided on the basis of Regulation (EC) No 1049/2001, regarding public access to European Parliament, Council and Commission documents

Generally, the ECJ does not refer to the ECHR in equality cases, although the explanations to Article 21 Charter state that Article 21(1) draws inspiration from Article 14 ECHR. In any event, the lack of reference to the ECHR might be explained given the vast case law on non-discrimination on grounds of sex coming from the ECJ and the fact that since the founding the European Economic Community Treaty included a provision on equal pay for equal work, which was interpreted as requiring sex equality in the workplace –the current Article 157 TFEU. Also, in cases regarding discrimination on grounds of age, the ECJ relied on its case law. Understandably, the cases on non-discrimination on grounds of nationality are based upon Articles 18 and 21 TFEU.

Likewise, the cases on citizenship do not include references to the ECHR. Only in *Dereci*, the ECJ indicated that if the national court decided that the situation fell outside the scope of application of EU law, then Article 8(1) ECHR should apply. Indeed, if the situation falls outside the scope of application of EU law, it is also beyond the jurisdiction of the ECJ.

### **3.2. Cross-references from the ECtHR to EU law**

The ECtHR case law includes references to the EU Charter as well as to other EU law provisions. According to the HUDOC database of the ECtHR, the Charter has been explicitly quoted in eight judgments and three decisions. In most cases the quotation was made in the section of the judgment regarding 'The Facts', such as in *M.S.S. v. Belgium and Greece*; *A, B and C v. Ireland* (both delivered by the Grand Chamber); *Shaw v. Hungary*; and *Sneersone and Kampanella v. Italy*, or the decisions *Stapleton v. Ireland* (on inadmissibility), *D.H. v. Finland* and *B.S. and others v. The United Kingdom* (striking out the applications). The fact that the Charter was not included in 'The Law' section means that the reference to the Charter had no relevance for deciding the case.

In *Tomasovic v. Croatia*, the Court quoted lengthy its precedent in the case *Zolotukhin v. Russia*, delivered by the Grand Chamber in 2009, in which Article 50 Charter was one of the international instruments cited by the Court when interpreting the *non bis in idem* principle of Article 4 of Protocol No. 7 of the Convention.

The most important use of the Charter in the period 2010-2011 was made in the three remaining judgments. In *Neulinger and Shuruk v. Switzerland*, Article 24.2 of the Charter was taken into consideration ('in particular') as an expression of the 'broad consensus' in support 'of the idea that in all decisions concerning children, their best interests must be paramount'.

In *Bayatyan v. Armenia*, where a right to conscientious objection was identified by the Court in Article 9 of the Convention, the Court recalled that '[W]hile the first paragraph of Article 10 of the Charter reproduces Article 9 § 1 of the Convention almost literally, its second paragraph explicitly states that '[t]he right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right'. Such explicit addition is no doubt deliberate and reflects the unanimous recognition of the right to conscientious objection by the member States of the European Union, as well as the weight attached to that right in modern European society'. Later in the judgment, the Court stated that in 2010 the Committee of Ministers of the Council of Europe 'relying on the developments in the UNHRC case-law and the provisions of the European Union Charter of Fundamental Rights, also confirmed such interpretation of the notion of freedom of conscience and religion as enshrined in Article 9 of the Convention and recommended that the member States ensure the right of conscripts to be granted conscientious objector status'.

The strong influence of the Charter is apparent in *Schalk and Kopf v. Austria*. In this judgment, Article 9 of the Charter made possible a new reading of Article 12 of the Convention regarding the right to marry. The Court pointed out that in *Christine Goodwin*, it had already noted that there had been major social changes in the institution of marriage since the adoption of the Convention. Moreover, the Court noted that Article 9 Charter 'has deliberately dropped the reference to men and women'. The ECtHR also recalled that the commentary to the Charter 'confirms that Article 9 is meant to be broader in scope than the corresponding articles in other human rights instruments [...]. At the same time the reference to domestic law reflects the diversity of national regulations, which range from allowing same-sex marriage to explicitly forbidding it. By referring to national law, Article 9 of the Charter leaves the decision whether or not to allow same-sex marriage to the States. In the words of the commentary: '... it may be argued that there is no obstacle to recognize same-sex relationships in the context of marriage. There is however, no explicit requirement that domestic laws should facilitate such marriages'. The ECtHR found that '[R]egard being had to Article 9 of the Charter, therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex' (emphasis added). Nonetheless, the ECtHR concluded that, as matters stand, the question whether or not to allow same-sex marriage should be left to regulation by the national law of the Contracting State.

In addition to the Charter of Fundamental Rights, the Strasbourg Court has referred to other EU law provisions in cases such as the following. In *Ullens de Schooten and Rezabek v. Belgium*, the ECtHR took into consideration the doctrine of the ECJ to interpret article 6 ECHR. The Court held that the obligation to raise the preliminary reference for courts of last instance (now Article 267 TFEU) was not absolute according to the ECJ's CILFIT doctrine and found no violation in the case at hand.

In *Dalea v. France* (decision of inadmissibility), the Court developed the concept of personal data with regard to inclusion in the Schengen information system register and its consequences for private and professional life. Such inclusion prohibits entry not only to the territory of a single State, but to all countries that apply the provisions of the Schengen Agreement.

The Court declared the violation of the right to free movement in *Nalbantski v. Bulgaria*, a case concerning the prohibition on leaving the country on account of a criminal conviction. The ECtHR included profuse references to free movement within the EU, particularly to 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. Those references, however, were not relevant for the decision taken by the Court.

Regarding admissibility criteria, Article 35(2)(b) ECHR declares not admissible any application that 'has already been submitted to another procedure of international investigation or settlement and contains no relevant new information'. In *Karoussiotis v. Portugal*, and *Shaw v. Hungary* (26 July 2011), the ECtHR ruled that the fact that an individual had previously lodged a complaint against a member State before the European Commission was not an obstacle to make an application on the same issue before the ECtHR. In the former, the ECtHR pointed out that the ECJ in resolving infringement proceedings may not award reparation for individuals.

In *S.H. and Others v. Austria*, the Grand Chamber mentioned the Directive 2004/23/EC of the European Parliament and of the Council dated 31 March 2004, on the setting of standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells, which explicitly provides that 'this Directive should not interfere with the decisions made by Member States concerning the use of or non-use of any specific type of human cells, including germ cells and embryonic stem cells', as a reason to support the States' Parties margin of appreciation in regulating matters of artificial procreation.

In *Shaw v. Hungary*, the Court used the Council Regulation EC 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility to examine whether, 'seen in the light of their international obligations [...], the domestic authorities made adequate and effective efforts to secure compliance with the applicant's right to the return of his child and the child's right to be reunited with her father'.

In some cases EU Law is considered only in 'The Facts' of the judgment, usually as a part of the section devoted to the relevant domestic and International Law and Practice, but no mention at all is made in 'The Law' part of the judgment. Thus, in these circumstances, EU law has no relevance in the reasoning of the Court, at least on a formal level, such as in *Mangouras v. Spain*.



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## 5. ANNEX

**Table 1: ECJ judgments**

Date	Case	Fundamental Rights
19/01/2010	C-555/07 <i>Seda Küçükdeveci v. Swedex GMBH &amp; Co. KG</i>	Non-discrimination on grounds of age (Article 21 Charter)
02/03/2010	C-135/08, <i>Janko Rottmann v. Freistaat Bayern</i>	Citizenship
18/03/2010	C-317/08 to C-320/08, <i>Alassini and Others</i>	Right to effective judicial protection (Article 47 Charter)
13/04/2010	C-73/08, <i>Nicolas Bressol and Others, Céline Chaverot and Others v Gouvernement de la Communauté française</i>	Non-discrimination on grounds of nationality
29/06/2010	Case C-28/08 P <i>Commission v Bavarian Lager</i>	Right to the protection of personal data (Articles 7 and 8 Charter)
29/06/2010	Case C-139/07 P <i>Commission v Technische Glaswerke Ilmenau</i>	Right to access to documents
01/07/2010	C-211/10 PPU, <i>Doris Povse v Mauro Alpagó</i>	Rights of the child (Article 24 Charter)
21/09/2010	Joined Cases C-514/07 P, C-528/07 P and C-532/07 P <i>Sweden v API et Commission</i>	Right to access to documents
29/06/2010	C 139/07 P, <i>European Commission v Technische Glaswerke Ilmenau GmbH</i>	Right to access to documents
05/10/2010	C-400/10, <i>J. McB. v L. E.</i>	Right to private and family life (Article 7 Charter) Rights of the child (Article 24 Charter)
12/10/2010	C-45/09, <i>Gisela Rosenblatt v Oellerking Gebäudereinigungsges. mbH</i>	Principle of non-discrimination on grounds of age
14/10/2010	C-243/09, <i>Günter Fuß v Stadt Halle</i>	Right to effective judicial protection (Article 47 Charter)
21/10/2010	C-310/2009, <i>I.B. v Conseil des ministres</i>	Right to non discrimination and fair trial
09/11/2010	Joined Cases C-92/09 and C-93/09 <i>Volker und Markus Schecke and Eifert</i>	Right to the protection of personal data (Articles 7 and 8 Charter)
18/11/2010	Joined cases C-250/09 and C-268/09, <i>Vasil Ivanov Georgiev v Tehnicheski universitet – Sofia, filial Plovdiv</i>	Non-discrimination on grounds of age (Article 21 Charter)
23/11/2010	C-145/09, <i>Land Baden-Württemberg v Panagiotis Tsakouridis</i>	Citizenship
22/12/2010	C-279/09 <i>DEB Deutsche Energiehandels-Beratungsgesellschaft</i>	Right to effective judicial protection (Article 47 Charter)
22/12/2010	C-491/10, <i>Joseba Andoni Aguirre Zarraga v Simone Pelz</i>	Rights of the child (Article 24 Charter)

01/03/2011	C-236/09, <i>Association belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres</i>	Non-discrimination on grounds of sex (Articles 21 and 23 Charter)
08/03/2011	C-34/09, <i>Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)</i>	Citizenship
17/03/2011	C-221/09, <i>AJD Tuna Ltd v Direttur tal-Agrikoltura u s-Sajd</i>	Right to be heard (Article 41 Charter)
05/05/2011	C-543/09, <i>Deutsche Telecom v. Germany</i>	Data protection (Article 8 Charter)
05/05/2011	C-434/09, <i>Shirley McCarthy v Secretary of State for the Home Department</i>	Citizenship
10/05/2011	C-147/08, <i>Jürgen Römer and Freie und Hansestadt Hamburg</i>	Non discrimination on grounds of sexual orientation
22/06/2011	C-399/09, <i>Marie Landtová v Česká správa sociálního zabezpečení</i>	Prohibition of discrimination on the grounds of nationality
08/09/2011	Joined cases C-297/10, <i>Sabine Hennigs v Eisenbahn-Bundesamt</i> and C-298/10, <i>Land Berlin v Alexander Mai</i>	Non-discrimination on grounds of age (Article 21 Charter)
13/09/2011	C-447/09, <i>Reinhard Prigge, Michael Fromm, Volker Lambach v Deutsche Lufthansa AG</i>	Non-discrimination on grounds of age (Article 21 Charter)
18/10/2011	C-34/10, <i>Oliver Brüstle v. Greenpeace e.V.</i>	Human dignity
11/11/2011	C-232/09, <i>Dita Danosa v LKB Līzings SIA</i>	Non-discrimination on grounds of sex (Article 23 Charter)
15/11/2011	C-256/11, <i>Murat Dereci and Others v Bundesministerium für Inneres</i>	Citizenship
17/11/2011	C-430/10, <i>Hristo Gaydarov v Direktor na Glavna direktsia 'Ohranitelna politisia' pri Ministerstvo na vnatreshnite raboti</i>	Free movement
17/11/2011	C-434/10, <i>Petar Aladzhov v Zamestnik direktor na Stolichna direktsia na vnatreshnite raboti kam Ministerstvo na vnatreshnite raboti</i>	Free movement
24/11/2011	C-70/10, <i>Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)</i>	Right to personal data (Article 8 Charter) Freedom of information (Article 11 Charter) Freedom to conduct a business (Article 16 Charter) Intellectual property (Article 17.2 Charter)
24/11/2011	C-468/10 and 469/10, <i>Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) and another v. Administración del Estado</i>	Data protection (Articles 7 and 8 Charter)
01/12/2011	C-157/09, <i>European Commission v Kingdom of the Netherlands</i>	Non-discrimination on the grounds of nationality
08/12/2011	C-386/10 P, <i>Chalkor AE Epexergasias</i>	Right to effective judicial protection

	<i>Metallon v. European Commission</i>	(Article 47 Charter)
08/12/2011	C-389/10 P, <i>KME Germany AG v Commission</i>	Right to effective judicial protection (Article 47 Charter)
21/12/2011	C-27/09 P, <i>French Republic v. People's Mojahedin Organization of Iran (PMOI)</i>	Right to be heard (Article 41 Charter)



**Table 2: ECtHR judgments**

Date	Case	Fundamental Rights
12/01/2010	Gillan and Quinton v. the United Kingdom	Right to private and family life (Article 8)
16/02/2010	Akdaş v. Turkey	Freedom of expression (Article 10)
02/03/2010	Al-Saadoon and Mufdhi	Prohibition of torture and inhuman and degrading treatment and punishment (Article 3)
02/03/2010	Kozak v. Poland	Right to private and family life (Article 8)
02/03/2010	Dalea v. France	Right to private and family life (Article 8)
16/03/2010	Carson and Others v. the United Kingdom	Prohibition of discrimination (Article 14)
29/03/2010	Medvedyev and Others v. France	Right to liberty and security (Article 5)
06/04/2010	Mustafa and Armağan Akın v. Turkey	Right to private and family life (Article 8)
16/04/2010	A, B and C v. Ireland	Right to private and family life (Article 8)
27/04/2010	Moretti and Benedetti v. Italy	Right to private and family life (Article 8)
04/05/2010	Stapleton v. Ireland (Decision)	Right to a fair trial (Article 6)
20/05/2010	Alajos Kiss v. Hungary	Prohibition of discrimination (Article 14)
01/06/2010	Gäfen v. Germany	Prohibition of torture and inhuman and degrading treatment and punishment (Article 3)
24/06/2010	Schalk and Kopf v. Austria	Right to private and family life (Article 8) Right to marry (Article 12)
06/07/2010	Neulinger and Shuruk v. Switzerland	Right to private and family life (Article 8)
02/09/2010	Uzun v. Germany	Right to private and family life (Article 8)
14/09/2010	Steindl v. Germany	Prohibition of slavery and forced labour (Article 4)
28/09/2010	Mangouras v. Spain	Right to liberty and security (Article 5)
02/11/2010	Şerife Yiğit v. Turkey	Right to marry (Article 12)
09/11/2010	Losonci Rose and Rose v. Switzerland	Right to private and family life (Article 8)
30/11/2010	B.S and others v. UK (Decision)	Prohibition of torture and inhuman and degrading treatment and punishment (Article 3)
30/11/2010	Hajduova. v. Slovakia	Right to private and family life (Article 8)
10/01/2011	Haas v. Switzerland	Right to life (Article 2)
13/01/2011	Haidn v. Germany	Right to liberty and security (Article 5)

18/01/2011	Scoppola v. Italy	Right to free elections (Article 3 of Protocol No. 1)
21/01/2011	M.S.S. v. Belgium and Greece	Right to an effective remedy (Article 13)
10/02/2011	Nalbantski v. Bulgaria	Freedom of movement (Article 2 of Protocol No. 4)
10/02/2011	Soltysyak v. Russia	Freedom of movement (Article 2 of Protocol No. 4)
18/03/2011	Lautsi v. Italy	Right to education (Article 2 of Protocol No. 1)
29/03/2011	RTBF v. Belgium	Freedom of expression (Article 10)
14/04/2011	Jendrowiak v. Germany	Right to liberty and security (Article 5)
09/06/2011	Schmitz v. Germany	Right to liberty and security (Article 5)
09/06/2011	Mork v. Germany	Right to liberty and security (Article 5)
21/06/2011	Ponomaryov v. Bulgaria	Prohibition of discrimination (Article 14)
28/06/2011	D.H. v. Finland (Decision)	Prohibition of torture and inhuman and degrading treatment and punishment (Article 3)
07/07/2011	Stummer v. Austria	Prohibition of slavery and forced labour (Article 4)
07/07/2011	Al-Skeini and others v. UK	Right to life (Article 2)
07/07/2011	Bayatyan v. Armenia	Freedom of thought, conscience and religion (Article 9)
19/07/2011	Đurđević v. Croatia	Prohibition of torture and inhuman and degrading treatment and punishment (Article 3)
26/07/2011	Shaw v. Hungary	Right to private and family life (Article 8)
20/09/2011	Ullens de Schooten and Rezabek v. Belgium	Right to a fair trial (Article 6)
27/09/2011	M. and C. v. Romania	Prohibition of torture and inhuman and degrading treatment and punishment (Article 3)
11/10/2011	Genovese v. Malta	Right to private and family life (Article 8)
11/10/2011	Emre v. Switzerland. No. 2	Right to private and family life (Article 8)
12/10/2011	Sneersone and Campanella v. Italy	Right to private and family life (Article 8)
18/10/2011	Giusti v. Italy	Right to a fair trial (Article 6)
20/10/2011	Nejdet Şahin and Perihan Şahin v. Turkey	Right to a fair trial (Article 6)
03/11/2011	S.H. and Others v. Austria	Right to private and family life (Article 8)
08/11/2011	V.C. v. Slovakia	Right to private and family life (Article 8)
15/12/2011	Al-Khawaja and Tahery v. the United Kingdom	Right to a fair trial (Article 6)

18/01/2012	Tomasovic v. Croatia	Right not to be tried or punished twice (Article 4 of Protocol No. 7)
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