Central and East European Moot Court Competition 2014

DUORP NITAL

V

STATE OF ERIPME

Reference for a Preliminary Ruling to the Court of Justice

MEMORANDUM FOR THE APPLICANT

Charles University in Prague, Faculty of Law

TABLE OF CONTENTS

INDEX OF CASES

Melloni (AG)	Case C-399/11, Criminal proceedings against Stefano Melloni (AG Bot`s Opinion) ***Cited as: Melloni (AG)***
Traghetti	Case C-173/03, Traghetti del Mediterraneo SpA v Repubblica Italiana ***Cited as: Traghetti***
Ullens (*ECHR*)	Applications nos. 3989/07 and 38353/07, Case of Ullens de Schooten and Rezabek v. Belgium (ECHR) ***Cited as: Ullens (*ECHR*)***
Y. S. (AG)	Joined Cases C-141/12 and C-372/12, Y. S. v Minister voor Immigratie, Integratie en Asiel and Minister voor immigratie, Integratie en Asiel v M. and S. (AG Sharpston`s Opinion) ***Cited as: Y. S. (AG)***

INDEX OF AUTHORITIES

Bobek	M. Bobek: "The Impact of the European Mandate of Ordinary Courts on the position of Constitutional Courts" in Claes, M. et al. (eds.), Constitutional Conversations in Europe (Cambridge, Intersentia, 2012) ***Cited as: Bobek***
Kornezov	A. Kornezov: The Area of Freedom, Security and Justice in the light of EU accession to the ECHR – is the break-up inevitable? ***Cited as: Kornezov***
Sarmiento	D. Sarmiento: Who's afraid of the charter? The court of justice, national courts and the new framework of fundamental rights protection in Europe ***Cited as: Sarmiento***
Steiner, Woods: General Principles of Law	J. Steiner and L. Woods, 'EU Law' (10th ed), OUP 2009, Chapter 6: General Principles of Law ***Cited as: Steiner, Woods: General Principles of Law***
Steiner, Woods: Preliminary rulings	J. Steiner and L. Woods, 'EU Law' (10th ed), OUP 2009: Chapter 10: The Preliminary Rulings Procedure ***Cited as: Steiner, Woods: Preliminary rulings***
Steiner, Woods: State liability	J. Steiner and L. Woods, 'EU Law' (10th ed), OUP 2009, Chapter 9: State Liability ***Cited as: Steiner, Woods: State liability***
Weatherill: Direct Effect of Directives	S. Weatherill, 'Cases and Materials on EU Law' (8th Edition), OUP 2007, The Direct Effect of Directives ***Cited as: Weatherill: Direct Effect of Directives***
Weatherill: Proportionality	Weatherill, S., Cases and Materials on EU Law (8th Edition), OUP 2007, Proportionality ***Cited as: Weatherill: Proportionality***

INDEX OF LEGAL DOCUMENTS

2008 FD	Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters ***Cited as: 2008 FD***
Bilateral Treaty	Bilateral Treaty between Eripme and Ynoloc signed prior to Eripme`s accession to the European Union ***Cited as: Bilateral Treaty***
CIA 2010	Criminal Investigations (Data Protection) Act (2010) ***Cited as: CIA 2010***
Dir. 95/46	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 ***Cited as: Dir. 95/46***
Charter	Charter of Fundamental Rights of the European Union ***Cited as: Charter***
TEU	Treaty on European Union ***Cited as: TEU***
TFEU	Treaty on the Functioning of the European Union ***Cited as: TFEU***

LIST OF ABBREVIATIONS

AFSJ	Area of freedom, security and justice ***Cited as: AFSJ***
AG	Advocate General ***Cited as: AG***
Applicant	Mr Duorp Nital ***Cited as: Applicant***
Bundle I	Moot Bundle 2014 ***Cited as: Bundle I***
Bundle II	Supplementary Background Reading ***Cited as: Bundle II***
Case	Moot Question 2014 ***Cited as: Case***
Commission	European Commission ***Cited as: Commission***
Court	Court of Justice ***Cited as: Court***
Defendant	State of Eripme ***Cited as: Defendant***
ECC	Eripme Constitutional Court ***Cited as: ECC***
ECHR	European Convention of Human Rights and Fundamental Freedoms ***Cited as: ECHR***
EPA	Eripme Police Authority ***Cited as: EPA***
EU	European Union ***Cited as: EU***
High Court	Eripme High Court ***Cited as: High Court***
MS	Member State of the European Union ***Cited as: MS***
Timsnart	State of Timsnart, Member State of the European Union ***Cited as: Timsnart***
Treaties	TEU and TFEU jointly ***Cited as: Treaties***
Ynoloc	State of Ynoloc that is not a Member State of the European Union ***Cited as: Ynoloc***

1A) THE STATEMENT "NO BELIEF IN POLITICS" IS DATA REVEALING POLITICAL OPINION WITHIN THE MEANING OF ART. 6 2008 FD

1. First, Applicant wishes to establish that 2008 FD should be interpreted in light of Dir. 95/46 (i). Consequently, Applicant claims that all terms instrumental for rights of data subjects must be given an extensive interpretation and, therefore, the statement "no belief in politics" must be classified as a political opinion (ii).

i. 2008 FD must be interpreted in light of Dir. 95/46

2. Applicant is aware that according to Art. 3 Dir. 95/46, it shall not apply to processing of personal data in areas of criminal law. However, both Dir. 95/46 and 2008 FD seek to ensure a high level of protection of fundamental rights.[1] Dir. 95/46 sets out fundamental principles[2] "which must apply to all processing of personal data by any person"[3] and is therefore essential to the interpretation of 2008 FD.
3. 2008 FD thus merely represents a special regime of data protection in the context of police and criminal investigations where it is necessary to balance the individual's interest and the society's interest in fighting crime. In effect, 2008 FD "particularises and complements the system of protection of personal data"[4] established by Dir. 95/46. Hence, 2008 FD must be interpreted in the light of Dir. 95/46.

ii. All terms instrumental for rights of data subjects must be given an extensive interpretation

4. Applicant submits that in general "personal data is a broad concept".[5] Art. 6 2008 FD guarantees enhanced protection for special categories of data such as, *inter alia*, data relating to the data subject's racial origin, political opinions, religious beliefs or health. Court ruled that "in the light of the purpose of the [Dir. 95/46], the expression "data concerning health" ... must be given a wide interpretation".[6]
5. Applicant acknowledges that the aforementioned judgment concerns Dir. 95/46. However, considering that both 2008 FD and Dir. 95/46 seek to protect fundamental rights of individuals during data processing and with regard to the importance of coherent interpretation and application of EU law,[7] both data protection instruments must be given a uniform interpretation. Thus, all of the categories of sensitive data should be interpreted broadly.
6. What is more, the need for wide interpretation of sensitive data is further accented by the fact that they are, by their very nature, highly prone to infringement of fundamental rights, most importantly the right to privacy. Therefore, these data, such as "no believe in politics", as they are likely to cause harm to the data subject require the enhanced protection of Art. 6 2008 FD.
7. This theoretical concern can be easily illustrated on the present case. Since Applicant was connected to people who openly criticise and protest against the government, national authorities interpreted his statement "no belief in politics" as scepticism about the current government in Ynoloc. This statement, in conjunction with keywords such as "corrupt government", led to Applicant´s persecution.[8]
8. **Therefore, Applicant asks Court to rule that the statement "no belief in politics" is data revealing political opinion which must be protected under Art. 6 2008 FD.**

1B) NATIONAL AUTHORITIES MUST DETERMINE WHETHER PROCESSING OF SENSITIVE DATA IS "STRICTLY NECESSARY" IN COMPLIANCE WITH THE PRINCIPLE OF PROPORTIONALITY AND LEGAL CERTAINTY. IN PARTICULAR, NATIONAL AUTHORITIES CANNOT HAVE UNFETTERED DISCRETION IN THAT REGARD

9. National authorities may process sensitive data only in compliance with general principles of law (i). In particular, national authorities cannot have unfettered discretion when they process sensitive data (ii).

i. National authorities must process sensitive data in compliance with the principle of proportionality and legal certainty

10. It is a given fact that any act of interpretation or application of EU law must be carried out in accordance with general principles of law.[9]

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[1] Rec. 10 Dir. 95/46, Rec. 10 2008 FD , Art. 16 (1) TFEU, Art. 8 Charter
[2] Art. 6 Dir. 95/46 enshrines the principle of lawful processing, the principle of purpose specification and limitation, the relevancy principle, the fair processing principle
[3] Rec. 12 Dir. 95/46
[4] *DRI* (AG), para. 34.
[5] *Y.S.* (AG), para. 44.
[6] *Lindqvist*, para. 50.
[7] General principle of EU law, for example C-260/89 *ERT* in Sarmiento, p. 369 in Bundle I.
[8] See paras 7, 13 of Case.
[9] See Steiner, Woods: General Principles of Law, p. 46 in Bundle II.

11. Processing of sensitive data constitutes an interference with the right to privacy[10] and may therefore only be lawful when subject to the strict requirements of the principle of proportionality[11]. The principle of proportionality requires that the means which it employs are appropriate to attain the objective sought and they must not go beyond what is necessary to achieve the given aim.[12]
12. Thus, any processing of sensitive data must be appropriate, i.e. the police authorities must have a clear idea about the future use of the processed data. Additionally, it must be ascertained that the aim of criminal investigation cannot be achieved by a measure less disruptive to the enjoyment of the right to privacy.
13. Moreover, as established above,[13] Art. 6 2008 must be interpreted in light of Dir. 95/46. According to Art. 8 Dir. 95/46, processing of sensitive data in criminal matters is derogation from the general prohibition of such action [14] and should, therefore, be allowed only in exceptional circumstances. The assessment of requirements of the principle of proportionality is thus even stricter.
14. Further, subject to the principle of legal certainty, a principle inherent in EU legal order ever since *Töpfer*[15], the practice of national authorities must be such as to give a reasonable person "full knowledge"[16] of when sensitive data will be processed in the normal course of affairs. National authorities must not process sensitive data *irrespective* of the behaviour of the data subject or of the specific circumstances.[17]
15. Clearly, the processing of Applicant's sensitive data was arbitrary. First, the principle of proportionality was breached as processing of Applicant's sensitive data was neither appropriate, nor necessary. The data were processed merely for the reason that he met with another specialist in computer programming with whom he shared his plans for a computer project in Ynoloc. Second, the principle of legal certainty was violated as Applicant, owing to the absence of a legislative framework to guide the exercise of police authorities' discretion, could not in any way anticipate that his sensitive data might be processed and could not adjust his behaviour accordingly.

ii. In particular, national authorities cannot have unfettered discretion when they process sensitive data

16. Applicant already established that EPA processed his sensitive data in violation of the principles of proportionality and legal certainty. Further, it shall be demonstrated that the act of granting national authorities unfettered discretion when processing sensitive data *alone* breaches said principles.
17. According to Court's case-law, national legislation must provide a framework to guide the discretion of national authorities when they apply their power.[18] This is crucial with respect to fundamental rights in the context of AFSJ where "fundamental rights are by definition particularly vulnerable"[19]. As stated in *Melloni (AG)*, the unfettered discretion of national authorities when deciding on fundamental rights and obligations of individuals is considered a "defect" in EU law as it is "unpredictable" and reduces "the effectiveness of the mechanism".[20] Consequently, such defect must be eradicated.
18. The situation is further aggravated when national authorities which possess unfettered discretion are not supervised by an independent authority. Applicant wishes to stress that control by an independent authority is an essential requirement of legality of processing of personal data. It is an "essential component of the protection of personal data"[21] embedded in primary law itself.[22]
19. Defendant failed to comply with this core requirement since it designated EPA as its national supervisory authority.[23] EPA is part of the hierarchy of executive organs and as such subject to binding instructions. Thus, it manifestly fails the independence test.
20. **Consequently, Applicant asks Court to hold that national authorities must comply with the principle of proportionality and legal certainty when they determine whether processing of sensitive data is**

[10] See *DRI* (AG), para. 68.
[11] Art. 52 (1) Charter
[12] See C- 84/94 *United Kingdom v Council* in Weatherill: Proportionality, p. 23 in Bundle II.
[13] See para. 3 of Memorandum.
[14] Art. 8 (5) and (6) Dir. 95/46
[15] C- 112/77 *August Töpfer & Co GmbH v Commission* in Steiner, Woods: General Principles of Law, p. 57 in Bundle II.
[16] *Y.S.* (AG), para. 70.
[17] See *Melki and Abdeli*, para. 73.
[18] See *Melki and Abdeli*, para. 74.
[19] Kornezov, p. 341 in Bundle I.
[20] See *Melloni* (AG), paras 67, 69.
[21] Rec. 33 2008 FD
[22] Art. 16 TFEU, Art. 39 TEU and Art. 8 Charter
[23] Section 5 CIA

"strictly necessary". In particular, national authorities may not have unfettered discretion in this regard.

2A) ART. 13 (1) (C) 2008 FD PRECLUDES MS FROM TRANSFERRING PERSONAL DATA TO A THIRD STATE WHEN THE TRANSMITTING MS ONLY GAVE A GENERAL CONSENT TO PROCESSING OF THE PERSONAL DATA

21. Rec. 20 2008 FD requires consent for *further processing* of personal data obtained from another MS. In contrast, Rec. 24 requires a special consent for *transfer* of personal data to a third State. Applicant acknowledges that Rec. 24 is not unconditional. However, the "in principle" expression refers solely to the exception provided for in Rec. 25 2008 FD which allows MS to transfer personal data to third State without prior consent when there is an immediate threat to essential interests of MS and when consent cannot be obtained in good time.
22. Therefore, 2008 FD unequivocally establishes two regimes of consent. By doing so, the EU legislator clearly seeks to provide enhanced protection for individuals when their personal data is transferred to third States since EU law has fewer tools to protect personal data of EU citizens outside its territory.
23. It follows that the term "consent"[24] must be interpreted as meaning a specific consent to transfer. In the present case, the transmitting MS only gave a general consent to processing in circumstances when neither the receiving MS nor the transmitting MS knew about the future transfer to a third State. Subsequently, Defendant transferred Applicant's personal data without consent and therefore in contravention to Art. 13 (1) (c) 2008 FD.
24. This is further supported by the fact that, in general, processing of personal data should be carried out with the data subject's consent which is, pursuant to Art. 2 (g) 2008 FD, "any freely given *specific* and *informed* indication of his wishes".[25] In situations when the data subject's consent cannot be obtained, there must be other measures to protect the data subject's fundamental rights, i.e. consent of the transmitting MS. The consent to transfer must be interpreted in the light of Art. 2 (g) 2008 FD, therefore it must also be *specific* and *informed*.
25. Even if Court decides that a general consent is sufficient for the transfer to third State, Applicant underlines that Defendant processed personal data in violation of the transmitting MS's consent. The general rule is that data "may be processed *only for the same purpose* for which it was collected".[26] As 2008 FD applies to transfers for the purpose of investigation of criminal offences *in general*,[27] the requirement of the *same purpose* must be interpreted more narrowly. Given the necessary elements of any criminal offence, Applicant proposes that personal data may only be processed when identity of crime or identity of person is present.
26. Timsnart, the transmitting MS, gave consent to processing and use of the transferred data to any *related* criminal investigations.[28] Applicant's personal data WERE collected as a result of his meetings with Mr Deliaj,[29] a national of Timsnart,[30] who was once convicted for computer hacking.[31] Defendant, however, transferred Applicant's personal data to Ynoloc for use in the criminal investigation of the sabotage threat of Mr Suriv,[32] a national of Ynoloc.[33] Applicant points out that there is absolutely no connection between the two investigations other than the fact that both concern computer crimes. Clearly, this is an insufficient link.
27. **Thus, Applicant invites Court to rule that 2008 FD precludes MS from transferring personal data to a third State on the sole basis of a general consent given by the transmitting MS.**

[24] Art. 13 (1) (c) 2008 FD
[25] Art. 8 (2) Charter, Art. 2 (g) 2008 FD, Rec. 30 Dir. 95/46 and Art. 7 (a) Dir. 95/46
[26] Art. 3 2008 FD
[27] Art. 1 (2) 2008 FD
[28] See para. 8 of Case.
[29] See para. 7 of Case.
[30] See para. 5 of Case.
[31] See para. 7 of Case.
[32] See paras 11 and 12 of Case.
[33] See para. 1 and 3 of Case.

2B) MS WHICH TRANSFERS SENSITIVE DATA TO A THIRD STATE MUST VERIFY THAT THE THIRD STATE WILL PROCESS THE TRANSFERRED DATA IN ACCORDANCE WITH THE REQUIREMENTS OF ART. 6 2008 FD

28. Art. 13 2008 FD allows for transfer of personal data to third States only if the concerned third State provides an adequate level of protection. As explained above,[34] this provision aims at ensuring protection of individuals.
29. In general, there is a presumption of high level of protection of fundamental rights within EU. Thus, if the requirement of Art. 6 2008 FD applies to transfer between MS, than *a minori ad maius* it must also apply to transfer to third States where the level of protection is not guaranteed.
30. This conclusion is consistent with the penultimate concept of effectiveness of EU law. This principle requires that the enhanced level of protection guaranteed by Art. 6 2008 FD is binding on MS not only when transmitting sensitive data to another MS, but also when facilitating transfers to third States since one single breach of the data protection provisions is capable of tearing down the entire system. Subsequently, Art. 6 2008 FD must be complied with upon receipt of the data and then again after the transfer.
31. Finally**,** Applicant emphasizes that Rec. 60 Dir. 95/46 states that transfer to a third State may only be affected in full compliance with Art. 8 Dir. 95/46. Since Art. 6 2008 FD regulates the same subject matter, i.e. processing of special categories of personal data, the transfer to third State pursuant to Art. 13 2008 FD may, by analogy, only be affected in full compliance with Art. 6 2008 FD.
32. **Therefore, Applicant asks Court to hold that the transferring MS must verify that the third State will process sensitive data only when it is strictly necessary and when there are adequate safeguards.**

3+3A) MS "IMPLEMENTS" EU LAW WITHIN THE MEANING OF ART. 51 (1) CHARTER WHEN IT APPLIES A BILATERAL TREATY ON TRANSFER OF PERSONAL DATA SIGNED PRIOR TO ACCESSION OF THAT MS TO EU WITH THIRD STATE AND IS, THEREFORE, BOUND BY ARTS 7 AND 8 CHARTER. ARTS 1(2), 13 AND 26 2008 FD AND ARTS 3, 25 AND 26 DIR. 95/46 ARE RELEVANT IN THIS REGARD

33. First, Applicant claims that MS must be deemed to "implement" EU law *whenever* it acts within the scope of EU law (i). Second, the abovementioned provisions of both 2008 FD and Dir. 95/46 are relevant for this consideration (ii).

i. "Implementing" EU law for the purpose of applying Charter must be interpreted as to encompass *any action* of MS that falls within the scope of EU law

34. Applicant hereby invites Court to rule that Defendant is bound by Charter when it applies Bilateral Treaty signed prior to its accession to EU.
35. Art. 51 (1) Charter stipulates that Charter is applicable to MS when they are implementing EU law. As established in *Fransson*, situations which are covered by substantive EU law must simultaneously be covered by Charter.[35] MS are thus bound by Charter when they act within the scope of EU law.[36]
36. The applicability of Charter depends solely on whether MS *acts* in an area governed by EU law, not on the nature and origin of law in question.[37] It is generally acknowledged that MS may act not only by applying national law but also by applying international instruments. Inconsistent application of the rule established in *Fransson* only to national legislation would compromise the effectiveness of EU law.
37. Further, in accordance with Court's case-law[38] and Treaties[39], human rights represent one of EU's core objectives and, given the duty of loyalty, MS are under the obligation to contribute to their attainment.[40] With its accession to EU, Defendant proclaimed that it would adhere to these values. The seriousness of this commitment was highlighted when MS adopted Charter as a legally binding document and thus made

[34] See para. 22 of Memorandum.
[35] See *Fransson*, para. 21.
[36] Fransson, para. 21: "[T]he applicability of [EU] law entails applicability of the fundamental rights." See also explanations to the Charter in Sarmiento, p. 360 in Bundle I.
[37] Legislation needs not to be enacted for the purpose of transposition of EU law, it suffices when it serves the purpose of the EU legislation. See *Fransson*, para. 28.
[38] See *Internationale Handelsgesellschaft*, C- 11/70 in Steiner, Woods: General Principles of Law, p. 47 in Bundle II.
[39] Art. 2 TEU provides that EU is founded on values of respect of human dignity, the rule of law and respect for human rights.
[40] Art. 4 (3) TEU

fundamental rights even more visible.[41] Therefore, Defendant must observe rights protected by Charter whenever it acts within the scope of EU law.

38. Consequently, Charter is applicable when MS acts pursuant to an int. agreement even if such agreement was signed prior to its accession to EU provided that the activity of MS falls within the scope of EU law.

ii. When applying such a bilateral treaty, MS is bound by Arts 7 and 8 Charter and Arts 1(2), 13 and 26 2008 FD and Arts 3, 25 and 26 Dir. 95/46 are relevant in this regard

39. Applicant submits that when MS transmits personal data obtained in the course of criminal investigation in another MS to a third State pursuant to an int. agreement concluded prior to its accession to EU, it operates within the scope of 2008 FD and is thus bound by Arts 7 and 8 Charter.
40. On the offset, Applicant underlines that AFSJ, of which 2008 FD is an integral part, is built on principles of mutual recognition and trust.[42] While these principles assume that all MS respect fundamental rights,[43] they do not possess the power to prevent incidental human rights violations. Charter serves as a complementary guarantee of rights protection and thereby ensures that said breaches are not irreversible. Such guarantee is needed especially when the level of human rights protection in a respective third country is disputed.[44] Otherwise, the functioning of AFSJ would be impaired.
41. As Arts 1 (2) and 13 2008 FD determine the scope of 2008 FD,[45] they serve as "triggering rules" for applicability of Charter in 2008 FD's area.[46] It is clear that Defendant transmitted personal data obtained in another MS to third State, therefore acted within the scope of 2008 FD as defined in Arts 1 (2) and 13 2008 FD.
42. Applicant acknowledges that Art. 26 (1) 2008 FD provides that 2008 FD is without prejudice to existing obligations of MS arising from int. agreements. Nevertheless, it is imperative that secondary legislation is interpreted in light of primary law. Therefore, Art. 26 (1) 2008 FD cannot be interpreted as excluding applicability of Arts 7 and 8 Charter to int. agreement.
43. The same applies to Arts 25 and 26 Dir. 95/46 as they are founded on identical principles.[47] Therefore, even Dir. 95/46 cannot be interpreted as excluding the applicability of Charter to int. agreements adopted in the same field of data protection.
44. This can be easily illustrated on the case at hand. The personal data obtained from Timsnart and further processed in Eripme were transferred to Ynoloc under Bilateral Treaty which contains no guarantees that the transferred personal data would be securely retained and processed. In effect, Art. 26 (1) 2008 FD must be interpreted as precluding Defendant from transferring such data in circumstances when basic safeguards set out in Arts 7 and 8 Charter are not complied with.
45. Should the abovementioned interpretation of Art. 26 (1) 2008 FD be disregarded, Defendant is expressly bound by Art. 13 (1) (c) or (2) 2008 FD as provided in Art. 26 (2) 2008 FD. This provision clearly represents the necessary link to EU law required for the applicability of Charter.[48]
46. It follows that MS act in the scope of EU law when they transfer personal data obtained pursuant to 2008 FD to third State and are thus bound by Arts 7 and 8 Charter.
47. **Based on the foregoing, Applicant invites Court to rule that when MS applies a bilateral treaty on transfer of personal data that was concluded with a third State prior to its accession to EU, it is "implementing" EU law for the purpose of Art. 51 (1) Charter and therefore bound by Arts 7 and 8 thereof.**

[41] See Sarmiento, p. 358 in Bundle I.
[42] See Kornezov, p. 340 in Bundle I.
[43] Ibid., p. 342 in Bundle I.
[44] "[F]ollowing the change of government in Ynoloc in 2013, concerns had arisen with regard to the sufficiency of both security of data and protection of human rights in Ynoloc." see para. 2 in Case.
[45] According to Art. 1 (2) 2008 FD MS shall protect fundamental rights, in particularly the right to privacy, when personal data are or *have been* transmitted between MS. Art 13 2008 FD stipulates the conditions of transfer to third States.
[46] See Sarmiento, p. 361 and 362 in Bundle I.
[47] See para. 2 of Memorandum.
[48] See para. 35 of Memorandum.

3B) UNDER ART 351 (2) TFEU, MS ARE OBLIGED TO RENEGOTIATE SUCH BILATERAL TREATY TO RENDER IT COMPATIBLE WITH CHARTER. EVEN IF MS FAILS TO FULFIL SUCH OBLIGATION, IT STILL "IMPLEMENTS" EU LAW FOR THE PURPOSE OF APPLYING CHARTER

48. Applicant hereby claims that the term "Treaties" referred to in Art. 351 (2) TFEU includes Charter (i). Further, Bilateral Treaty is incompatible with Charter within the meaning of Art. 351 (2) TFEU and Defendant must renegotiate it (ii). Finally, MS must be deemed as "implementing" EU law even if it doesn't fulfil its obligation enshrined in Art. 351 (2) TFEU (iii).

i. The term "Treaties" within the meaning of Art. 351 (2) TFEU must be interpreted as including Charter

49. As a rule, provision of EU law must be interpreted in consideration of its context, objectives and evolution.[49] "Given the ambiguity of the legal framework, it is obvious that one should look not so much into the dots and commas of the various legal provisions but rather into the general scheme of the EU legal order."[50]
50. Art. 351 (2) TFEU governs int. agreements that are contrary to primary legislation.[51] According to Art. 6 TEU, Treaties and Charter possess the same legal value and thus constitute primary law, a homogenous cornerstone of EU legislation. Principles of EU[52] and objectives of Art. 351 (2) TFEU require that int. agreement must be compatible not only with the Treaties *stricto sensu* but with primary law or even EU law as a whole, including Charter.
51. Additionally, Commission itself referred to *Charter* when it examined the compatibility of Bilateral Treaty with "Treaties" for the purpose of Art. 351 (2) TFEU.[53]
52. It follows that incompatibility with Treaties within the meaning of Art. 351 (2) TFEU must be interpreted as including incompatibility with Charter.

ii. Bilateral Treaty is incompatible with Charter and Defendant is obliged to renegotiate it pursuant to Art. 351 (2) TFEU

53. As established above, Charter is applicable to Bilateral Treaty. Applicant argues that Bilateral Treaty is contrary to Arts. 7 and 8 Charter. Firstly, it contains *no* guarantees with respect to personal data protection. Further, it provides Defendant with virtually no possibility to refuse the transmission of personal data since it states vague conditions[54] for the transfer.[55]
54. Art. 351 (2) TFEU sets forth that MS shall take all *appropriate* steps to eliminate any incompatibilities of int. agreement with "Treaties".[56] Applicant claims that in the case at hand the only appropriate step is to renegotiate Bilateral Treaty. As there are no safeguards enshrined in Bilateral Treaty, the interpretation of Bilateral Treaty in compliance with Arts 7 and 8 Charter proved in Applicant's case unfeasible. With regards to denunciation, it cannot be in principle excluded.[57] However, as it serves as a purely *ultima ratio* measure, denunciation of Bilateral Treaty will come into question only if renegotiation is unsuccessful.[58]
55. Court must assess Defendant´s situation in light of *Commission v Sweden.*[59] Even though Defendant received the formal notice from Commission it, similarly to Sweden, did not take any measure to comply with its duty under Art. 351 (2) TFEU.
56. Consequently, Defendant is under an obligation to renegotiate Bilateral Treaty.

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[49] *CILFIT*, para. 20: "Every provision must be placed in its context and interpreted in light of the provisions of community law as a whole, regard being had to objectives thereof an to its state of evolution."
[50] Kornezov, p. 342 in Bundle I.
[51] Court even refers to EU law as a whole, not "Treaties" or primary law, hence not strictly distinguishing between Treaties or primary law and EU law. See *Commission v Sweden*, para. 35.
[52] Art. 2 TEU
[53] Defendant already received a formal notice from Commission regarding the incompatibility of Bilateral Treaty with "Treaties". See para. 16 (g) of Case.
[54] Para. 2 of Case: "…the exchange of data…initiated by a simple request from either authority to the other; simply setting out the detail of the information required and certifying that it was necessary…."
[55] See similarly *Commission v Sweden* where int. agreements, that secured free transfer of investment payments but did not contain any provision that would allow Sweden to deny it, were considered contrary to "Treaties". See *Commission v Sweden*, paras 25, 27 and 33.
[56] Interpretation in compliance with EU law, renegotiation or denouncement. See *Budvar*, para. 169 and 170.
[57] *Commission v Portugal*, para. 58, mentioned in *Budvar*, para. 170.
[58] *Budvar*, para. 170 or *Commission v Slovakia*, para. 44.
[59] Sweden did not even try to renegotiate bilateral agreements and thus Court held that it violated its obligation under Art. 351 (2) TFEU. In contrast see *Commission v Slovakia*, where Slovakia prior to the proceedings before Court unsuccessfully tried to renegotiate the treaty.

iii. Principles of effectiveness and uniform interpretation of EU law require that even if MS does not fulfil its obligation to renegotiate, it is still "implementing" EU law

57. Principles of effectiveness and uniformity of EU law demand that no MS may exclude the application of Charter by not fulfilling its obligation pursuant to Art. 351 (2) TFEU. Otherwise, MS would not be motivated to renegotiate its int. agreements. Furthermore, MS would thereby release itself from the obligation to secure appropriate level of protection of human rights and consequently deprive individuals of the corresponding protection of their rights. That would clearly violate the principle that no MS may benefit against individuals from its own failure to perform obligations set out by EU law.[60]
58. Therefore, the term "implementing" in Art. 51 (1) Charter must be interpreted as including the MS's failure to act pursuant to Art. 351 (2) TFEU.
59. **Court should thus conclude that MS is under the obligation to renegotiate such a bilateral treaty in order to render it compatible with Charter and it is "implementing" EU law even if it fails to fulfil this duty.**

4) NATIONAL CONSTITUTIONAL COURT THAT IS CALLED TO DECIDE UPON CONSTITUTIONAL COMPLAINTS CLAIMING VIOLATION OF FUNDAMENTAL RIGHTS GUARANTEED BY NATIONAL CONSTITUTION IS A COURT OR TRIBUNAL WITHIN THE MEANING OF ART. 267 TFEU ENTITLED TO SUBMIT A REQUEST FOR PRELIMINARY RULING

60. Applicant establishes that national constitutional court, such as ECC, is a court or tribunal within the meaning of Art. 267 TFEU (i). Pursuant to the principle of effectiveness, primacy and uniformity of EU law, national constitutional court has the right to refer a question to Court (ii).

i. National constitutional court, such as ECC, is a "court or tribunal"

61. The question of whether a national court is a "court or tribunal" within the meaning of Art. 267 TFEU, is a matter of EU law. Court developed several criteria in assessing the issue.[61] It must be noted that Court takes an extensive approach and includes even professional associations.[62] The fact that national constitutional courts are rather reluctant to submit requests to Court or even claim that they do not consider themselves to be courts under Art. 267 TFEU is of no relevance.[63] Applicant submits that ECC satisfies the criteria and qualifies as "court or tribunal" within the meaning of Art. 267 TFEU.

ii. Given the principles of effectiveness, primacy and uniformity of EU law, even national constitutional court that decides on constitutional complaints must be entitled to refer a question for preliminary ruling

62. It is generally accepted that the preliminary rulings procedure helps to enhance effectiveness and primacy of EU law.[64] In order for the preliminary rulings procedure to be admissible, national constitutional court must face a question on matter of EU law. Court ruled in *Melloni* that "rules of national law, even of a *constitutional* order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State."[65] Applicant holds that the question of interpretation of EU law might arise even before ECC and it would compromise effectiveness, primacy and uniform interpretation of EU law if ECC was not entitled to submit a question to Court.
63. That applies *a fortiori* after the adoption of Charter and in situation as that of Defendant where Charter was "incorporated" into the Eripme Constitution.[66] This conclusion is supported by AG Stix-Hackl in *Intermodal*.[67] "In the area of implementation of EU law, it's the Charter which shall be the ultimate yardstick for compliance with fundamental rights not national bills of rights [and] the ultimate interpreter of the Charter is [Court]."[68]

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[60] Case 152/*84 Marshall v Southampton Area Health Authority*, para. 47 in Weatherill: The Direct Effect of Directives, p. 4 in Bundle II.
[61] See, Steiner/Woods: Preliminary Rulings, p. 320 in Bundle I: The criteria are statutory origin, permanence, *inter partes* procedure, compulsory jurisdiction, application of rules of law and independence.
[62] Case C-246/80, *Broerkmuelen*, in Steiner, Woods: Preliminary Rulings, p. 320 in Bundle I.
[63] See Bobek, p. 393 and p. 388 in Bundle I.
[64] See *Intermodal*, paras 29 and 38.
[65] *Melloni*, para. 59. In *Melloni* it was Spanish constitutional Court who referred the question and the question was accepted.
[66] See Case, para. 16 (d).
[67] See *Intermodal (AG)*, para. 65.
[68] Bobek, p. 390 in Bundle I.

64. Moreover, the divergent interpretation of rights set out in Charter by constitutional courts could impair legal certainty and uniform standard of protection of human rights among MS and as a consequence, adversely affect rights of individuals.
65. Therefore, in situations that are not of purely internal nature,[69] national constitutional courts such as ECC must be entitled to submit a question for preliminary ruling.
66. **In light of the abovementioned, Applicant asks Court to rule that national constitutional court that is called to decide on constitutional complaints claiming violation of fundamental rights guaranteed under national constitution is a "court or tribunal" within the meaning of Art. 267 TFEU, entitled to submit a request for a preliminary ruling.**

5A) THE MERE FAILURE OF A NATIONAL COURT OF LAST INSTANCE TO MAKE A PRELIMINARY REFERENCE TO COURT MUST BE CONSIDERED A "MANIFEST" BREACH OF EU LAW FOR WHICH DEFENDANT SHOULD BE HELD LIABLE. THE FAILURE OF NATIONAL COURT TO EXAMINE SOME OF THE ELEMENTS OF THE ACTE CLAIRE EXCEPTION SPELLED OUT IN *CILFIT* AMOUNTS PER SE TO SUCH A "MANIFEST" BREACH OF EU LAW

67. Applicant claims that "manifest" breach must be interpreted in light of the purpose of state liability as including the *mere* failure of the court of last instance to refer a question to Court (i). Further, the purpose of *acte claire* exceptions requires that the court of last instance examines all the elements and justifies its invocation (ii).

i. "Manifest" breach must be interpreted in light of the purpose of state liability

68. Applicant hereby submits that the purpose of state liability, namely effective protection of rights of individuals and effectiveness of EU law,[70] demands that "manifest" breach is interpreted as including the *mere* failure of a national court of last instance to make a preliminary reference.
69. As a rule, where a question on interpretation of EU law arises, national court against whose decision there is no judicial remedy must refer the question for preliminary ruling.[71] In *Köbler*, Court ruled that the effectiveness of EU law rules and effective protection of rights of individuals would be marginalised if individuals were denied redress for harm caused by judicial decisions.[72] In *Traghetti*, Court further clarified that such liability applies essentially to any stage of deliberation of national courts, including interpretation and assessment of facts.[73]
70. Applicant acknowledges that in order for the individual to be entitled to reparation, the breach must be "manifest".[74] In Courts' view, the factors to be taken into account when evaluating this criterion include, *inter alia*, the non-compliance of the court to make a reference for preliminary ruling.[75] Applicant, however, wishes to go further in this analysis.
71. As the decision of the court adjudicating at last instance is *final* and cannot be further appealed, it is virtually irreversible leaving the individual without any other option to enforce its rights derived from EU law. The protection of rights of individuals, which is the *raison d´etre* of state liability, thus requires that the *mere* failure of the court of last instance to make such a reference constitutes a "manifest" breach for which MS must be held liable.
72. Regarding the compliance of the eventual decision with EU law, the effectiveness and uniform interpretation of EU law, inherent in preliminary rulings procedure,[76] demand that the breach is considered "manifest", irrespective of the substance of such decision.
73. As follows from Art. 20 CIA, High Court is a court of last instance that is obliged to refer a question to Court.[77] In case at hand, it refused to make a preliminary reference and thereby violated the obligation incumbent on it by virtue of EU law. As a consequence, Defendant must be considered liable.

[69] In our case, personal data of Applicant that were transferred to Ynoloc were obtained in Timsnart.
[70] *Braserrie,* para. 39: "Account should…be taken of the principles inherent in the Community legal orderwhich form the basis for State liability…the full effectiveness of Community rules and the effective protection ofthe rights..."
[71] Art. 267 TFEU
[72] See *Köbler,* para. 33.Similarly *Traghetti*, para. 31.
[73] See *Traghetti*, paras 33 and 40.
[74] See *Köbler*, paras 51 and 53. Simiralry in *Brasserie*: the breach must be "suffitiently serious". See *Brasserie,* para. 51.
[75] See *Köbler,* para. 55.
[76] See *CILFIT*, para. 7, *Intermodal* – paras 29 and 38.
[77] See *Lyckeskog*, para. 15 and para. 16 *a contrario*, *Intermodal*, para. 30.

74. Therefore, Court should conclude that the *mere* failure of a court of last instance, such as High Court, to make a preliminary reference to Court is a "manifest" breach for which Defendant must be held liable.

ii. While invoking the *acte claire* exception, national court of last instance must examine all its elements and properly justify its ruling

75. In *CILFIT*, Court defined few exceptions to the national courts' obligation under Art. 267 TFEU.[78] Applicant underlines that these exceptions must be interpreted strictly and not as means to groundlessly relieve national courts from their obligation to refer the question to Court.
76. The *acte claire* exception applies only where the issue of EU law is particularly obvious.[79] Its purpose is to ease Court of case overload where the question offers *one clear* answer and Court's interpretation is not objectively required, *effectiveness of EU law not being thereby compromised*.
77. Being aware of the gravity of its ruling, Court specified elements that must be examined when considering invoking the *acte claire* exception. While bearing in mind the characteristic features of EU law and difficulties to which its interpretation gives rise, national court must conclude that the answer is equally obvious to courts of other MS. Account must be taken to different language versions, specific EU law terminology and context.[80]
78. It is clear that these elements must be fulfilled cumulatively. By failing to examine one of them, national court of last instance risks that it incorrectly concludes that the *acte claire* exception is satisfied and as a consequence interprets EU law and encroaches on the interpretative monopoly of Court. Thus, even a failure to examine one element of *acte claire* exception constitutes a "manifest" breach.
79. Further, it must be emphasised that since the protection of rights of individuals is the core function of judiciary, any court must always state reasons to its decisions. The duty to give reasons is also recognized as a general principle of EU law.[81] Examining *acte claire* exception thus, by definition, *always* involves justification. This reasoning is supported in *Ullens* (ECHR).[82] Hence, any failure to give reasons for *acte claire* exception in essence negates the sole purpose of *CILFIT* and in case of the court of last instance[83] must result in a "manifest" breach.
80. When applying these general observations to the case at hand, High Court blatantly failed to examine one of the requirements of *acte claire* exception, namely whether the question is obvious to courts of other MS.[84] Further, by not *truly* examining some of elements of *acte claire* and by giving no *genuine reasons* to its decision,[85] High Court in essence abused the exception to liberate itself from obligation under Art. 267 TFEU. Hence, unlike in *Köbler*[86], High Court´s breach must be deemed "manifest".

81. Applicant thus invites Court to rule that the mere failure of a court of last instance to make a preliminary reference to Court constitutes a "manifest" breach of EU law within the meaning of *Köbler* for which MS should be held liable. Further, the failure of the national court to examine some of the elements of the *acte claire* exception spelled out in *CILFIT* amounts *per se* to such a "manifest" breach.

5B) THE CONDITION FOR A "MANIFEST" BREACH OF EU LAW AS SPELLED OUT IN *KÖBLER* IS TANTAMOUNT TO THE CONDITION FOR A "SUFFICIENTLY SERIOUS" BREACH OF EU LAW AS SPELLED OUT IN *BRASSERIE*

82. According to *Köbler*, state liability for infringements of EU law caused by a decision of the court of last instance is subject to the identical conditions as liability for violations caused by legislative failures as laid down in *Brasserie*.[87] Applicant admits that the different wording of such conditions in *Brasserie* and *Köbler* may be misleading, however, he wishes to establish that they *are and must be* the same.

[78] See *CILFIT*, paras 10, 13, 14 and 16.
[79] Ibid., para. 16: "the correct application of [EU law] may be so obvious as to leave no scope for any reasonable doubt."
[80] See *CILFIT*, paras 16-20.
[81] See Case 222/86 *UNECTEF v Heylens*,p. 60 in Bundle II.
[82] See *Ullens* (ECHR), paras 60 and 62.
[83] See para. 71 of Memorandum.
[84] See *Case*, para. 18, and *CILFIT*, para. 16.
[85] High Court delivered only empty proclamation on a copy-paste basis from *CILFIT*. See para. 18 of Case.
[86] In *Köbler,* the court of last instance considered EU law. It even first submitted a request for preliminary ruling, but subsequently wrongly decided to withdraw it.
[87] See *Köbler,* paras 51 and 52.

83. In *Brasserie,* Court defined three conditions for state liability with regard to legislature, one of them being the "sufficient seriousness" of breach. Subsequently, it stated factors that must be taken into account when assessing this condition.[88] While Court in *Köbler* emphasized that in case of judiciary the breach must be "manifest", it nonetheless referred to the same factors as it delimited in *Brasserie*.[89]
84. Further, when determining state liability under EU law, MS must be viewed as a single entity, irrespective of which branch of government is responsible for the breach in question.[90] The reasoning behind this conclusion is simple. Should the conditions of state liability differ depending on the acting branch of government, the level of protection of rights of individuals would undesirably vary. Consequently, the condition for "manifest" breach *must* be the same as the condition for "sufficiently serious" breach.
85. **Applicant thus urges Court to rule that the condition for a "manifest" breach of EU law, as spelled out in *Köbler*, is the same as the condition for a "sufficiently serious" breach of EU law, as spelled out in *Brasserie*.**

5C) DEFENDANT SHOULD BE HELD LIABLE FOR INCORRECT IMPLEMENTATION OF 2008 FD AND FOR FAILURE OF EPA TO PROCESS PERSONAL DATA IN COMPLIANCE WITH EU LAW

86. Applicant claims that Defendant incorrectly implemented 2008 FD. First, Defendant stipulated that EPA shall function as the national supervisory authority.[91] Second, Defendant declared by virtue of CIA that all necessary safeguards securing and protecting sensitive data already exist in national law. This essentially deprives Applicant of the possibility to assert the rights conferred on him by virtue of EU law, namely by Art. 6 2008 FD, before courts[92] since ordinary courts cannot contradict a provision of law. In effect, Applicant is not able to question the adequacy of safeguards governing the processing of his personal data. Section 6 CIA therefore violates the right to due process which is one of the general principles of law recognised by EU.[93]
87. As for the actual processing, EPA transferred Applicant's data to a third State contrary to Art. 13 (1) (c) 2008 FD, i.e. without the consent of the transmitting MS.[94]
88. In concordance with Court's settled case-law, Defendant shall be held liable for damage caused to Applicant as a result of breaches of EU law when the rule infringed confers rights on individuals, the breach is sufficiently serious and when there is a direct causal link between the breach and the damage sustained.[95] Applicant now wishes to demonstrate that all three conditions are fulfilled in the case at hand.
89. As to the first condition, Applicant holds that the relevant provisions of data protection, by their very nature, confer rights on individuals. These provisions anchor protection of individuals as data subjects when their personal data is processed.
90. With regards to the condition "sufficiently serious", Applicant claims that all the provisions are clear and precise.[96] Since Section 5 CIA manifestly contradicts both the wording and objectives of 2008 FD,[97] the breach of EU law is inexcusable. As to the illegal processing of Applicant's personal data, Applicant submits that Art. 13 (1) (c) 2008 FD is crystal clear: the transmitting MS must give its consent. The fact that EPA transferred Applicant's data without consent of the transmitting MS thus cannot be justified.
91. Finally, Applicant claims that had EPA processed his personal data in compliance with EU law, it would not have transferred his personal data to Ynoloc and Ynoloc would not have issued a freezing order. Thus, there is a direct causal link between the freezing of Applicant's substantial assets and the identified breach of EU law.
92. **Therefore, Applicant asks Court to rule that an infringement of EU law, such as that in the case at hand, fulfils the conditions under which MS shall be held liable.**

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[88] See *Brasserie,* paras 51 and 56.
[89] *Brasserie,* para. 56, *Köbler,* para. 55.
[90] See *Brasserie,* para. 34. The same rule applies to ECHR – see *Köbler,* para. 49.
[91] As established in para. 19 of Memorandum this is in violation of Art. 8 (3) Charter, rec. 33 and 35 2008 FD and Art. 25 2008 FD.
[92] See *Johnston v Chief Constable of the Royal Ulster Constabulary* (C- 222/84) in Steiner, Woods: General Principles of Law**,** p. 61 in Bundle II.
[93] *Johnston v Chief Constable of the Royal Ulster Constabulary* (C- 222/84) in Steiner, Woods: General Principles of Law**,** p. 61 in Bundle II.
[94] See para. 23 of Memorandum.
[95] See *Brasserie,* para. 51.
[96] See *Brasserie,* para.56.
[97] See *R v Her Majesty's Treasury, ex parte British Telecommunications pic* (C- 392/93), para. 43 in Steiner, Woods: State liability, p. 310 in Bundle I.